Mutisya v Republic (Criminal Appeal E049 of 2019)
[2023] KEHC 17570 (KLR) (18 May 2023) (Judgment)

Neutral citation: [2023] KEHC 17570 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MAKUENI

CRIMINAL APPEAL E049 OF 2019

GMA DULU, J

MAY 18, 2023

BETWEEN

SOLOMON MUTISYA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(From the conviction and sentence in Criminal Case No. 163 of 2019 by Hon. J. O. Magori (SPM) at Makindu Law Court on 19th May, 2021)

JUDGMENT

1. The appellant was charged in the Magistrate's court with burglary and stealing Contrary to Section 304(2) as read with Section 279 (b) of the *Penal Code*.

2. The particulars of offence were that on the night of 27th and December 28, 2018 at Syumile Secondary School, Nguumo Location in Makindu Sub-County in Makueni County broke and entered into the dwelling house of Angeline Mueni Kyalo with intent to steal therein and did steal one TV flat screen make Armco, one DVD set, two plastic chairs, two gas cylinders, two mattresses, one utensil tray, one solar battery, one inverter, one brief case containing assorted clothes, one travelling bag, beddings, cash money Kshs 15,000/=, one plastic table, one wall clock, all valued at Kshs 107,888/= the property of Angeline Mueni Kyalo.

3. In the alternative, he was charged with handling stolen property Contrary to Section 322(2) of the *Penal Code*, the particulars of which being that on February 13, 2019 at the same place otherwise than in the course of stealing dishonestly retained two mattresses, two gas cylinders, one TV set, two plastic chairs, one plastic table, one utensil tray, one wall clock, knowing or having reason to believe them to be stolen property or unlawfully obtained.

4. He denied both charges. After a full trial, he was acquitted of the main charge of house breaking and stealing. He was however convicted on the alternative charge of handling stolen property Contrary to Section 322(2) of the *Penal Code* and sentenced to seven (7) years imprisonment.

5. Aggrieved by the conviction and sentence, the appellant has come to this court on appeal and relied on the following grounds: -

    a. The prosecution did not prove their case beyond reasonable doubt as required by law.

    b. There was no proof that the exhibits were recovered from his rental house since there was no exhibit memo form to authenticate the alleged recovery.

    c. The learned Magistrate erred in law and fact for convicting on evidence full of glaring inconsistencies and contradictions.

    d. The learned Magistrate misapprehended the facts of the case.

6. The appeal was canvassed through written submissions. I have perused and considered the submissions filed by the appellant as well as the submissions filed by the Director of Public Prosecutions.

7. This being a first appeal, I am duty bound to independently analyze re-evaluate and re-assess the evidence presented before the trial court and arrive at my own independent conclusions and inferences see *Okeno vRepublic* (1972) EA 32.

8. In proving their case, the prosecution called five (5) witnesses. On his part, the appellant tendered sworn defence testimony and did not call any additional witness.

9. The offence for which the appellant was convicted was handling stolen property Contrary to Section 322(1) of the *Penal Code* Section 322(2) which appears in the charge sheet is the sentence section. In the case of *Mungari vRepublic* (2006) eKLR the court defined the ingredients of the offence and stated as follows:-

    'Under Section 322(1) of the *Penal Code* (Cap 63), a person handles stolen goods if otherwise that in the course of stealing knowing or having reason to believe them to be stolen goods he dishonestly receives or retains the goods or dishonestly undertakes, or assists in the retention, removal, disposal or realization by or for the benefit of another person, or if he arranges to do so.'

10. In accordance with the provisions of Section 107 of the *Evidence Act* (Cap 80), the burden was on the prosecution to prove all the elements of the offence. This being a criminal case, the standard of proof was beyond any reasonable doubt – see *Sawe vRepublic* (2003) eKLR.

11. The appellant has raised several grounds of appeal. With regard to inconsistencies the appellant has referred to the evidence of PW3 PC John Saitoti who stated in evidence that – on December 31, 2018 Administration Police officers from Kiundani AP camp brought a suspect who had been arrested for burglary and stealing. The appellant complains that the said Administration Police Officer said later that on February 13, 2019 Administration Police officers escorted the accused to the police station with items which had allegedly been stolen, which the appellant says was a contradiction.

12. I note also that another officer PW5 Sergeant Francis Mutai stated in evidence that on February 13, 2019 at Ilani, a lady came and informed him that she had been sent from Makindu Police Station so that they arrest a suspect in a stealing case. He stated that they arrested the suspect at a garage, went with him for 17km and were shown his house, where they recovered 2 mattresses, TV, DVD player, Oil Libya cylinder make, a plastic trolley. This was also the evidence of PW4 PC Samuel Chege.

13. In my view, other than the mention of December 31, 2018 by PW3 PC John Saitoti, there is no other contradiction in the prosecution evidence. This witness (PW3) confirmed later in his evidence that he received the suspect from APC Kiplagat and APC Mwitari on February 13, 2019. I thus find no contradiction of substance in this case. The earlier mentioned date of 31st December, 2018 must in my view, have been a lapse of memory of PW3, as the alleged break in and theft was said to have occurred earlier, on the night of 27th /December 28, 2018. Thus there is no material contradiction regarding dates.

14. The next issue is whether the appellant was found in possession of the items as alleged. For clarity 'possession' is defined under Section 4(a) of the *Penal Code* (Cap.63). With regard to this issue, I note that none of the prosecution witnesses who testified knew or claimed to know the house or residence of the appellant. He was also not arrested or found in his house as he was arrested in a garage. Not even a neighbor was called to testify and confirm that he lived in the house where the items were found.

15. Further, though the premises where the items were recovered was said to have been rented premises, neither the landlord/lady or caretaker was called to testify on whether the appellant was the tenant or lived there.

16. In my view, from the totality of evidence on record, the prosecution did not prove beyond any reasonable doubt that the appellant was found in possession of the items, as the evidence on record was not conclusive that he was the owner or occupier of the premises or was in control of those premises where the items were recovered. He was also not arrested with or near any of the items alleged to have been stolen.

17. The appellant not having been shown to be in possession of the recovered items, the burden did not shift to him to give an explanation on the said possession, as the prosecution did not discharge its primary burden of proving that the appellant was in possession of the allegedly stolen items see *Tome v Republic* [2019] eKLR. The appeal will succeed on that account.

18. On the same element of possession, the appellant has also complained about failure of the prosecution to call a crucial witness that is his grandmother, who paid back the allegedly stolen Kshs 15,000/=

19. I note that though in cross-examination the complainant PW1 Angeline Mueni Kyalo said that the appellant's grandmother and the appellants' landlord, confirmed the items were recovered from the house where the appellant lived, none of the two crucial witnesses were called by the prosecution to testify in court. In my view, at least one of these two crucial witnesses should have been called by the prosecution to confirm occupation and control of the premises by the appellant, in order to establish the element of possession.

20. None of these two crucial witnesses having been called by the prosecution, the legal principle stated in the case of *Bukenya v Uganda* (1972), EA 549 comes into play. The benefit of the adverse inference has to be given to the appellant with regard to proof of the element of possession, as the other evidence on record with regard to control of the premises was hearsay evidence of no probative value.

21. For the reason therefore, that possession of the stolen items by the appellant was not proved by the prosecution, the offence of handling stolen goods was not proved against the appellant by the prosecution. The conviction of the trial court has thus to be quashed and sentence set aside.

22. For the above reasons, I allow the appeal, quash the conviction and set aside the sentence. I order that the appellant be set at liberty unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED THIS 18TH DAY OF MAY, 2023, VIRTUALLY FROM VOI.

GEORGE DULU

JUDGE

In the presence of:-

Appellant

Mr. Sirima holding brief for Kazungu for state

Mr. Otolo court assistant