



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**Criminal Appeal 56 of 2007**

**JOSEPH ODONGO.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

The appellant Joseph Odongo, together with one John Musyoki (hereinafter “the 1<sup>st</sup> accused”) were charged in Kaloleni Resident Magistrate’s Court Criminal case No. 870 of 2004 with the offence of shop breaking and stealing contrary to Section 306 (a) of the Penal Code. The particulars of the offence were that on the night of 21<sup>st</sup> and 22<sup>nd</sup> November 2004 at Mariakani Township in Mariakani Location in Kilifi District of Coast Province, the appellant and the said 1<sup>st</sup> accused jointly with others not before court broke into the shop of Hannah Mwanajirani and stole therein (1) Two computer base units make Unisys L2GB 32 MB S/No. MDLP69103763-62P (No. 040) IBM 640 MB S/No. 4K55DR5R (2) Two Keyboards and (3) One mouse all valued at Kshs. 50,000/=, the property of the said Hannah Mwanajirani (hereinafter “the complainant”).

There was an alternative charge of handling stolen goods contrary to Section 322 (2) of the Penal Code. The particulars of the alternative charge were that the appellant and the said 1<sup>st</sup> accused on the 26<sup>th</sup> day of November 2004 at Moi Avenue, Mombasa District of Coast Province jointly with others otherwise than in the cause of stealing dishonestly received and retained one computer base unit IBM 640 MB 32MB S/No. 4K558DR5R and one Keyboard all valued at Kshs. 25,000/= the property of Hannah Mwanajirani knowing the same to have been stolen or unlawfully obtained.

The appellant and his co-accused pleaded not guilty. After a full trial, the 1<sup>st</sup> accused was acquitted on both the main count and the alternative one. The appellant was not as lucky. He was convicted of the main count and sentenced to serve four years imprisonment.

Being dissatisfied with the conviction and sentence, the appellant has appealed on various grounds which raise two broad issues: That he was convicted on insufficient evidence and that his defence was not considered. In his written submissions, the appellant elaborated those broad issues arguing that the prosecution witnesses were not reliable and further that an important witness one Brown was not called to testify and if he had done so, his evidence would have been adverse to the prosecution. The appellant

further submitted that there was conflict in the evidence relied upon by the Learned Resident Magistrate.

The appeal was opposed by Mr. Onserio, Learned State Counsel for the Republic. He submitted that the evidence adduced before the Learned Resident Magistrate proved the charge against the appellant and that the appellant's alibi defence was considered and properly rejected. In the State Counsel's view, some of the items stolen were found to have been in possession of the appellant soon after the shop breaking yet the appellant offered no explanation for that possession.

This is a first appeal. That being the case, this court is mandated to reconsider and re-evaluate the evidence before the trial court and arrive at its own independent determination on whether or not to uphold the conviction bearing in mind that the court did not see or hear the witnesses (see **Njoroge – v – Republic [1987] 1KLR 19**).

In a nutshell, the facts of the case were that on the morning of 22<sup>nd</sup> November 2004, the complainant, who testified as PW 1, opened her shop at Mariakani and found that computer base units, keyboards and a mouse which she had left in the shop were missing. She reported the theft to Mariakani Police Station. The OCS of that station visited the shop the same morning as investigations commenced. Three days later, the complainant received a report that one base unit together with the keyboard had been recovered. The recovery was made by PW 2, Johnson Kea Kitsao. PW 2 testified that he is a computer technician and was a business partner of PW 1 as well as an employee of Real ICT Center in Mombasa. On 24<sup>th</sup> November 2004 he was visited by PW 3, Morris Ochieng Oyula, and one Brown. PW 3 wanted a computer they had, tested before buying the same from Brown. He, (PW 2), noticed the serial number on the computer and identified it as belonging to them. The computer further displayed their password or their business name. He disclosed those facts to PW 3 and Brown. The latter stated that he had been given the computer by a friend to take to PW 3. PW 2 retained the computer and later informed PW 1 of the recovery. The two reported to Central Police Station Mombasa which station referred them to Mariakani Police Station.

Brown took PW 2 and the police to the person who had given him the computer who happened to be the 1<sup>st</sup> accused. He also took the team to the appellant's home where he (appellant) was arrested. PW 1 and PW 2 identified the recovered computer which included a keyboard. PW 3, Morris Ochieng Oyula, testified that on 24<sup>th</sup> November 2004 at about 9.00 p.m., the appellant visited him at his home. PW 3 was with the said Brown. The appellant asked him whether he would buy a computer which he had to sell. He showed interest and the following morning Brown brought him a Central Processing Unit (CPU) and a keyboard. PW 3 took the computer to PW 2 for testing. He was with Brown. PW 2 checked the computer, found it ok but identified it as one of the items which had been stolen from their business at Mariakani. A report was made to Central Police Station which referred them to Mariakani Police Station. The appellant went to PW 3's office to collect the purchase price of the said computer but was reluctant to go to the police station. Later, Brown led him together with police officers and PW 2 to the 1<sup>st</sup> accused's house and later to the appellant's house.

PC Aron Koech, PW 4, was the investigating officer. He testified that PW 1 reported the offence at Mariakani Police Station on 22<sup>nd</sup> November 2004. He visited the scene in the company of other police officers in the course of investigations. On 26<sup>th</sup> November 2004, PW 1 reported that one of the computer base units and a keyboard had been recovered in Mombasa to where she led PW 4 and another police officer where they met PW 2 who showed them the recovered items which he said had been taken to him by PW 3 and the appellant for testing. The team then proceeded to the house of PW 3 where they found him in the company of the said Brown. They then proceeded to the 1<sup>st</sup> accused's house and arrested him. They then went to the house of the appellant and arrested him as well. PW 4 further testified that PW 1 identified the recovered items and produced receipts of the items stolen from her shop. PW 4 produced the base unit and the keyboard.

In his sworn testimony, the 1<sup>st</sup> accused stated that, the appellant had gone to his house at Magongo in Mombasa and asked him to keep a computer machine he had in a paper bag which he wanted a technician who lived nearby to look at, but had closed for business at the time. The 1<sup>st</sup> accused kept the machine

until the following day when the said Brown went to his house to collect the same on the appellant's instructions. After two days, the said Brown took police officers to the 1<sup>st</sup> accused's house when he was arrested and later charged with the present offences.

The appellant also testified on oath. He told the court that on 18<sup>th</sup> November 2004, he received a telegram from his rural home that he had been bereaved. He had a building project which he left in the hands of the said Brown with whom he left Kshs. 11,000/=. He stayed at his rural home for four days and when he came back to Mombasa on 25<sup>th</sup> November 2004, he could not immediately trace Brown. When he did so, Brown told him he had used the Kshs. 11,000/= and promised to refund the same.

On 26<sup>th</sup> November 2004, Brown led police officers to the appellant's house where he was arrested and placed in cells at Makupa Police Station where he found the 1<sup>st</sup> accused. That is when he learnt of the allegation that he had taken a computer to the 1<sup>st</sup> accused. The appellant denied committing the offence.

The 1<sup>st</sup> accused called Irene Mwikali, his wife, as a witness. She testified as DW 2. She stated that on a date she could not recall, the appellant went to their home at 6.00 p.m. carrying some luggage in a paper bag. He asked the 1<sup>st</sup> accused to keep the luggage for him for a while. He further stated that he had taken it to a neighbour who is a technician but who was then not around. DW 2 further testified that the following day, the same luggage was collected by a young man whom she did not know. Later the same young man went to their house with policemen and arrested the 1<sup>st</sup> accused.

That is the evidence upon which the Learned Resident Magistrate based his conviction of the appellant. He found that indeed PW 1's shop premises had been broken into and several computer items stolen therefrom. He further found that one computer base unit and a keyboard were recovered about two days later and were sufficiently identified by both PW 1 and PW 2. The Learned Resident Magistrate accepted the evidence of PW 3, Morris, that the appellant went to him and offered to sell a computer to him which he (the appellant) authorized Brown to collect from the 1<sup>st</sup> accused. The Learned Resident Magistrate also found that, that was the same computer which was taken to PW 2 for testing and which PW 2 identified as belonging to the business he owned in partnership with PW 1. He, the trial Magistrate, concluded that the shop breaking and stealing having taken place about two days before the said recovery, the appellant was in recent possession of the said computer and keyboard and had no reasonable explanation for that possession. Instead the appellant set up an alibi defence which, in the Learned Magistrate's view, was rebutted by the evidence of PW 3 Morris, and the 1<sup>st</sup> accused both of whom saw the appellant on 23<sup>rd</sup> November 2004.

Having independently evaluated the evidence which was adduced before the Learned Resident magistrate, I have noted discrepancies regarding reference to the 1<sup>st</sup> accused when in fact the Learned Magistrate intended to refer to the appellant in his judgment. Those discrepancies were however, insignificant and are not fatal to the conclusions made by the Learned Resident Magistrate. The Learned Magistrate considered the failure to call Brown as a witness and found that that failure did not weaken the case put forward by the prosecution against the appellant. Brown's evidence was not deliberately excluded by the prosecution and the Learned Magistrate was perfectly entitled not to draw any adverse inference from his failure to testify.

The appellant in his written submissions challenged the Learned Magistrate's evaluation of the evidence of the 1<sup>st</sup> accused and his wife DW 3 which evidence he appeared to discredit and accept at the same time. I find that that challenge was not well taken. The Learned trial Magistrate satisfactorily explained the aspect of the evidence he did not believe. The evidence related to whether the 1<sup>st</sup> accused and his wife knew what was in the paper bag which was left with them by the appellant. That aspect in my view could not discredit their entire evidence. In any event the 1<sup>st</sup> accused testified that the appellant identified what was in the bag as a computer.

The appellant further challenged the trial magistrate's treatment of his defence. He set up an alibi as already stated. Regarding that defence the Learned trial Magistrate stated as follows:-

**“He raised an alibi and said he was away in Busia at the time. However, his alibi is rebutted by the evidence of Morris PW 3 and the 1<sup>st</sup> accused both who saw him on 23<sup>rd</sup> November 2004. I therefore reject the alibi as untrue.”**

On my own re-evaluation of the evidence adduced by the prosecution, I have no doubt that the same rebutted the alibi put forward by the appellant. Like the Learned Resident Magistrate, I would reject the same. The evidence of Morris PW 3, the first accused and that of DW 3, Irene Mwikali, clearly displaced the alibi.

The upshot is that the evidence presented before the Learned Resident Magistrate established that the appellant was guilty of the main count of shop breaking and stealing therefrom beyond reasonable doubt. I therefore consider that the conviction of the appellant was just and safe in all the circumstances. With regard to sentence, the appellant was sentenced to serve four (4) years imprisonment. The Learned Resident Magistrate did not state whether the sentence was in respect of the 1<sup>st</sup> limp or the 2<sup>nd</sup> limp or both. Failure to state to which limp the sentence applied was irregular. The irregularity was however not fatal and in any event there was no challenge in that regard.

I will therefore correct the same and order that the appellant shall serve 4 years imprisonment on both limps. The sentences to run concurrently from the date the appellant was convicted and sentenced.

The entire appeal is therefore dismissed.

Orders accordingly.

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT MOMBASA THIS 27<sup>TH</sup> DAY OF APRIL 2009.**

**F. AZANGALALA**

**JUDGE**

Read in the presence of:-

The Appellant and Mr. Onserio for the Republic.

**F. AZANGALALA**

**JUDGE**

**27<sup>TH</sup> APRIL 2009**