Runo v Republic (Criminal Appeal E044 of 2020)
[2023] KEHC 18882 (KLR) (Crim) (15 June 2023) (Judgment)

Neutral citation: [2023] KEHC 18882 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CRIMINAL

CRIMINAL APPEAL E044 OF 2020

LN MUTENDE, J

JUNE 15, 2023

BETWEEN

HENRY NGANGA RUNO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal against the original conviction and sentence in Criminal Case No. 4749 of 2008 at the Chief Magistrates' Court Makadara by Hon. H.M. Nyaga – CM on November, 2022)

JUDGMENT

1. Henry Nganga Runo, the appellant, alongside others were charged with the offence of stealing contrary to section 275 of the *Penal code*. Particulars being that on the 5th day of November, 2008 at United Ware House Shimanzi within Coast Province, they jointly stole 495 jute bags bundles valued at Ksh 3.6 million the property of James Gichuhi Munyaka.

2. In the alternative, he faced the Charge of handling stolen goods. Particulars being that on the 5th day of November, 2008 at Samsy International Agency in Industrial Area within Nairobi Area Province, otherwise than in the course of stealing, they dishonestly retained 459 jute bags bundles knowingly or having reason to believe them to be stolen goods.

3. Upon being taken through full trial the appellant was acquitted of the main count of stealing but found guilty of the alternative count, whereby he was convicted and fined Ksh 200,000/- and in default to serve two (2) years imprisonment. In addition he was required to pay the complainant 1/3 of Ksh. 1,606,745/- being compensation under the *Victim Protection Act* an award that was to take precedence as provided for under section 26(2) of the Act.

4. Aggrieved by the conviction and sentence the appellant proffered this appeal on grounds-

1. That the decision of the learned magistrate was manifestly unjust as it laid liability on the appellant in an offence he did not participate.

2. That the learned magistrate erred in law and in fact by reaching a decision solely based on circumstantial evidence without any corroborating evidence.

3. That the learned magistrate erred in law by reaching his decision based on assumptions and unproved facts.

4. That the learned magistrate erred in law by purely relying on investigations carried out by a private investigator who is not legally authorized to conduct investigations on behalf of the state.

5. That the learned magistrate erred in law and fact by shifting the burden of proof from the prosecution to the accused person.

6. That the learned magistrate erred in law and in fact by ruling against the 2nd accused when there was no clear nexus to link the 2nd accused to the offence committed.

7. That the magistrate erred in law and in fact in reaching the decision even when critical facts were not proved.

8. That the learned magistrate erred in law and fact by finding the accused persons liable of count 2 of the offence even when count I was not proved to his satisfaction.

9. That the learned magistrate erred in law and in fact for reaching a decision which was against the weight of the evidence.

10. That the learned magistrate reached his decision for appreciating the evidence of the prosecution and disregarding the evidence of the 2nd accused person.

11. That the learned magistrate erred in law by finding the 2nd accused person liable even when the elements of the offence charged could not be proved beyond reasonable ground.

12. That the learned magistrate occasioned a miscarriage of justice for reaching a decision based on half-baked investigations and incomplete links to the offence having chosen to join the dots left by the weak inconclusive evidence.

5. Briefly, facts of the case were that PW1 James Gichuhi a subscriber of Greenland Suppliers Limited imported bales of Jute sacking bags valued at Kenya Shillings 3.6 million from Bangladesh. On October 29, 2008, PW2 Abubakar Mustafa who worked for him loaded 117 bales of the sacking bags on to a truck. On the November 4, 2008, 110 more bales were loaded on to motor-vehicle, Registration Number KSH 891 Mercedes Bens Truck. The first consignment was delivered but the second one was not. On November 5, 2008 PW2 could not trace the truck hence notified PW1. The matter was reported to Makupa Police Station. Investigations that were being conducted were not satisfactory hence PW1 reported the case to the Police Commissioner and the matter was assigned to Industrial Area Police.

6. In the meantime, PW1 also engaged services of PW3 Francis Leki Marawoshe, a Private Investigator. Information received led to the recovery of some of the jute bags. PW3 engaged an individual known as Makanga who claimed to be a broker. He posed as a buyer and was taken by Makanga to Wachira and Stanley (Accused in the case). A sample of Jute bag was availed and after the complainant confirmed it to be what he had imported; the police were notified. The following day, he hired motor-vehicle registration number KBD 332G that was to carry the items. They went to the go down where the

appellant opened the gate. Makanga on realizing the police were alerted, fled. Wachira also fled leaving his car behind but was arrested when intending to board an aircraft to Mombasa. 11,425 bags were recovered as the appellant and others were arrested and subsequently charged.

7. Upon being placed on his defence the appellant stated that on 5th January, 2008 he was working as a loader at Samsy International Agency, a go down where goods would be stored by clients. That when that particular consignment was delivered, he only participated in off-loading, when arrested he was not told why the arrest took place.

8. The appeal was disposed through written submissions. It was urged by Mr. David Muriuki, learned Counsel for the appellant, that the appellant was dragged into an offence he was not aware of and did not participate in its planning and execution. That he was not part of the syndicate that was involved in stealing and arranging for the sale of the stolen goods. That according to evidence adduced by PW3, the goods were stored at a huge ware house namely Samsy go down where the appellant a mere employee was manning the gate, loading and offloading goods from trucks following instructions. That PW4 the arresting officer clearly stated that after Wachira fled the appellant introduced himself as the caretaker at Samsy Warehouse.

9. Further, it was urged that there was no concrete evidence to show that the goods recovered were the ones stolen in Mombasa as the jute bags recovered had no serial numbers. That it was concluded that the goods were stolen because Wachira was selling them at Ksh 80/- instead of the market value of Ksh 150/- which led to the conclusion that the jute bags were stolen which was a wrong assumption.

10. The appeal is opposed by the respondent through Learned Counsel Ms. Zapheda Chege who argues that the trial court exhaustively dealt with the aspect of circumstantial evidence, a threshold met by the prosecution. That the complainant who was present during the recovery that was made through controlled purchase positively identified the goods that were recently stolen. That the appellant participated in retaining the goods for his benefit and that of his accomplices; goods that were being disposed at cheaper price but were intercepted on good time.

11. On the sentence imposed, it is urged that the default sentence should have been twelve (12) months as provided by section 28 of the *Penal Code*. In this regard, the court is called upon to correct the error.

12. This being a first appellate court I must examine and analyze evidence adduced at trial afresh and reach independent conclusions bearing in mind that I had no opportunity of seeing and hearing witnesses who testified. This duty of the court on a first appeal was stated by the court in *Okeno -vs- Republic* [1972] EA 32 as follows:

> " An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya v. R [1957] E A 336) and to the appellate courts own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions - Shantilal M. Ruwala v. R [1957] EA 570. It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower courts' findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses - See Peters v. Sunday Post [1958] EA 424".

13. With regard to the offence of stealing, the appellant was jointly indicted with three (3) others. Section 268 of the *Penal Code* defines stealing as:

(1) A person who fraudulently and without claim of right takes anything capable of being stolen, or fraudulently converts to the use of any person, other than the general or special owner thereof, any property, is said to steal that thing or property.

(2) A person who takes anything capable of being stolen or who converts any property is deemed to do so fraudulently if he does so with any of the following intents, that is to say—

(a) An intent permanently to deprive the general or special owner of the thing of it;

(b) An intent to use the thing as a pledge or security;

(c) An intent to part with it on a condition as to its return which the person taking or converting it may be unable to perform;

(d) An intent to deal with it in such a manner that it cannot be returned in the condition in which it was at the time of the taking or conversion;

(e) In the case of money, an intent to use it at the will of the person who takes or converts it, although he may intend afterwards to repay the amount to the owner;

14. The goods in issue were loaded in a vehicle that could not be identified by PW2 who had the duty of causing them to be transported. Although there was proof of the goods having been imported and subsequently taken, the result being that the complainant was permanently deprived of the same, there was no evidence connecting the appellant with the theft in issue hence the trial court reached a correct verdict of acquitting him of the main count.

15. On the alternative count, section 322 (1) (2) of the *Penal Code* provides thus:-

1. A person handles stolen goods if (otherwise than in the course of the 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, their retention, removal, disposal or realization by or for the benefit of another person, or if he arranges to do so.

2. A person who handles stolen goods is guilty of a felony and is liable to imprisonment with hard labour for a term not exceeding fourteen years.

16. In the case of *Eric Arum vs. Republic* (2006) IKLR 233, the Court of Appeal set out ingredients of recent possession as follows:

1. Before a Court can rely on the doctrine of recent possession as a basis of conviction in a criminal case, there must be positive proof;

(a) That the property was found with the suspect;

(b) That the property was positively the property of the complainant;

(c) That the property was stolen from the complainant;

(d) That the property was recently stolen from the complainant.

2. The proof as to time will depend on the easiness with which the stolen property can move from one person to another.

17. It is urged by the respondent that property in question was found with the appellant. Looking at the sequence of events, following investigations conducted by PW3, a broker, known as Makanga volunteered to lead him to where he could purchase jute bags at a reasonable price. He led him to

Wachira and Stanley and they negotiated purchase of the jute bags. When he sought to see a sample, following instructions by Wachira, Stanley was to take him to the store. Stanley took him to Ngara Market, then Taveta Stage, Nyamakima where he was made to wait at Jadho Café. He availed one jute bag. Upon wanting to go have the sample, Stanley declined arguing that he had to consult Wachira. Wachira then said that the go-down had closed hence they were to connect the following day.

18. All along the appellant was not included in the arrangement; but, when they ultimately went to the go down the following day, the gate was opened by the appellant.

19. PW4 No. 232429 CI Hussan Lalama, was led to the go-down by PW3. He stated that the go-down bore a name Samsy Investments Ltd. He identified the appellant as the caretaker at the go-down.

20. On cross-examination PW4 stated that upon arresting Stanley he claimed to be a broker and identified Wachira who also alleged that he was also a broker and Emily was the trader.

21. Section 107 of the *Evidence Act* provides:

    (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

    (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

22. In the case of *Tembere Vs. Republic* (1990) KLR 393 it was held that:

> " ...One of the important elements of the charge of handling is that the accused must know or have reason to believe that the goods were stolen.....Another vital element of the charge of handling is that the accused must dishonestly receive or retain etc.."

23. The prosecution had the duty of establishing ownership of Samsy International Ltd. This was not done. PW4 stated that when the gate was opened by the appellant people inside the go-down fled, An explanation was given by the appellant as to how he was at the premises. He was believed by the prosecution witnesses as being a loader and/ or caretaker. The burden was upon the prosecution to disapprove the allegation by establishing that he was one of the recipients who did so dishonestly and retained them. And, that on the material date he was assisting in their removal with a guilty mind.

24. In the case of *Ratilal v R* [1971] EA 575 at page 578, the court held that:....

> " The necessary mens rea must exist at the time of the receipt of the stolen goods so that it must be established that the accused person knew at the time of the receipt that the goods were stolen or that he had reason to believe."

25. The prosecution failed to demonstrate that the appellant had knowledge of the goods having been stolen. The evidence adduced by the prosecution proved that the culprits escaped upon realizing the police were involved, but , the appellant did not. His conduct did not suggest of any involvement in the retention of the goods. Therefore. It was erroneous on the part of the trial court to reach a verdict of guilty in his regard.

26. In the result, I allow the appeal, quash the conviction, and set aside the sentence imposed.

27. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS AT NAIROBI, THIS 15TH DAY OF JUNE, 2023.

L. N. MUTENDE

JUDGE

IN THE PRESENCE:

Appellant

Mr. Mutuma for ODPP

Court Assistant- Mutai