Ikambi v Republic (Criminal Appeal E001 of 2023)
[2023] KEHC 21970 (KLR) (1 September 2023) (Judgment)

Neutral citation: [2023] KEHC 21970 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIVASHA

CRIMINAL APPEAL E001 OF 2023

HI ONG'UDI, J

SEPTEMBER 1, 2023

BETWEEN

DAVID KIMANI IKAMBI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal against the Judgment in Engineer SPM's Court Criminal Case No. E292 OF 2020 delivered on 9th November 2021 by Hon. D.N Sure (SRM)

JUDGMENT

1. David Kimani Ikambi hereinafter referred to as the appellant was charged with the offence of shop breaking and stealing contrary to section 306 (a) of the *Penal Code*. The particulars being that the appellant on November 17, 2020at Rironi area in Kipipiri Sub-County within Nyandarua County, broke and entered the shop of John Maina Mbugua with intent to steal therein and did steal one shirt, one blouse valued at Kshs 2,000/= the property of John Maina Mbugua. In the alternative he was charged with handling stolen property contrary to section 322(1) of the Penal Code particulars being that the appellant on the November 17, 2020at Rironi area in Kipipiri Sub-County within Nyandarua County, otherwise than in the course of stealing, dishonestly retained one blouse and one shirt knowing or having reason to believe them to be stolen goods.

2. He pleaded not guilty and the matter proceeded to full hearing with the prosecution calling four (4) witnesses. The appellant gave a sworn statement of defence and called no witness. Thereafter the court in its judgment convicted him of the main count and sentenced him to serve five (5) years imprisonment.

3. Being aggrieved by the judgment the appellant filed this appeal citing the following grounds

    i. That, the learned trial magistrate erred in law and fact by convicting the appellant without considering that he was not arrested while in possession of suspected exhibits.

    ii. Thatthe learned trial magistrate erred in both law and facts by judging and convicting the appellant without any positive witness that testified during hearing of the case.

    iii. Thatthere was no dusting done to ascertain the owner of the tools collected from the scene.

    iv. Thathe was convicted basing on the time he was arrested not considering that I was a businessman and his suppliers walk up as early at 5,900am to deliver him grocery considering that it was not curfew time.

    v. Thatthe reporter of the incident did not link him in anyway with the offence

    vi. Thathe prayed this honourable court to quash away this sentence as it lacks basis and set me at liberty

    vii. Thatother grounds to be adduced during the time of hearing.

4. The respondent filed the following grounds of opposition dated May 19, 2023

    i. Thatthe appellant was arrested at the scene of crime with the stolen goods hence the doctrine of recent possession applies

    ii. Thatthe trial court heard all the witness and dismissed the appellant defence

    iii. Thatthe appellant ought to plead to the appellate court on review if his sentence only, noting there was cogent evidence that led to this conviction

5. The prosecution case is founded on the evidence of four witnesses. PW1 John Maina Mbugua is a businessman who sells clothes at Wanjohi & Rironi. On November 16, 2020 3pm he left his Wanjohi shop and went to Rironi to take stock. He left for Wanjohi at 5pm, leaving behind his sister and Jamleck an employee. He closed shop at 8pm and went home, where he found his sister who had also closed shop. At 3am he received a call from a neighbour (Lucy) at Rironi informing him of a breakage at his shop. After all efforts the police were notified and they went to the scene. He was also notified of an arrest by the police. He went to the scene at 5.00am and saw the damages on the shop. At the police post he found 9 sacks (Exb 1) 1 blouse (Exb 2(a), jeans shirt (Exb 2(b) , 3 metal rods (Exb 3). Police took photos of the shop break in (Exb 4 a-c). He only saw the appellant at the police station. Among the stolen items he was only able to identify one shirt and one blouse valued at Kshs 2,000/=.

6. PW2 No 80593 PC Isaac Chebon from Rironi police post received the report on November 17, 2020at 3.55am. Him and others visited the scene and took strategic positions. PC Koech flashed his torch and two people came towards them. They refused to stop and PW2 fired his gun and arrested the appellant who surrendered and pleaded not to be killed. They went to the shop and noted a block that had been removed (Exb 4b&c - photos), 2 small chisels and one big one (Exb 3). Outside the shop were 9 sacks (Exb 1) and clothes (Exb 2a & b). The appellant was escorted to the Rironi police post. Two pieces of clothes were identified by the owner.

7. PW3 No. 112638 PC Francis Mutua of Kipipiri police station is the investigating officer. He visited the scene on November 17, 2020 and also spoke to officers from Rironi police post. He recorded statements and thereafter charged the appellant. Photos of the scene were taken and processed and a certificate issued (Exb 5&6)

8. PW4, J.N Mwangi is a business woman at Wanjohi and sells clothes. On November 17, 2020 she was asleep when she heard noises at 3.00am and she alerted PW1 and asked him to tell other neighbours. After 20 minutes she heard noises and a gunshot. She went outside where she found the police and one person arrested.

9. In his sworn defence the appellant testified that he woke up at 4am and went to Rironi to buy potatoes and carrots from Simon Mwangi. At the stage he met three (3) men who interrogated him and declared him a suspect and took him to Rironi police post and later to Kipipiri police station. It was his case that there was no evidence to support that of the arresting officer. The witnesses did not know him and no inventory was taken.

10. The appeal was canvassed by way of written submissions. A summary of the appellant's submissions is that PW1 and PW4 did not link him to the offence but only relied on PW2's testimony. Further that the court convicted him because he had just been released from prison. No inventory was taken and no dusting was done to link him to the incident. He further stated that PW1 had not proved ownership. He pointed out that the witness who alerted the police about his presence did not testify. He also challenged the long sentence which was without justification.

11. The respondent's submissions are dated May 22, 2023 having been filed by Serling Joyce. She submitted that the appellant was arrested at the scene and found in possession of the complainant's goods, which were well identified. Counsel relied on the doctrine of recent possession as found in the case of *Erick Otieno & another vs Republic* KSM Court of Appeal criminal appeal No. 85 of 2005 (2006) eKLR where the court stated

> "In our view, before a court of law can rely of the doctrine of recent possession as a basis of conviction in a criminal case, the possession must be positively proved. In other words, there must be positive proof, first, that the property was found with the suspect, secondly that the property is positively the property of the complainant, and lastly that the property was recently stolen from the complainant. The proof as to time, as has been stated over and over again, will depend on the easiness with which the stolen property can move from one person to another."

12. Further reference on recent possession was made on the case of *Kelvin Nyongesa & 2 others v Republic* (2016) eKLR Criminal Appeal No. 76 of 2006. Counsel submitted that the appellant had a duty to explain how he came into possession of the stolen items. This according to her had not been satisfied.

Analysis and Determination

13. I have carefully considered the evidence on record, grounds of appeal, parties submissions case law and the law. the issues for determination are as follows:

    i. Whether the doctrine of recent possession applies

    ii. Whether the sentence passed is excessive

14. This being a first appeal this court has a duty to reconsider and re-evaluate the evidence on record and arrive at its own conclusion. The Court of Appeal in the case of *Patrick & another v Republic* (2005) 2 KLR 162 stated the following in respect of this duty

> " (3) An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court's own decision on the evidence. It is not the function of first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions, it must make its own findings and draw its own conclusions."

15. PW1 the complainant was not at his shop when the incident took place. He was called by one Lucy who is a neighbour to his business premises at Rironi and she stays at her business facility. Lucy did not testify. The lady who testified is Joyce Nyakio Mwangi who runs business at Wanjohi, and testified of what happened at Wanjohi.

16. PW1 testified that he runs businesses at Wanjohi and Rironi. From his evidence in chief the business that had a problem that night was the one at Rironi and not Wanjohi and the person who called her was Lucy and not Joyce (PW4).

17. It is PW2's evidence that after all the hullabaloo at Rironi they looked for the shop owner. This is his evidence at page 10.

> " We looked for the shop owner and alerted her. She came to the station immediately. We went back to the shop. It was opened. We checked and she confirmed only the 2 clothes had been taken. She recorded the statement"
>
> It is clear that the complainant herein is Mr. John Maina Mbugua who is not female. PW2 has talked much of a female who owns the shop where a blouse/shirt were stolen from. PW4 talks of the shop being in Wanjohi while PW1 says it's in Rironi. How does one reconcile all this?

18. It is PW2's evidence that it was PW4 who telephoned them over the incident in Wanjohi and that's where they went. That is where she heard the gunshot from. PW3 produced photos of the scene. He stated thus

> " The accused and exhibits were handed to me" page 12 line 8-9)
>
> Part of the exhibits must have been the shirt and blouse that were allegedly found with the appellant. I do not see anywhere in the record where PW1 identified any shirt and blouse as being the ones belonging to him. There was even no photo taken of PW1's shop.

19. The appellant in his defence told the court that he had come to Rironi to buy potatoes and carrots from Simon Mwangi who was never looked for by the police to confirm or deny the appellant's allegations.

20. The respondent has submitted that the appellant was found in possession of recently stolen goods. The principle is clear that when one is found in possession of recently stolen property he/she is deemed to be the thief unless he/she rebuts that assumption.

21. It was the duty of the prosecution to prove that indeed the appellant was found in possession of stolen goods. Issue is, where are those stolen goods which were allegedly recovered? They were never

produced in court for identification. Secondly was the incident at Rironi or Wanjohi? (see the evidence of PW1,PW2 and PW4).

22. A criminal case must always be proved beyond reasonable doubt for one to be convicted. I find this to be seriously missing in this case, and I grant the appellant the benefit of doubt.

23. I therefore allow the appeal, quash the conviction and set aside the sentence of five (5) years.

24. The appellant must forthwith be released from prison unless serving lawfully under a separate warrant.

25. Orders accordingly

DELIVERED VIRTUALLY, DATED AND SIGNED THIS 1ST DAY OF SEPTEMBER 2023 IN OPEN COURT AT NAIVASHA.

HEDWIG ONG'UDI

JUDGE

In the presence of:

The appellant present, virtually

Mr. Atika for the respondent

Ms Ogutu- Court assistant