



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

Criminal Appeal 108 of 2005

REPUBLIC RESPONDENT

- Versus -

BONFACE MWAKIO APPELLANT

J U D G M E N T

The appellant, Bonface Mwakio, was convicted in the Senior Resident Magistrate's Court, Voi of housebreaking contrary to section 304 (1) and stealing contrary to section 279 (b) of the Penal Code. He was sentenced to serve four years in jail. He came to this court appealing against conviction and sentence.

The particulars of the charge were that the appellant, on the 10th day of March, 2004 at Taita Farmers Training Centre in Kidaya Ngerenyi Location in Taita Taveta District within Coast Province, broke and entered the house of Harrison Ben Mghana with intent to steal therein and did steal one Radio make Macete, two travelling bags, Driving Licence, one shaving machine and two watches the property of the said Harrison Ben Mghana all valued at Kshs. 9,550/= . He also faced an alternative count of handling stolen goods contrary to section 322 (2) of the Penal Code. The particulars of this count were that on the 10th day of March, 2004 at Taita Farmers Training Centre in Kidaya Ngerenyi Location in Taita Taveta District within Coast Province, otherwise than in the cause of stealing, the appellant dishonestly received or retained one travelling bag knowing or having reason to believe it to be stolen goods or unlawfully obtained.

At the hearing of the appeal, the appellant appeared in person and Mr. Onserio appeared for the Republic. In his written submissions on which he relied, the appellant argued that the evidence of P.W.1 and P.W.2 was hearsay, and that he was not present when the allegedly stolen bag was identified by P.W.1 as the appellant was in prison. He also contended that the court failed to consider "the entic (sic) difference" portrayed in the evidence of P.W.2. It was further his case that this was a frame up, and the bag in question was a local one which anyone could buy. He further contended that P.W.1 had a grudge against him. Finally, he submitted that the learned trial magistrate failed to take into account the appellant's testimony which was given on oath. He therefore urged the court to allow the appeal and set aside the conviction and sentence.

On his part, Mr. Onserio supported the conviction and asked for the sentence to be reviewed and enhanced since the appellant was a recidivist.

I have considered the evidence in the lower court very carefully. The testimony of the complainant

was that on 10th March, 2004, he left his house and went to work. He left behind Bruson Kiringo (P.W.2) who was his employee. He returned to the house at about 3 p.m. and his employee asked him whether he had returned home earlier as the employee's radio cassette player, which the employee had left at the veranda, had disappeared. The witness replied that he had not come home any earlier, and upon entering his room, the witness found the bed sheet and blankets removed from the bed, and his digital radio, which had been on a side table, was gone. Also gone were his wristwatch, shaving machine, two black travelling bags, one with his documents and the other with clothes. He asked his employee who told the witness that at 12.30 p.m. he went to the shopping centre to get medicine and when he returned the items were gone. They both went to Wundanyi Police Station where they reported the incident. This account was corroborated in all material particulars by the evidence of the employee, Buldason Kisingo, who testified as P.W.2.

About a month later the witness learned from the officer to whom they had reported that some stolen items had been recovered. He then went to the Police Station and identified one of his bags by one handle which had been cut and sewn back. The bag was also identified in court by Felix Mwangigha, (P.W.3), the cobbler who had sewn it. According to No. 52709 PC Luke Mwinyi, who testified as P.W.4, the circumstances leading to the recovery of the bag were that on 22nd March, 2004, at 10.30 a.m., he was at Wundanyi Police Station when they got a report that a thief had been arrested at St. Mary's School. He proceeded to the scene in the company of Senior Sergeant Mwangangi and P.C. Musau. They found the appellant detained in the head teachers office together with the things he was found stealing. They took the appellant to his home. The witness was directed to the appellant's room by the appellant's brother and, in that room, the witness found one bag, three jackets, two shirts, one T-shirt, suspected to be stolen or illegally obtained. It was then that the appellant was taken to the Police Station and charged. On 10th May, 2004, the appellant identified the bag as one of the items he had lost. The evidence of the search in the appellant's room and the recovery of the bag identified by the complainant as his stolen bag was corroborated by No. 49507, Corporal Robert Murunga.

In his defence, the appellant made a sworn statement in which he stated that, inter alia, that he was arrested while he had another charge. The police officers took him to his house and took his clothes – shirts and trousers. He was jailed at Wundanyi and the court ordered that his things be returned to him. The police officers then said that he had reported them to the magistrate and they would teach him a lesson. They therefore brought a man to say that the bag he had belonged to that man.

In cross-examination by the prosecutor, the appellant said –

“The complainant has nothing to do with the T-shirt, shirt – only the bag. He showed that he took it for sewing. I knew the complainant before. He is a neighbour. I knew the tailor. No animosity.”

Against this background, I find that there is cogent evidence that the complainant reported the theft of his goods on 10th March, 2004. The incident was reported to the police by the complainant in the presence of P.W.2 who was his employee. The appellant was arrested barely two weeks later breaking into somebody else's house. It was then that police officers took him to his house, and upon a search, the bag which the complainant had earlier reported as having been stolen was found among other items in the house. He positively identified it on 10th May, 2004. The identification mark was the handle which had detached and been re-sewn onto the bag. The cobbler who had done the sewing testified as P.W.3 and confirmed the bag to be the same one he had sewn, and that it belonged to the complainant. The appellant admitted that there was no animosity between him and the complainant or the cobbler. There was no reason therefore why they would want to lie against him. They did not even allege that they saw him stealing.

Indeed, from the evidence, the appellant made a spirited effort to establish that no one saw him stealing. It is true that no one saw him stealing. Since, however, the bag was found in his room among other possessions belonging to the appellant, and this was only twelve days after the report of the theft of the bag by the complainant, the learned trial magistrate correctly applied the doctrine of recent possession to find the accused the culprit. This doctrine applies where it is proved that premises have been entered

and property stolen therefrom and that very soon after the entry the accused has been found in possession of the property. In such circumstances, it is open to the court to convict the accused person. All these ingredients have been established in this case, and I accordingly find that the appellant was properly convicted.

After the conviction, the trial magistrate sentenced the appellant to serve 4 years imprisonment. The learned State Counsel submitted that this sentence was lenient since the appellant is a recidivist, and has been convicted of similar offences in the past. He urged the court to review the sentence and impose the seven years maximum as by law provided. The case of REX v. MOHAMEDALI JAMAL (1948) 15 EACA 126 set the tone for situations in which an appellate court may interfere with a sentence. The Court said –

“It is well established that an appellate court should not interfere with discretion exercised by a trial judge or magistrate except in such cases where it appears that in assessing sentence the judge has acted upon some wrong principle or has imposed a sentence which is either patently inadequate or manifestly excessive.”

Before sentencing the appellant in this case, the learned trial magistrate made the following notes –

“Accused not first offender. He appears not to learn from past mistakes. He shall serve 4 years in jail ...”

The learned magistrate was aware of the circumstances surrounding this matter before he meted out a sentence of 4 years. Since the maximum sentence was 7 years, I am not able to say that a term of 4 years was patently inadequate. In any case, since he has already served three years, I think that it would be unjust to enhance the sentence at this point in time.

Being of the above persuasions, the appellant’s appeal against both conviction and sentence is hereby dismissed.

Dated and delivered at Mombasa this 19th day of May, 2008.

L. NJAGI

JUDGE