



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU
Criminal Appeal 159 of 2005

REPUBLIC

APPELLANT

V E R S U S

DARMI KALICHA.....**1ST**

RESPONDENT

KUNA GUYO JATTAN.....**2ND**

RESPONDENT

JUDGEMENT

1. The Appellant in this Appeal is the Republic and in the Petition of Appeal dated 1.9.2005 and filed on the same day the following grounds are listed;

1. That the Learned Honourable Magistrate erred in law by acquitting the Respondents against the weight of evidence.
2. The learned Honourable Magistrate erred in Law by acquitting the Respondents under section 210 of the Criminal Procedure Code despite a Prima Facie case having been made out.
3. That the learned Honourable Magistrate erred in law by holding that the prosecution's case had a major structural defect without pointing out any, contrary to the express provisions of section 169 of the Criminal Procedure Code.
2. The decision being challenged is the Ruling dated 25.8.2005 by J.M. Nduna Esq. S.R.M. In Marsabit, SRM's Criminal Case No 225/2005. In that case, the Respondents had been charged with the offence of burglary contrary to s.304 (2) and stealing contrary to s.279 (B) of the Penal Code. The Alternative count was that of handling stolen property contrary to s.322 (2) of the Penal Code.
3. When the case came up for hearing on 22.8.2005 the prosecution called 2 witnesses;
4. P.W.1, Rosemary Buke said that on 16.7.2005 one Mr. Mogaka informed her at 1.00 p.m. that her house had been broken into and when the witness got that information, she immediately made a report at Marsabit Police Station and went to her home at Diribgombo area where she found that

her house and her mother's house next door had been broken into and the following items stolen;-

- i) A dinner set
- ii) 2 wall clocks
- iii) a big 6x6 high density mattress
- iv) a 10 litre metal water container
- v) a meat mincing machine
- vi) 4 boxes containing 12 tins of paint
- vii) 4 mattresses
- viii) weighing machine
- ix) assorted clothes.

5. All these items were valued at Ksh.100,000/=. On 1.8.2005, “**an askari by the name Mogaka**” again informed P.W.1 that her house had been broken into a second time. The witness stated thus; “**I suspected the 1st and 2nd accused**”

6. That a search was conducted in the houses of the Respondents and in the house of the 1st Respondents Darmi Kalicha the following items were recovered;

- (a) a dinner set
- (b) 4 glass plates
- (c) 2 glasses
- (d) serving dish
- (e) a pillow case (the witness said that she personally stitched the decorations on it)

7. In the house of the 2nd Respondent, Kuna Guyo Jattani, P.W.1 said that the following items were recovered;

(a) a table clothe (the witness said that she stitched the decorations on it). No other item was recovered. I should pause here and note that the charge sheet states that;

on count 1. “**Burglary contrary to section 30(2) and stealing contrary to section 279(b) of the Penal Code**”. On the night of 16th Day of July 2005 at Diribgombo Location in Marsabit District within the Eastern Province jointly with others not before court broke and entered the house used as human dwelling of Rosemary Buke with intent to steal therein, and did steal therein seven mattresses, one dinner set, one wall clock, two hot pots, one meat mincer, one milk gallon, two pairs of bed sheets, one pillowcase, four wooden beds, and three boxes of paint the property of Rosemary Buke all valued at cash Kshs.49,850/=

The alternative count “**Handling stolen property contrary to section 322(2) of the Penal**” On the 1st day of August 2005 at Dirib Gombo in Marsabit District within Eastern Province jointly with others not before court otherwise than in the course of stealing dishonestly handled three glass plates, one pillow case, one bowl and one table clothe the property of Rosemary Buke knowingly or having reasons to believe it to have been stolen or unlawfully obtained.

8. The important point is that the items allegedly stolen on 16.8.2005 were:

- i) seven mattresses
- ii) a dinner set
- iii) one wall clock
- iv) two hot pots
- v) one meat mincer
- vi) one milk gallon
- vii) two pairs of bed sheets
- viii) one pillow case
- ix) four wooden beds
- x) three boxes of paint

9. The value was put at Ksh.49,850/=. In the alternative count, what was allegedly recovered from the Respondents and which was found in their possession “**jointly with others not before the court**” were;

- (a) 3 glass plates
- (b) One pillow case
- (c) One bowl (presumably bowl)
- (d) One table clothe

10. I will return to the issues arising out of the evidence as read with the charge sheet but the evidence of P.W.2 was this: -

11. He was P.C. Erick Kasamba who was assigned the case on 1.8.2005 by O.C.S. Marsabit Police Station. He proceeded to the scene and it was his evidence that a search was conducted within the vicinity and neighbourhood. It is unclear what this means in real terms. In any event he said that in the house of the 1st Respondent they recovered;

- (a) 4 plates
- (b) a big bowl (again it must have been a bowl!)
- (c) a white pillow case.

In the house of the 2nd Respondent, they recovered;

- (a) a white table cloth. What he however produced in court were;
 - (i) a dinner set – exh.1
 - (ii) glasses – exh. 2

- (iii) bowl - exh. 3
- (iv) pillow case – exh 4
- (v) clothes – exh 5

12. In cross-examination, P.W.2 said that the 2nd Respondent informed them that they could have mistaken her own household utensils for the stolen ones.

13. The learned trial magistrate when making the Ruling subject of appeal noted in very few words that the case was based entirely on the recovery of the goods produced as exhibits 1,2,3,4 and 5. These are household utensils and table clothes. He then proceeded to state categorically that he did **“not see any special identification by the complainant that could prove that the said goods were obtained from the house of the complainant. No identification mark has been brought to the attention of the court.”**

14. The learned trial magistrate then acquitted the Respondents under s.210 of the Penal Code. The result was the Appeal now before me.

15. This court sitting on Appeal and having heard counsel appearing is entitled to evaluate the evidence on record and reach its own conclusion. Without belabouring the point the evidence on record as I have reproduced above does not show one single iota of proof that the Respondents broke and entered P.W.1's house on the night of 16.7.2005 as alleged by the Prosecution. I gathered that the learned State Counsel who argued the Appeal was in agreement with this finding and therefore the acquittal on the main count was not challenged. I also gathered that what the Republic is really unhappy about is the acquittal on the alternative count of handling stolen property. I am deliberately not making too much of the argument that the trial magistrate should have been specific about what count he was acquitting the Respondent's for, because in my view he acquitted them on both counts and he may have done so inelegant language but the point is clear.

16. Anyhow, turning back to the alternative count, one should ask, was there a prima facie case made out that the items allegedly found in the Respondent's houses were stolen?

17. To prove the charge of handling stolen property it must be shown that;

- (a) the handling was otherwise than in the cause of stealing
- (b) the handler received the goods knowing or having reason to believe that they were stolen.
- (c) The handler dishonestly undertook or assisted in the retention, removal or disposal or realization of the goods by or for the benefit of another person.

18. These elements were considered in Ratilal and Another vs R. [1971] EA 575 and approved in

19. In the present case, there is completely no evidence of these elements having been proved even at the prima facie level. P.W.1 said that she “**suspected**” the Respondents but the basis for that suspicion of people she called “**good friends**” was unexplained. Even if the suspicion could be the basis for the charge, as was said in the Thahabu case;
20. **“There was indeed suspicion, very strong suspicion that these two appellants might have known something about the origin of these goods found in their house but remains only a suspicion. The law requires that the charge against an accused person must be proved beyond reasonable doubt. If there is any doubt, then the same is resolved in favour of the accused person.”**
21. In the instant case, I am disturbed by the fact that the items P.W.1 allegedly saw in the houses of the Respondents are different from those in the charge sheet and those produced by P.W.2 as exhibits. The charge sheet does not have a dinner set; P.W.1 saw 4 glass plates and 2 glasses while the charge sheet had 3 glass plates only while P.W.2 saw 4 plates, said nothing about 2 glasses but ends up producing “**glasses**” generally! P.W.1 saw a flowery pillow case with embroidments she allegedly stitched while P.W.2 saw a white pillow case with embroidments but ends up producing Exh.5 called “**clothes**”
22. What exactly was recovered from the houses of the Respondents and why the total mix-up in the evidence? The trial court stated categorically that household items are generally similar and without identifying marks it is difficult to say that they specifically the ones allegedly stolen. I wholly agree and as regards the pillow case and table clothe, the trial court had the benefit of seeing them and said they were not unique.
23. With all these questions about the items taken from the Respondents house I cannot but agree with the trial court that the case had too many defects to have warranted the Respondents being put on their defences.
24. One last thing is with regard to s.169 of the Criminal Procedure Code. That section provides for what a judgment should contain namely; the offence, issues for determination, the decision reached and reasons thereof. It has been argued that the Ruling in question in this case did not meet the expectations of this section.
25. I have read and re-read the Ruling aforesaid and in my view although short it is to the point. It explains what issue is to be determined; whether the exhibits produced belonged to the complaint. The learned magistrate answered that question in the negative for reasons set out; that there was no special identification of otherwise common household goods. He then makes his decision to acquit under s.210 of the Criminal Procedure Code. I would agree that the Ruling was not as detailed as one would expect but on the whole and looked at closely it cannot be a non-Ruling.

26. In the end, I should say that upon evaluating the evidence tendered before the lower court and looking at the discrepancy between the charge sheet and the evidence actually tendered, this court would have reached the same decision as the lower court. I should only say one last thing in this regard; I do not know how the prosecution was going to prove that the Respondents as stated in the charge sheet “**jointly handled**” the items listed there when each, separately in different houses, were allegedly found with different items.

27. I have said enough to show that the Appeal is baseless and without merit whatsoever. Let the matter come to an end and the complainant and the Respondents, otherwise good neighbours and friends, as stated by the complainant, go back to their homes and live in peace.

28. The Appeal is otherwise ordered to be and is hereby dismissed.

29. Orders accordingly.

Dated, signed and delivered in open court at Meru this 19th day of June 2006

ISAAC LENAOLA

JUDGE

In the Presence of

Mr. Muteti State counsel for the Appellant

Mr. G. Anampui Advocate for the Respondent

ISAAC LENAOLA

JUDGE.