REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MACHAKOS
APPELLATE SIDE
CRIMINAL APPEAL 160 OF 2003
(From Original Conviction and Sentence in Criminal Case No. 785 of 2002 of the Senior Resident Magistrate's Court at Kangundo: N. N. Njagi Esq. on 15/ 1/03)

JOSEPHAT MUTUKU NZIOKI.....APPLICANT

VERSUS

REPUBLIC .....RESPONDENT

J U D G E M E N T

The Appellant appeals against the conviction and sentence in Kangundo Cr. Case 185/02 where he was charged with the offence of Kiosk Breaking and Committing a Felony therein Contrary to Section 306 (a) of the Penal Code. In the alternative he was charged with handling stolen property Contrary to Section 322 (2) of the Penal Code. He is aggrieved by the conviction and sentence.

The appellant raised four (4) grounds in his appeal which can be summarized as follows: that he was never identified as the person at the scene of crime, that the charge was not proved beyond any doubt and the sentence of six (6) years is excessive and manifestly harsh. The appellant maintains that the cigarettes were his and that the complainant did not identify them as hers.

The appeal was opposed on grounds that the evidence against the appellant was overwhelming since he was seen entering complainant's kiosk and was arrested soon thereafter with cigarettes stolen from complainant's *kiosk*. The court was asked to take judicial notice of the fact that an owner of a *kiosk* will not ordinarily mark his goods like cigarettes.

Briefly, stated the facts are that the complainant who owns a kiosk at Kakuyuni opened her kiosk in the morning and went to wash her clothes about 10.00 a.m. She was later called and informed that the kiosk was broken into and from therein were stolen 3 packets of Horseman, 1 packet Sportsman cigarettes and a packet of Rooster cigarettes. She found the window broken and PW 2 and 3 who were working on a road nearby informed her that they had seen somebody enter the *kiosk* and they followed the direction, that he went. They brought back the appellant who was in possession on 1 ½ packets of cigarettes. Who was later charged.

After going through the evidence in the lower court, I found there to be contradictory evidence as regards the breakage in the *kiosk*. PW 1 did not tell the court what state she left the kiosk. She did not say whether the door was open or locked. She also told the court that she was only called and informed of the breakage. The court was not told who called her or who discovered the breakage. PW 1 then went ahead to say that the window of the kiosk was broken to gain access to the *kiosk.* PW 4 who visited the scene said that entry was gained through the window. PW 2 did not say how he saw the appellant enter the *kiosk.* He merely said he saw the appellant enter the kiosk. PW 3 on the other hand saw the appellant enter the *kiosk* through the door by forcing it open. The question is whether the kiosk was broken into twice, through the window and door. The Magistrate went ahead to find that he relied on the evidence of PW 2 and 3 who witnessed the appellant enter the kiosk through the window. That was a wrong finding. The Magistrate should have gone ahead to make a finding on the glaring contradictions between PW 1 and 4 evidence on one hand and PW 2 and 3 on the other. This contradiction raised doubt in the prosecution case as to whether and where the breakage was in PW 1's kiosk if all there was any breakage.

PW 2 & 3 said they saw the appellant from a far. They did not tell the court or estimate from how far they saw the appellant. The court not having been told the distance, wonders whether there is a possibility of mistaking the appellant for another. This is an issue that the court should have addressed.

The appellant was arrested with 1 1/2 packets of cigarettes. It is possible that they may be part of those stolen from the complainant's kiosk. It is true that normally one will not mark cigarettes in a kiosk but I find that what the court concluded above raises sufficient doubt regarding the appellant's guilt. He should have been given the benefit of doubt. The court finds the conviction to have been unsafe. It is hereby quashed and sentence set aside. The appellant is set at liberty unless otherwise lawfully held.

Dated, read and delivered at Machakos this 14th day of October 2004.

R.V. WENDOH

JUDGE