



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUSIA

HCCR. A. NO.62 OF 2010

**ISAAC MUTSUNE OKINDAAPPELLANT
VERSUS**

REPUBLICRESPONDENT

***(From the judgement
of E.H. KEAGO SNR. RESIDENT MAGISTRATE Busia criminal case no.1891 of 2009)***

J U D G E M E N T

The appellant Isaac Mutsune Okinda was convicted by Busia Senior Resident Magistrate of the Offence of office breaking and committing a felony contrary to Section 306 (a) of the Penal Code and sentenced to serve seven (7) years imprisonment.

In his petition, the appellant contends that the offence was not proved to the standards required and that the case was framed against him and that his defence was not considered.

The facts of the case are that in the night of 16th and 17th November 2009, the office of Kingandole secondary school were broken into and property listed in the charge stolen. Acting on information, police arrested the appellant at Murumba Medical clinic selling two microscopes to the personnel. The items were identified by PW1 the school headteacher as property of the school.

PW1 testified that he was informed of the breakage of the school office by a student in the morning of the 17th November 2009. He went to the office and found his office broken into. Some property was stolen and papers strawn all over. There was fire on the desk burning school records. . There was fire on the desk burning school records. On 29/11/09, PW1 accompanied police to one Dr. Omao clinic at Murumba where the appellant was arrested selling two microscopes to PW2. Police then proceeded to the house of the accused at Bumala and recovered more of the stolen property which PW1 identified.

PW2 testified that he operates a medical clinic at Murumba. He had received information that there was breaking in and theft of property at the Kingandole school office. On 29/11/09, PW2 was at his clinic when the appellant approached him wanting to sell to him two microscopes. PW2 asked the appellant to go and bring him the items to him. PW2 then called the school headteacher and informed him about the microscopes. PW1 went to the clinic with administration police officers who laid ambush and arrested the appellant at the clinic with the stolen items.

PW3 is one of the administration police officers who arrested the appellant at the clinic. He testified that he and his colleague laid the ambush at the clinic. They were called to come in when the appellant

brought the microscopes which were found on the table of the Clinical Officer. PW3 took the exhibits after arresting the appellant. From the appellant's house at Bumala, PW3 recovered the beam balance in its box which PW1 identified as the school's property. The father of the appellant was present at home and assisted PW3 to gain access to the house.

PW4 the village elder of Kingandole village testified that he was informed by the Assistant Chief of his area that the appellant had been arrested. He was instructed to go with the administration police officers to the house of the appellant which he did. The father of the appellant was present and helped PW3 and PW4 to gain access in the house of the appellant where the beam balance was recovered.

PW5 an administration police officer was in the company of PW3 and PW4 during the recovery of the exhibits.

The scene of crime personnel PW6 took several photographs of the scene which he produced in evidence showing the breakage and damage by the fire.

PW7 was the investigating officer from Bumala Police post. He visited the scene and found evidence of breaking in and burning of the office desk which was done after the incident. The appellant was handed over to PW7 together with the recovered exhibits by administration police from Bukhalalire Chiefs office. She then investigated the case and preferred charges against the appellant.

PW8 was the Deputy head teacher of Kingandole Secondary school. He did not witness the incident and was only informed of it and went to the scene.

The appellant in his defence denied committing the offence. He was arrested at the shop of one Otiale where he had gone to charge his phone. He was waiting on the bench with one Viviane the daughter of PW4 and a student at Kingandole secondary school. He was locked at Bukhalalire Chiefs camp for two days and later transferred to Bumala Police station where he spent one day before he was charged.

The appellant admitted that he was arrested by about four (4) people. He says it was at a shop not at the clinic of PW2. PW1, PW2, PW3 and PW5 were present during the arrest. They must be the four people the appellant mentioned in their defence. All the four (4) witnesses testified that the arrest was made at PW2's clinic. During cross-examination, the appellant said there was no grudge between him and the witnesses although he still claimed that the case was framed against him. The court believed the witnesses thereby arriving at a correct conclusion that the prosecution had established that the appellant was arrested selling the stolen goods. PW2's evidence was very clear on how the appellant approached him to buy the microscopes and how the ambush was laid. PW2 is the one who alerted PW1 of the appellant's mission based on the information PW2 had that some microscopes had been stolen at the school. PW3 and PW5 effected the arrest and recovered the exhibit. With the assistance of PW4 the beam balance was recovered from the house of the appellant in presence of the appellant's father. The recovery was about twelve (12) days after the incident. This was recent possession of the stolen property. The appellant denied possession of the items. The evidence of possession was well corroborated by the four witnesses. The appellant failed to give any explanation, let alone a satisfactory one on how he came to be in possession of the school items. The alibi defence was dislodged by the overwhelming evidence of the four (4) prosecution witnesses.

On count II, three witnesses PW1, PW8, PW5 visited the scene and found that some items on the office desk had been set on fire. PW1 and PW8 found the fire still burning. The people who broke into the office and stole the items in the charge sheet must have set the books and receipts on fire. The evidence of PW1 and PW8 was clear that no one else had entered the office that morning until the fire and the theft were discovered. The school watchman testified that he signed off duty between 5.00 to 6.00am and did not go to the office. The photographs of the scene produced by PW7 corroborated the evidence of PW1, PW5 and PW8 on the burnt office which destroyed several school records. Coupled with the recent possession of some of the stolen property, the evidence on record proves that none else but the appellant and his accomplices (if any) burnt the office, the act of burning was activated by malice to destroy the property in question.

I find that the conviction was safe and it is hereby upheld.

As for the sentence the seven years imprisonment given for each count was within the law. The appellant had one previous conviction which was relevant to the offence in question. The sentence is also upheld.

The appeal stands dismissed.

F.N. MUCHEMI

J U D G E

Judgement dated and delivered on the 14th day of December 2011 in the presence of the appellant and the State Counsel Mr. Okeyo.

F.N. MUCHEMI

J U D G E