



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISUMU
Criminal Appeal 49 of 2009

FREDRICK OLOO WANDEI APPELLANT

VERSUS

REPUBLIC RESPONDENT

[From original conviction and sentence in Criminal Case number 333 of 2008 of the Senior Resident Magistrate's Court at Ukwala]

JUDGMENT

The appellant, **Fredrick Oloo Wandei**, and another appeared before the Resident Magistrate at Ukwala charged with kiosk breaking and committing a felony contrary to Section 306 (a) of the Penal Code, in that on the night of 5th / 6th November 2008 at unknown time at Asango West Sub – location Siaya District Nyanza Province, jointly broke and entered a kiosk belonging to Samson Odhiambo Obare and stole from therein thirty five (35) mobile charges, five (5) universal charges six (6) shaving blades and three (3) extension all valued at Kshs. 6,000/= the property of the said Samson Odhiambo Obare.

There was an alternative charge of handling stolen property contrary to Section 322 (2) of the Penal Code in that the appellant dishonestly retained the forementioned property knowing or having reasons to believe them to be stolen.

After pleading not guilty to the charge, the appellant was tried, convicted and sentenced to five years imprisonment for the alternative charge of handling stolen property.

Being dissatisfied with the conviction and sentence, the appellant preferred this appeal on the basis that he was merely implicated in this case when the recovered stolen items were not found in his possession. He also alleges that the trial magistrate failed to consider his defence when he rejected it.

The appellant represented himself at the hearing of the appeal and chose to address the court after the respondent's submission.

The learned Senior State Counsel, M/s Oundo, represented the respondent and conceded the appeal.

The learned State Counsel submitted that the prosecution failed to discharge its onus of proof in that there was no evidence that the appellant had broken the material kiosk nor was there evidence that he was found in possession of stolen goods.

In response to the foregoing submissions, the appellant stated that he was arrested from his place of work and taken to his house which was searched and nothing recovered. He agreed with the learned state Counsel.

This is a first appeal. The obligation of this court is to reconsider the evidence and arrive at its own conclusions bearing in mind that the trial court had the advantage of seeing and hearing the witnesses (**See Okeno =vs= Republic [1972] E. A. 32 and Achira =vs= Republic [2003] KLR 707.**)

Briefly, the prosecution case was that on the material date the complainant **Samson Odhiambo Obare (PW1)** closed his kiosk and went home. He returned on the following day only to find the kiosk broken into and property stolen from therein. The property included chargers, extension and blades all valued at Kshs. 6,000/=.

He reported the matter to the police but at about 3:00 to 4:00 p.m. on the same day, a person approached and offered to sell some items to him. The person was carrying a black bag which was opened.

The complainant then saw his stolen chargers, extensions and blades. He called the police. A police officer arrived at the scene and arrested the second accused (the appellant herein). He (appellant) was taken to his house and additional chargers were found therein.

The complainant stated that the appellant led him and the police to the house of the first accused (appellant's co-accused).

In the house, a sack containing chargers was recovered. The appellant's co-accused was then arrested.

Sgt Samwel Famake (PW2) of Mboisiye A. P. Post Ugunja Division received the complainant's report and commenced investigations on the 6th November 2008. At about 5:00 p.m on the same date he was called by the complainant and informed that a person had offered to sell some electronic items stolen from the complainant's kiosk. He (PW2) rushed to where the complainant was and found the appellant carrying a brief – case containing some chargers and an extension. The appellant was arrested and on being questioned he led the Sgt (PW2) and the complainant to his house where a bag containing additional charges was found hidden in a pit latrine.

The appellant also led the police officer to the house of the appellant's co-accused where some more charges and extension were found.

The appellant and his co-accused were eventually charged with the present offence.

In his defence, the appellant stated that he was a farmer and was from work on the 6th November 2008 when four youth wingers approached and told him that he was a thief who was wanted.

After a short while an administration police officer arrived at the scene. He (Appellant) was taken to his house without knowing the offence he had committed. His house was searched and in the process a youth winger arrived with a brief case. He did not know where the briefcase came from. He was only told to accompany the youth wingers and the A. P. so that the matter could be sorted out. Instead, he was taken to Mboisiye A. P. Camp and then Sigomere Police Post where he saw chargers inside a box. He was tortured and forced to admit the offence. He then saw his brother (the co-accused) at the police station. He was surprised on being asked about a shop he had broken into. He was still surprised even at the time of the trial.

In essence, the appellant denied the offence and implied that he was arrested and charged without good reason.

After considering all the foregoing evidence, the learned trial magistrate convicted the appellant and his co-accused on the alternative charge of handling stolen property. In so doing, the learned trial magistrate stated:-

“I have evaluated the evidence herein and I am fully satisfied that the main charge has not been proved by the prosecution beyond any reasonable doubt.

Firstly, no independent witness was called to confirm if actually the shop was broken into. The only available evidence is that of PW1 the complainant, his worker was not called to testify and PW2, the investigating officer did not visit the scene.

Secondly, the complainant failed to prove that the recovered items belonged to him.

Such items can be owned by any body including the accused and as such it was only through proper proof that the complainant should have established the existing connection between him and the items. However, I have seen some receipts which were produced in bundle by the complainant but the same were not moved (sic) with any or either of the items recovered or stolen”.

The learned trial magistrate went on to state that:-

“Both accused were found with the stolen items as enumerated herein above without any proof of ownership.....

The accused were unable to account for all those recovered items and secondly, they knew that they are stolen items. That is why they were in a hurry to sell them and secondly, they were hidden in a very suspicious manner in their respective houses”.

Having re-considered the entire evidence, the opinion of this court is that the appellant’s conviction on the alternative count was not sound and safe.

There was no direct evidence against the appellant.

The prosecution was therefore left with evidence of possession of the alleged stolen property. This could have provided sufficient circumstantial evidence based on the doctrine of recent possession which evidence was capable of proving the main count if not the alternative one. However, there was no evidence of proof of ownership of the alleged stolen property. Indeed, the learned trial magistrate appreciated that the complainant was unable to establish ownership of the property.

Proof of ownership is a vital ingredient for the application of the doctrine of recent possession.

In the case of **Isaac Nganga Kahinga alias Peter Nganga Kahinga –VS- Republic Criminal Appeal No. 272 of 2005.** It was stated by the Court of Appeal that:-

“It is trite law that before a court of law can rely on doctrine of recent possession as a basis of conviction in a criminal case, the possession must be positively proved. In other words, there must be positive proof first, that the property was found with the suspect, and secondly that the property is positively the property of the complainant, thirdly that the property was recently stolen from the complainant.....”.

Herein it could not be held with certainty that the recovered items were stolen property when there was no evidence of the complainant’s ownership of the same.

Whereas the learned trial magistrate made correct findings with regard to the ownership of the material items he, with respect, contradicted the same with his final conclusions.

It would appear that the learned trial magistrate mixed the offence of handling stolen property under Section 322 (2) of the Penal Code with that of having in possession suspected stolen property contrary to section 323 of the Penal Code.

It is apparent that instead of the prosecution proving its case beyond reasonable doubt thereby discharging its burden of proof, the appellant was required to prove his innocence.

The learned State Counsel correctly conceded to the appeal.

In the end result, the appeal is allowed. The appellant’s conviction by the trial court is hereby quashed and the sentence set aside.

The appellant be released forthwith unless otherwise lawfully withheld.

[Delivered and signed this 18th day of November, 2009].

J.R. Karanja

JUDGE

JRK/aao