



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

Criminal Appeal 113 of 2004

**(FROM ORIGINAL CONVICTION AND SENTENCE IN KILIFI CR.CASE NO. 103 OF 2004
BEFORE MR.C.O.OBULUTSA SRM)**

SILVESTER OKELLO

MOHAMED ALI KATANA.....APPELLANTS

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The two appellants were tried, convicted and sentenced to a fine of Kshs. 20,000 or in default 18 months imprisonment for the offence of stealing contrary to Section 275 of the Penal Code. Both being dissatisfied with the conviction they filed two separate appeals, namely Criminal Appeal No. 113/2004 and No. 114/2004 respectively. The two appellants filed, what the Court of Appeal would call home-made Memorandum of Appeal, in which each one of them listed four grounds. Being home-made the four grounds in both Memorandum of Appeal can be combined into one ground, namely- that the learned trial magistrate convicted the appellants against the weight of evidence adduced before him. The two appeals were consolidated on 5th August 2005 and heard together.

It will be necessary at this stage to set out the evidence adduced before the lower Court, evaluate the same and consider if the trial Court reached the correct conclusion. In doing this I will bear in mind the fact that I have not had the advantage of the trial Court where witnesses testified.

It was the prosecution case that on 25th March, 2004 at a shop belonging to the complainant, the appellants in the company of two others tried to sell a mobile phone to the complainant. When she declined to buy the appellants and their colleagues went away but returned a second time to try and convince the complainant. They did not succeed. At this stage the complainant stepped out of shop to the next shop for milk. The 1st appellant in No. 113/04 (Okello) followed the complainant while the 2nd appellant (Mohammed Ali Katana) went into her shop. She saw 2nd appellant leaving her shop. She went back to her shop and found her mobile phone and cash money- Kshs. 1000/= missing from the shop. The appellants ran away and were later arrested separately.

In his unsworn statement the 1st appellant stated that the complainant was known to him both as a neighbour and a girlfriend. PW 3 – Eric Mwadosho was not pleased with this relationship as he too was having a relationship with the complainant. The 1st appellant attributed his arrest and the subsequent

events to the bad blood between himself and Eric.

The 2nd appellant also confirmed that there was bad blood between his family and that of Eric regarding a land dispute.

The 1st appellant eloquently argued the appeal by reading written submissions which the 2nd appellant confirmed he participated in the drafting and he had nothing to add to it but to adopt it.

In those submissions the appellants raised one matter which was not contained in their grounds. That matter related to the fact that the learned trial magistrate after consolidation of the cases involving the two appellants failed to rule which case was terminated and on which he was proceeding. This, Mr.Ogoti for the respondent, argued did not prejudice the appellants' trial. That is true. I have perused the record and I am satisfied that although there was no order as to which file the proceedings were to continue in, it is clear that the new charge sheet and subsequent proceedings were conducted in Criminal case No. 248/2004. I find no prejudice in that omission. But more fundamentally is the provision in Section 350(2) of the Criminal Procedure Code which limits the grounds to be argued on appeal to only those filed in the memorandum of appeal. This ground was not part of the four grounds listed in the memorandum of Appeal.

I will turn now to the main argument that there was no or no sufficient evidence to warrant a conviction of the appellants. To begin with there were no eye witnesses to the actual theft. The complainant only saw the 1st appellant following her, and she thought he was keeping an eye, so to speak, on her, while the 2nd appellant was upto some mischief. Indeed when she was returning she saw the 2nd appellant leaving her shop. In the shop she found her money and mobile phone missing. On coming out the appellants ran away.

This is circumstantial evidence. To rely on such evidence, it must be established that the evidence relied on point to the guilt of the suspects to the exclusion of any other person(s) and that there were no other co-existing factors which would weaken or destroy the inference of the guilt of the suspect.

The trial Court found that the appellants were clearly known to the complainants, a fact also confirmed by both appellants. On the occasion in question the appellants went to the complainant's shop twice trying to convince her to buy a mobile phone. The trial court also found the evidence of the complainant credible. The evidence irresistably point to the two appellants. Although there were other people around the shop, it is the 2nd appellant who was seen leaving the shop and immediately thereafter the money and mobile phone were found missing.

The trial court also found that the two acted in concert to commit the offence. As the 2nd appellant was stealing from the shop the 1st appellant ensured that the former was not interrupted by trailing the complainant. I find, as the lower court, no merit on the appellants' respective defence.

For these reasons, I find no merit in this appeal.

It is dismissed

Dated and delivered at Malindi this 8th day of November, 2005.

W.OUKO

JUDGE

8.11.2005

Coram

W.Ouko

Judge

Appellants present

CC: Gladys

Judgment delivered.

W.OUKO

JUDGE