



**Muboka v Republic (Criminal Appeal E015 of 2022)
[2023] KEHC 17975 (KLR) (2 June 2023) (Judgment)**

Neutral citation: [2023] KEHC 17975 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CRIMINAL APPEAL E015 OF 2022
WM MUSYOKA, J
JUNE 2, 2023**

BETWEEN

AMOS MUBOKA APPELLANT

AND

REPUBLIC RESPONDENT

*(Appeal from judgment by Hon. JR Ndururi, Principal Magistrate,
PM, in Kakamega CMCCRC No. E1205 of 2021, of 15th February 2022)*

JUDGMENT

1. The appellant, Amos Muboka, had been charged before the trial court on 2 counts. The first was of the offence of breaking into a building and committing a felony therein, contrary to section 306(a) of the *Penal Code*, Cap 63, Laws of Kenya. The particulars were that on the night of 20th and 21st July 2021, at Kenya Highway Authority Bridge store, in Kakamega Central Sub-County of Kakamega County, with others not before the court, he broke into and entered a building, namely a store, and committed therein the offence of theft. The second charge was that of stealing from a locked room, contrary to section 279(g) of the Penal Code, the particulars being that on the day and at the same time, he, with others not before court, he stole 8 pieces of Flexi beams, valued at Kshs 160, 000.00, the property of KENHA, and in order to commit the theft, he opened a locked room by cutting the main door.
2. He also faced an alternative charge of handling stolen goods, contrary to section 322(2) of the Penal Code, the particulars being that on 21st July 2021, at Maraba area of Kakamega Central Sub-County, within Kakamega County, otherwise than in stealing, he, with others not in court, he dishonestly retained 8 pieces of Flexi beams knowing or having known or believed them to be stolen goods.
3. He pleaded not guilty, and a trial was conducted. 4 witnesses testified.



4. PW1, Alice Okello, was the human resource officer for the complainant, based at Kakamega. She was called back to her office, with information that one of the guards had been found with Flexi beams belonging to the complainant. When she got to the offices of the complainant, she found the appellant under arrest. She and others went to the store and found it locked. The storekeeper said that he had locked it with 2 padlocks. When they opened, they found some of the Flexi beams missing. A hole had been cut through the side of the store. The co-accused of the appellant said that he and the appellant, and another guard had carried the beams.
5. PW2, Amin Hassan Ali, was a procurement officer for the complainant. He identified the appellant as a security guard for the facility at Kakamega. He said that Flexi beams had been stored at the Bridge yard. He stated that on 21st July 2021, he got information that some people had been found at Malava with Flexi beams. He found the appellant having been arrested by the police. He said that the appellant showed them a cut through the fence. PW2 had keys to the store, and upon checking he realised that there were 87 out of 92 beams at the store.
6. PW3, Dennis Moturi, was the person who drove the vehicle that carried the beams, after they were loaded on it by the appellant and others. He said that he was approached on 20th July 2021, at about 6.00 PM, by a customer, who said that he had scrap metal that he wanted transported at 4.00 AM, the following day, to Malava. They agreed on a fee of Kshs. 4, 000.00. the person who approached him was named Tosh. He drove his vehicle to the appointed place, in the Works area, where he found Tosh, who told the appellant and another to load some metallic material on the vehicle. Tosh then asked the appellant to accompany him to Malava Primary School. When they got to their destination, the appellant and Tosh offloaded the cargo. At the scene, some people came and started quarrelling with Tosh, attracting the attention of local officials, who called the police. Tosh disappeared before the police came, who found PW3 and the appellant at the scene. They were both arrested.
7. PW4, No. 78989 Police Constable Aggrey Mugalla, was the investigating officer. He testified that he got information that the property in question was stolen from the complainant, KeNHA, whose officials came to the police station and identified the same. The appellant took them to the KeNHA yard, and showed them a hole through which they removed the beams.
8. The appellant was placed on his defence. He testified as DW1. It is not clear from the record whether he gave a sworn or unsworn statement. He stated that on the material day, people suddenly appeared at his place of work, and said that they wanted the beams, and forced him to load them on a vehicle,. He said it was night-time and he was alone, and he could do nothing to resist. He said that he was forced to get into the vehicle. When they got to where the beams were to be offloaded, the police arrived, and he was arrested.
9. After taking evidence from both sides, the trial court found that the offence charged in the first count had been established against the appellant, convicted him and sentenced him to serve 4 years in jail. The appellant was aggrieved, hence the instant appeal. The grounds are that Article 50(2)(b)(j) of *the Constitution* had been violated; the evidence was inconsistent, uncorroborated and malicious; the charge was defective, and the trial court erred in amending the same; no one witnessed him make a hole on the fence; and he should have been charged with theft by servant.
10. Directions were given on 4th April 2022, for canvassing of the appeal by way of written submissions.
11. The appellant filed written submissions, where he argued 3 points, around a defective charge; the evidence being uncorroborated, contradictory and inconsistent; and crucial witnesses not being called to testify. I shall take it that the appellant dropped the other grounds of appeal, and I shall limit my analysis to the 3 points argued in the submissions.



12. On the matter of the defective charge, I note that the appellant was convicted of the first count, the one for store-breaking and stealing from therein. He has not argued that that charge was defective. The charge that the trial court said was defective was the second count, that charged under section 279(g), of stealing from a locked room. It was stated to be defective, in the sense that section 279(g) does not create an offence, for it merely states the circumstances in which theft may occur, for otherwise the offence of theft is defined in section 275, and stated that the prosecution ought to have cited both sections 275 and 279(g). As the appellant was not convicted on the basis of the defective charge, but the first count, the defectiveness of that charge was of no consequence to his conviction.
13. On the ground of the evidence being inconsistent, contradictory and uncorroborated, I have not found that any inconsistency or contradictory. PW1 and PW2 were clear that it was the side of the store that had been cut. It was variously referred to as a yard. The pictorial evidence shows that it was a wooden structure with sides made of wire mesh. It was the wire mesh that was cut. It is clear as to how the persons who store the beams gained access to the store. There is no requirement for corroboration in offences of this nature.
14. On certain witnesses not being called, the legal position is that the prosecution is not required to call any number of witnesses, or to call everyone who might have been mentioned by the other witnesses as knowing something or other about the crime. The duty on the prosecution is to call such number of witnesses as would be sufficient to prove their case. The witnesses who testified herein placed the appellant in charge of the security of the store and the beams on the material night that they got stolen, and that he was amongst the persons who were found in possession. PW3 was able to explain himself, and was let off the hook, the appellant was not able to. I do not see how the trial court can be faulted for coming to the conclusions that it came to based on the evidence before it.
15. From the material on record, I find and hold that there was sufficient evidence upon which the trial court could convict. The sentence imposed is commensurate to the offence, if anything, it was a little lenient for a person who abused trust. The appeal has no merit, for the reasons given, and I hereby dismiss the same.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 2ND DAY OF JUNE 2023

W MUSYOKA

JUDGE

Mr. Erick Zalo, Court Assistant.

Appearances

Amos Muboka, the appellant in person.

Ms. Kagai, instructed by the Director of Public Prosecutions, for the respondent.

