



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA

Criminal Appeal 413 of 2003

MICHAEL OTIENO OCHIENG APPELLANT

VERSUS

REPUBLIC RESPONDENT

(Being an appeal from Original Criminal Conviction and sentence in Criminal Case No.616 of 2001 of the Snr. Resident Magistrate's Court at Voi – E. N. Maina, SRM)

Coram: Before Hon. Justice J.W. Mwera

Ademba for the State

Appellant in person

Court clerk – Kazungu

JUDGEMENT

The appellant was charged with two counts of garage and shop breaking and committing a felony both under Section 306(a) Penal Code. He faced an alternative charge of handling suspected stolen goods contrary to section 322(2) Penal Code. He was convicted of the two counts and sentenced to serve 5 years on each count plus strokes (six in all) on 1st November 2001. By the time of arguing his appeal the term had been served but the appellant, who was still in prison on some other matter unconnected here, wanted to clear his name in the event his appeal was allowed. The two counts related to the night of 18th / 19th July 2001 at Taru market – Kwale. In the first count it was alleged that the appellant broke into and stole from the garage of Samuel Mangale (PW1) and stole many bicycle items there including two bicycles all worth Kshs. 44,055/-. In the second charge the appellant was said to have done the same to Cecilia Wamaitha's (PW2) shop where shop goods including a radio all valued at Kshs. 106,000/- were stolen.

The appeal had some fourteen grounds when broken down, particularly as the appellant submitted, came to claims that the appellant had a grudge with the arresting officer P.C Mutai (PW 3); that the police did not call anybody from the hawkers at the open market where the appellant was arrested or those who helped PW3 carry the goods he was found selling to the police station. That there was contradiction and doubt about the origin of the second bicycle and the identification of one radio PANASONIC. The level of investigation was attacked and, though not a ground in the petition, the appellant claimed that his defence was not considered.

The appellant going by his written submission urged this court to consider that the 3 charges were fabricated against him in that PW3 (PC Mutai) had a grudge with the appellant over chang'aa and some woman called Lucy Waithera. It may be pointed out here that even in cross examination of PW3 and in

the unsworn statement in defence, there was nothing about Lucy Waithera. The appellant said that PW3 once arrested him with chang'aa and when he refused to give a bribe for it became a grudge. PW3 denied the allegation, though, and the Learned Trial Magistrate did not find it credible. Having gone over the evidence of PW3, it appears that the first time he came into contact with the applicant was at 6.30am on 19th July 2001 when he had information that a suspicious person was selling shop goods at Mariakani market. He went there with Cpl. Kinoti and watched the appellant for a while before approaching him to ask for his trading licence.

He had none. That seemed to have deepened their suspicion and they arrested with the many goods including a bicycle No. AH 09793. Those goods and the bicycle were later identified by PW1 & 2 (the complainants). In his own unsworn statement the appellant said that he lived at Plot No. 57 Mwatate B. He did not live at Taru or Mariakani so when the learned trial magistrate rejected the claim of a grudge she was right. This court also finds the same adding that here the appellant introduced Lucy Waithera as the cause of friction with PW3 – a thing that was never raised in the lower court. In sum the appellant had no justification to claim that he was framed in the case before the learned trial magistrate and that that officer should have found so. The next point was that there was another bicycle which PC Mwaniki recovered from somebody else who was never apprehended and it was slapped on the appellant.

The appellant chose to attack that part of the recovered goods without denying the others including bicycle No. AH 09793. So focusing on this other bicycle the court was told to regard it as further evidence of a frame-up. The lower court did not and this court, does not agree. P.C Mwaniki (PW4) investigated the case. He got to a house where the other bicycle – No. 69818 was found. The owner was not there but a woman who looked to be visiting was. PW4 waited for the house owner unsuccessfully and then took the bicycle away which PW1 identified as one of the two that were stolen from his garage. There was no problem or doubt raised by this. Although PW3 does not speak of recovering the radio as they arrested the appellant, and PW4 says that he only found it at Mariakani Police Station during his investigations, PW2, identified this radio as her property and in any case that item alone did not prejudice the appellant. He was caught by PW3 and another officer with many more items including one bicycle which had only the previous day been stolen from the premises of PW1 & 2. These two identified them. It was not in doubt that their premises were broken into and goods stolen.

Although the issue of defence not being considered by the lower court was not part of the grounds in this appeal, but having been argued this court has looked at it and found it without merit. The learned trial magistrate set it out (see page 19 of record) and said at the end:-

“I have considered the evidence of the prosecution witnesses and the accused’s unsworn statement carefully.”

She went on to find, and this court agrees, that the appellant was found selling the property stolen from the premises of PW1 & 2. He was arrested and later charged accordingly. This court also, like the learned trial magistrate, is not convinced that PW3 had a grudge with the appellant on account of a chang'aa incident.

In sum this appeal is dismissed in its entirety.

Judgement accordingly.

Delivered on 15th November 2005. J.W. MWERA

JUDGE