



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CRIMINAL APPEAL NO. 816 OF 2003

**FROM ORIGINAL CONVICTION AND SETENCE IN CRIMINAL CASE NO. 9449
OF 2001 OF THE CHIEF MAGISTRATE’S COURT AT MAKADARA**

HALAKE BORU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant, **HALAKE BORU**, was convicted for **GODOWN BREAKING AND STEALING** contrary to section 306(a) of the Penal Code. He was then sentenced to 3 years imprisonment, with one stroke of the cane.

The particulars of the offence, as set out in the charge reads as follows:

“On the 3rd day of May 2000 at Zebra Limited, along Dakar road, Industrial Area within Nairobi Area Province jointly with others not before court, with intent to steal broke and entered the godown of M/S ZEBRA LIMITED and did steal from there 87 boxes of Zebra matches and two cartons of AA size batteries valued at Kshs 131,000/= the property of the said ZEBRA LIMITED.”

During the trial, the appellant was tried alongside two other co-accused. At the conclusion of the trial, the court acquitted the 3rd accused, but convicted the other two persons. The appellant was the 2nd accused during the trial.

PW1, Rahim Mahmud Malik, was the Manager of Zebra Limited. He locked up their premises at 6.00p.m. On 2nd May 2001. He locked the doors using padlocks, and then armed the alarm system. He testified that the appellant was on guard duty for that night.

At 1.00 a.m., PW1 received a phone call from EARS Security, telling him that the alarm had been triggered, but that the appellant had informed them that everything was alright. At 4.35 a.m., PW1 received another telephone call from EARS; this time he was told that the godown had been broken into, and that the thieves were still inside. PW1 rushed to scene, where he found the appellant and another person, already under arrest. Inside the godown, PW1 found a canter KRK 506, into which 48 cartons of Zebra matches had been loaded. Also loaded into the said vehicle were 3 gas cylinders.

According to PW1, the thieves gained entry into the godown through the roof.

PW2, Henry Mochoni Otuke, is an employee of EARS Security. He deals with alarms. On 2nd

May 2001, at 1.00 a.m., the EARS Security control room instructed PW2's team to go to Zebra Limited, as their alarm system had been triggered. PW2 went there, and found the appellant who assured them that everything was alright. At the rear gate, the EARS team did not find the guard. Later, at 4.00 a.m. PW2 got another call from EARS Security control room, requiring them to dash to Zebra Limited. When he got there, he found the appellant and another person under arrest, by the police.

This witness also reiterated that entry into the godown was through the roof.

PW3, SGT Vincent Baya, said that he was on duty at his offices at Industrial Area Police Station on the night of 2nd /3rd May 2001. At 4.30 a.m. he received a radio call that there were thieves at Zebra Limited. He rushed there with PW4. They met the appellant, who told them that nothing was wrong. But PW3 noticed that the appellant was trembling. He therefore became suspicious, and thus more observant.

PW3 noticed that the door to the godown was slightly open. On asking the appellant about it, the appellant said that that door was normally like that.

Clearly, the appellant could not have been speaking the truth, as PW1 had left the godown firmly locked.

In any event, PW3 touched the door and it opened. According to PW3, there was a yellow vehicle, a Mitsubishi canter, inside the godown. Behind the vehicle was the 1st accused, and inside the vehicle there were cartons of matches and 3 welding gas cylinders.

PW3 said that when the police reached the premises of Zebra Limited, the appellant was outside, at a sentry box.

PW4, PC Jackson Kemei, was a police officer attached to the Industrial Area Police Station. He corroborated the evidence of PW3, to a large degree. But according to him, the appellant was inside the premises when the police arrived. This is the evidence he gave;

“Consequently, we started walking by foot and observed that one small door was open. Before entering, we met the accused who immediately came outside.”

In my understanding, the appellant could only have come outside, if he had been inside.

The question that now arises is whether the appellant was outside the premises, in a sentry box as PW3 said, or inside the premises as said by PW4. It would appear to me that if the appellant was inside the premises, as said by PW4, he would have absolutely no excuse for alleging that he was not aware of what was going on inside the godown.

On the other hand, if the appellant was outside the premises, at a sentry box, it is just possible that he might not have been aware of what was going on within the premises.

In the circumstances, the inconsistency between the testimony of PW3 and that of PW4 assumes a significant meaning

when it is borne in mind that the 1st accused, testified that it was not the appellant who opened the gate for them, there is more reason to believe that the appellant's defence could possibly be true.

It is noted that the godown had two entrances; one at the front, and the other at the rear. The appellant was the guard at the front. The 3rd accused was the guard at the rear. He was acquitted by the trial court, as nobody had evidence to connect him with the offence.

What was the evidence adduced against the appellant? In his Judgment Mr. Muga Apondi, Chief Magistrate, (as he then was) held that the appellant, with the 1st accused were caught red-handed, inside the godown, having loaded the stolen goods onto the canter vehicle.

The court found that the appellant was “in league” with the 1st accused. The reason for that finding was that the appellant had told both PW2 and PW3 that everything was okay, despite the fact that the canter vehicle had gained unlawful entry into the premises, and was already loaded with the stolen goods.

I find that the conviction was unsafe because it had not been shown that the only entrance for vehicles was through the front gate of the premises. When it is borne in mind that there was a rear entrance to the premises, there is a possibility that the vehicle may have gained entry through that rear entrance.

Also, as I have already analysed herein above, it is not clear whether the appellant was inside the premises or outside it. Therefore, without first resolving that issue, it would be premature for one to hold that the appellant was caught red handed inside the godown.

For all the foregoing reasons, I find merit in this appeal. I hold that it would be unsafe to sustain conviction. Accordingly I now allow the appeal.

The conviction is quashed, sentence set aside, and I further direct that the appellant be set at liberty unless he is otherwise lawfully held.

Dated at Nairobi this 24th day of January 2005

FRED A. OCHIENG

JUDGE

Appellant in person present

Mr. Odero court clerk