REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CRIMINAL APPEAL 62 OF 2009

(Appeal arising from the original conviction & sentence in

Mumias SRM'S Criminal Case No. 307 of 2008)

SIMON MARTIN..APPELLANT

VERSUS

REPUBLIC..RESPONDENT

J U D G E M E N T

The Appellant together with two others was charged 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 19th day of April 2008 at Harambee market, Kholera Sub-location in Mumias District within Western Province the accused jointly broke and entered into the shop of Ramadhan Sande with intent to steal and did steal therein shop goods valued at Kshs.70,000/= the property of the said Ramadhan Sande.

The Appellant was found guilty and sentenced to serve three (3) years imprisonment. Being dissatisfied with the conviction the appellant filed this appeal with the following six grounds of Appeal:-

1. The learned acting Principal Magistrate erred in law and fact when he convicted the Appellant on the charges before him without the case being proved beyond reasonable doubt.

2. The learned acting Principal Magistrate failed to give any or any proper attention to the statement of the Appellant.

3. The learned acting Principal Magistrate misdirected himself in law and in fact when he failed to realize and consider that the Appellant's Constitutional rights as enshrined under Section 72 of the Constitution of Kenya had been violated and therefore the charges against him ought to have been dismissed.

4. The trial and conviction of the Appellant failed to comply with the provisions of section 200 of the Criminal Procedure Code and thereby adversely affected the Appellant and his conviction should be quashed.

5. The learned acting Principal Magistrate erred in law when he failed to realize that the case was not proved beyond reasonable doubt on the evidence before him.

6. The learned acting Principal Magistrate erred in law and fact when he failed to realize that the evidence adduced contained contradictions and was in fact insufficient to support the conviction of the Appellant.

Miss Watima, learned counsel for the appellant, argued grounds 1, 2, 5 and 6 together and grounds 3 and 4 separately. Counsel submitted that the Prosecution failed to prove its case against the appellant beyond reasonable doubt. PW1, Ramadhan Sande, the complainant arrived home on the material day at about 11.00 p.m. He saw a sack outside his shop. He did not see the appellant in his shop. An empty carton was found in the appellant's shop but contained none of the items allegedly stolen in the complainant's shop.

Counsel further submitted that PW1 did not mention the appellant to PW2 who went to the scene. PW3 did not see the appellant at the scene. PW4 alleged to have seen the appellant walking from the scene and talked to him but he did not answer.

Learned counsel for the appellant further submitted that the appellant was arrested on 20th April, 2008 and was charged on 23rd April 2008. He was not informed why he was arrested and only learnt about the charges in court. This contravened **Section 72** of the Constitution.

Finally, counsel contended that **Section 200** of the Criminal Procedure Code was not complied with. The matter was handled by two magistrates and no directions were given.

Mr. Karuri, learned State Counsel, opposed the appeal. He submitted that PW1 knew the appellant and he saw him that night. PW1 screamed and PW4 responded to the screams and while on his way to the scene, PW4 saw the appellant whom he recognized. Learned counsel further submitted that **section 200** of the Criminal Procedure Code was complied with as the second magistrate only read the judgement on behalf of the magistrate who had heard the case.

There are only three issues to be determined in this Appeal. Firstly, whether the Appellant's Constitutional rights were violated. Secondly, whether **Section 200** of the Criminal Procedure Code was complied with and lastly, whether the prosecution proved its case beyond reasonable doubt.

Counsel for the appellant submitted that the appellant was arrested on 20th April, 2008 and was not informed of the reasons for his arrest until 23rd April, 2008 when he was charged in court. **Section 72 (2)** of the Constitution requires that a person who is arrested or detained shall be informed as soon as reasonably practicable of the reasons for his arrest or detention. The appellant was presumably in custody for three days before he was charged in court. In his defence, he confirmed that he was arrested in the evening on 20th April 2008. **PW5, P.C. Simeon Koech** is the one who arrested the appellant and took an empty carton from his shop. The appellant was represented by counsel before the trial court. He did not raise this issue and it is difficult for this court to determine whether the police explained to the appellant why he was being arrested or if they did not. The prosecution does not have the opportunity to produce evidence to disprove this allegation. It took three days to have the appellant charged in court. I do find that this was not unreasonable period for the appellant to have known his charges if it were to be taken that the police did not explain to him the reason for his arrest. I do not find any merit in this ground and the same fails.

The Appellant contends that **Section 200** of the Criminal Procedure Code was not complied with. The record before the trial court shows that the prosecution and the defence closed their respective cases on 12/1/2008 before S. N. Abuya, Acting Senior Resident Magistrate. There is a certificate to the effect that the judgement was read in open court by E. K. Makori, Acting Principal Magistrate on behalf of S. N. Abuya on 5th March, 2008. The original handwritten judgement shows that it was signed by Mr. S. N. Abuya. **Section 200 (1) (a)** allows a magistrate to deliver a judgement that has been written and signed but not read by his predecessor. I do not find that the reading of the judgement by E. K. Makori did prejudice the appellant. The appellant is not complaining that the sentence is excessive. Section 200 of the Criminal Procedure Code was complied with and this ground of appeal also fails.

Lastly, the appellant argues that the prosecution did not prove its case beyond reasonable doubt. Five witnesses testified for the prosecution. The only relevant evidence is that of PW1 and PW4. PW1, Ramadhan Sande Nyongesa was the complainant. He left his home on 19/4/2008 leaving the 1st Accused at his shop. He went to Bunyore for a funeral. He arrived back home the same day at 11.00 p.m. and saw two people outside his shop one being the appellant herein. He tried to ask him what he was doing there but the appellant fled. The complainant saw a sack of sugar that had shop items inside. He saw the door to his shop open and he went inside, he found the first accused arranging things into a sack.

PW1 screamed. PW2, PW3 and PW4 went to the scene. PW2 and PW3 did not see the appellant. PW4 Mohammed Okoth's evidence is that he saw the appellant using a torch and he recognized him. He asked him whether he had had the noise but the appellant just passed him.

The only evidence connecting the appellant to the commission of the offence is that of PW1. He testified that the 1st accused told him that he gave the property to the 2nd accused and the appellant. Further, PW1 testified that he saw the appellant outside his shop that night. He did not see the appellant carrying a sack containing shop items.

PW5, the arresting officer, P.C. Simeon Koech went to the appellant's house on 20th April, 2008 and got one empty carton of Toyo soap and the complainant identified it as his. The appellant told him that it was the first accused who had sold him the goods.

Section 303 (2) of the Criminal Procedure Code states that "***A person is deemed to enter a building as soon as any part of his body or any part of any instrument used by*** ***<u>him</u>*** ***is within the building."*** The appellant was charged with the offence of shop breaking and stealing. It is the complainant's evidence that the shop was not broken into. The 1st accused who was his shop attendant had made a duplicate key. The complainant did not see the appellant inside the shop. Nothing stolen from the complainant was recovered from the appellant. The complainant testified that the first accused had mentioned the 2nd accused and the appellant.

PW5 testified that they found one carton box of toyo soap in the 2nd accused's shop and the complainant identified it as his as it bore the writing R6 meaning Rama No. 6. The 1st and 2nd accused faced alternative charge of handling stolen property. The 2nd accused was acquitted of all the two charges.

I do find that the appellant was not accorded the benefit of doubt. Nothing stolen was found from his house. He was not found inside the complainant's shop. He was also not caught carrying the stolen items. The appellant was not accorded the benefit of doubt by the trial court. Indeed the evidence on identification is not free from doubt. It was at night and the complainant claimed to have used a torch. This seems to have been the only source of light. However, PW1 did not tell PW2 and PW3 that he had seen the appellant at the scene. PW1 did not inform PW5, PC Sieon Koech that he had seen the appellant at the scene. The appellant was arrested because he was mentioned by the 1st Accused.

On this ground, the appeal succeeds. The prosecution's evidence did not prove beyond reasonable doubt that the appellant committed the offence. The Appeal has merit and the same is allowed. The appellant is hereby set free and shall be at liberty unless otherwise lawfully held.

Delivered, Dated and Signed at Kakamega, this 8th day of October, 2008.

SAID J. CHITEMBWE

<u>J U D G E</u>