Ochieng v Republic (Criminal Appeal E003 of 2024)
[2024] KEHC 12441 (KLR) (18 October 2024) (Judgment)

Neutral citation: [2024] KEHC 12441 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BUSIA

CRIMINAL APPEAL E003 OF 2024

WM MUSYOKA, J

OCTOBER 18, 2024

BETWEEN

NEPHTON OCHIENG ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal from conviction and sentence by Hon. EC Serem, Resident Magistrate, RM, in Busia CMCCRC No. E300 of 2022, of 16th January 2024)

JUDGMENT

1. The appellant, Nephton Ochieng, had been charged before the primary court, on 2 counts, of breaking into a building and committing a felony therein, with an alternative of handling stolen goods, contrary to section 306(a) and 322(1)(2), of the Penal Code, Cap 63, Laws of Kenya, respectively, and of having suspected stolen property, contrary to section 323 of the Penal Code.

2. The particulars of the first count were that on the night in question he had broken into a bar operated by the complainant and stole assorted liquors; while the particulars of the alternative charge were that on 12th March 2022, he was found in possession of the alleged assorted liquors, while knowing or having reasons to believe that the they were stolen goods. The second count alleged that on 12th March 2022, upon being detained by a police officer, in exercise of the police powers conferred by section 26 of the Criminal Procedure Code, Cap 75, Laws of Kenya, he had in his possession a motorcycle registration mark and number KMES 326B, suspected to have been stolen or unlawfully obtained.

3. The appellant denied the charges, and a trial ensued, where 3 witnesses testified. PW1, Rajab Hamisi Odhiambo Lasiri, was the complainant. He testified that when he went to open his bar, in the morning of 12th March 2022, he established that it had been broken into, the previous night, and various assorted brands of liquor were missing . The appellant was found selling some of the stolen items, and he was arrested and charged. PW2, Number 250442 Police Constable Meshack Ekonga, of Funyula Police

Station, was the investigating officer. He was assigned the case on 13th March 2022, and was informed that someone had been arrested with stolen alcohol. He rushed to the police station where he was being held, recovered assorted liquors, and a motorcycle. He suspected the motorcycle to be stolen. He rearrested the appellant.

4. PW3, Number 83173 Police Constable Solomon Wasilwa, of Port Victoria Police Station, was the arresting officer. He got information, at 7.00 AM, on 12th March 2022, from members of the public, that someone had been seen conveying goods that were suspected to be stolen. He went to a bar and found the appellant offering the goods, being liquor, to members of the public, for sale. The appellant could not explain where he got the liquor from. He, with the assistance of another, arrested him, with the liquor. The appellant had come with a motorcycle, to the police station, which was suspected to have been stolen. A report of a case of breaking and stealing had been made at Funyala Police Station, and PW1 and PW2 came, and recognised both the appellant and the motorcycle.

5. The appellant was put on his defence, vide a ruling that was delivered on 25th October 2022. He made a sworn statement, on 7th November 2023, and he did not call a witness. He denied the charges. He described himself as a boda boda operator. He was arrested on 12th March 2022, by individuals who claimed that he did not have a driving licence. They demanded money from him, which he did not have, and then they took him to the police station, where he was booked for theft of the motorcycle and liquor.

6. In its judgment, delivered on 2nd December 2021, the trial court found the appellant guilty, on the alternative count of handling stolen goods. He was sentenced to 10 years imprisonment, on 2nd February 2024.

7. The appellant was aggrieved, and brought the instant appeal, revolving around Article 50(2)(d) of *the Constitution* being violated; his rights to be informed of the charge in sufficient details, and to have adequate time and facilities to prepare for his defence, had not been observed; there being a language challenge; the investigations were shoddy; and the conviction was based on the weakness of his alibi defence. He later filed amended grounds of appeal, which largely regurgitated the earlier grounds of appeal.

8. Directions were given on 6th May 2024, for canvassing of the appeal by way of written submissions. Both sides did file written submissions, and I have read them, and noted the arguments advanced.

9. In my estimation the main issue for determination is whether the appeal is merited.

10. The appellant alleges that there was gross mismanagement of the trial records. He claims that the trial court relied on unseen or unrecorded facts to determine the case against him. I have perused the proceedings and judgment of the trial court. The analysis by the trial court shows that the appellant was acquitted on the count of breaking and entering into a building, but was found guilty of the alternative count of handling stolen goods, contrary to section 322(1)(2) of the Penal Code. The trial court relied on the exhibits produced in court, being the recovered liquor, and the receipt produced by PW1, and that was what was relied on to arrive at the verdict of guilty on the alternative charge. The trial court relied on the evidence that was placed before it.

11. The other ground is that the rights of the appellant to a fair trial was violated. He alleged that the bigger and important part of the trial was not done in a fair and public open court. He cited Article 50(2)(d) of *the Constitution*, which provides that "every accused person has the right to a fair trial, which includes the right to a public trial before a court established under this Constitution."

12. From the proceedings of the trial court, the appellant was arraigned in court on 14th March 2022, when the charges were read to him, and he pleaded not guilty in open court. The hearing of the case began on 14th June 2022, but the witness, PW1, was stepped down, as the appellant had not been supplied with witness statements and the record of the items stolen. The matter was mentioned on 15th June 2022, where the witness statements were supplied, in open court. The matter proceeded for hearing, in open court, on 14th July 2022, until it was concluded on 7th November 2023, after the accused person testified. It would appear that sometimes the hearings were conducted online, in line with the COVID-19 pandemic guidelines in place at that time. It would also appear that whenever the network was down, the appellant would be presented in open court for the hearing.

13. The appellant has submitted that he needed to see the serial numbers of each exhibit that was produced in court by the prosecution. The appellant never raised that issue before the trial court, during the trial, nor ever requested to be physically present in court, so as to verify the serial numbers of the exhibits. The liquor in contention had already been released to PW1, after its production in court, as an exhibit, something that the appellant did not object to.

14. In view of the above, I am satisfied that the rights of the appellant, as per Article 50(2)(d) of *the Constitution*, were not violated.

15. The third ground is that the investigations, the basis of the prosecution, were shoddy, and the evidence gathered was insufficient to prove the charges beyond reasonable doubt. PW2 told the court that he was assigned the case, after PW1 reported it, and that he was called from Port Victoria Police Station, with information that a suspect had been arrested with liquor that was suspected to be stolen. When he arrived at that police station, with PW1, PW1 identified the alcohol, and said the appellant was his neighbour. PW2 testified that the appellant was found with the alcohol and a motorcycle, and he could not account for them. PW3, the investigating officer, said that he received a report, from members of the public, that there was someone seen carrying luggage found in Hararemo Bar. He went to the said bar, and found that person, the appellant herein, with various brands of liquor, which he could not account for. He said that PW1 later came with a police officer from Funyula Police Station, as he, PW3, had called the nearest station, as there was no report of a break-in and theft of liquor made at the Port Victoria Police Station.

16. From the testimonies of the prosecution witnesses, it would appear that the appellant was arrested because he failed to explain how he came into custody of the alcohol he was found with. The trial court convicted him of being found in possession of the alleged stolen alcohol, and that he had been positively identified by the prosecution witnesses.

17. The elements of the charge of handling stolen property was summarized in Tembere vs. Republic [1990] KLR 353 (Githinji, J) as follows:

> " 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 ..."

18. The testimonies of the prosecution and defence witnesses do not give indication that the appellant was aware that the liquor that he allegedly had in his possession was stolen from the bar of PW1. There was no evidence, adduced by the prosecution, pointing to the appellant having received or retained the liquor knowing that it was stolen. Of course, the presumption was that he had possession of the liquor, and he could not account for how he came to possess it, and so he must have received it dishonestly, knowing it to be stolen. He denied being in possession of it, saying that he was taken to the police

station, and that was where the liquor was, meaning that he never received it nor retained it, and the same was being planted on him. If the liquor was found in his possession, and there was evidence that it was stolen, the doctrine of recently stolen goods should apply, and he was obliged to account for that possession.

19. The case against the appellant was built around possession of recently stolen goods. The appellant was allegedly found in possession liquor said to have had been stolen from PW1, which made him either the thief or the receiver. The trial court was not convinced that he stole the liquor, but was persuaded that he received and handled it dishonestly.

20. It was stated, in Muiruri Njoroge vs. Republic Nakuru CACRA No. 18 of 1999 (Tunoi, Lakha & Owuor JJA), that the doctrine of recent possession is a presumption of fact arising under section 119 of the *Evidence Act*, Cap 80, Laws of Kenya, from recent possession of stolen goods, and it would only arise when the court believes that the person in possession of the goods knew or had reason to believe that the goods were stolen or otherwise unlawfully received. See Chaama Hassan Hasa vs. The Republic [1974] KLR 6 [1976-80] 1 KLR 8 (Trevelyan & Hancox, JJ) and Ogembo vs. Republic [2003] 1 EA 222 (Tunoi, Lakha & Owuor, JJA). Some of the other factors to be taken into account, according to Uganda vs. Joseph Sempala Mukasa (1975) HCB 210 (Butagira, Ag J), are the nature of the property stolen, whether it was of a kind that readily passes from hand to hand, the nature of the occupation or business of the accused person, among others. See Ngugi and another vs. The Republic [1979] KLR 182 [1976-80] 1 KLR 1311 (Trevelyan & Scriven JJ).

21. Several questions then beg for answers. Whether there was sufficient evidence of the theft of the liquor. Whether there was proof that the liquor allegedly found in possession of the appellant belonged to PW1. Whether the appellant was in fact found in possession of that liquor.

22. Was there theft of the liquor? PW1 testified that he operated a bar. He did not provide proof, by way of a licence that he was in that line of business. The allegation was that he had liquor, which was stolen. The prosecution should have led evidence to demonstrate that indeed PW1 had or could possess such liquor, for he traded in it. That required production of a license. He claimed that the premises, from where he operated his business, had been broken into. The 2 police witnesses did not testify to visiting that premises, to obtain evidence of the alleged break-in, and to lend credence for the allegation of the alleged theft. Handling of stolen goods can only be established where there is evidence that there was a theft. PW1 merely alleged a theft, but no serious effort was made to prove it. There was no proof that PW1 had business premises, which could be broken into, and items, specifically, the liquor, stolen from there.

23. PW1 produced a receipt, to demonstrate that he had recently acquired the liquor in question. Unfortunately, the receipt produced did not bear his name. Therefore, the same could not prove that he purchased that liquor, for there was nothing to connect him to the receipt. That gap could have been filled by calling the maker of the receipt, the person who allegedly sold the liquor to him, and issued the said receipt. That maker was not called to the witness box, and the receipt was, as a consequence, of not much probative value. Secondly, the liquor recovered was an item of common usage. It was easily available in the market. There was nothing unique in it, which could peculiarly connect it to PW1, as proof that it belonged to him.

24. The foundation of the doctrine of possession of recently stolen goods, however, appears to be that the goods, that the accused is alleged to be in possession of, must be owned by the complainant. It was said in Sefu Ally vs. Republic [1976] LRT 215 (Mwakibete, J) and Arum vs. Republic [2006] 1 KLR 233 [2006] 2 EA 10 (Tunoi, O'Kubasu & Onyango Otieno, JJA), that the presumption, that the possessor

is either the thief or the handler, arises only when the prosecution has established ownership of the article in question, theft of the article, and its recent possession by the accused.

25. What should emerge from the above is that ownership of the items that the accused person is found in possession of should be established first, before consideration of the other issues, as to the theft of the items, possession of the items by the accused, and lack of explanation for the possession. I doubt that the prosecution presented any tangible evidence on the ownership of the items by PW1, for the reasons that I have detailed hereabove. There was no evidence that he kept a liquor store, to provide basis for his owning liquor, that could be stolen. There was no evidence that he had such liquor in store. There was no evidence that that liquor store, if there was one, had been broken into. All there is that there was a report of the alleged break-in, before the allegedly stolen liquor was found in possession of the appellant.

26. Was the element of possession proved? I doubt it. The only witness, as to the possession, was PW3, the police officer who arrested the appellant. He acted on information from unnamed individuals. He rushed to the scene, at a bar, where he allegedly found the appellant with the wares, which he was allegedly offering to sell to whoever pleased to buy them. The owner of that bar was present, yet neither he, nor any of the others present ,were called as witnesses. An independent witness should have been presented. It should have been a matter of some curiosity, that all those events happened or unfolded during the COVID-19 pandemic time, there were restrictions in place, yet there was that bar operating or open during morning hours. .

27. It should also be a matter of some curiosity, that the prosecution presented only 3 witnesses, to prove a case which had so many elements, such as a break-in, theft, ownership of property, possession of stolen goods, among others. Out of the 3 witnesses, 1 was civilian, the other 2 were police officers. Police witnesses usually rely on second-hand information. I am alive to the legal position that not a particular number of witnesses is required to prove a particular case or particular facts. However, the threshold of proof in criminal cases is higher than that in civil cases. Proof beyond reasonable doubt may require more than calling 1 civilian witness, being the complainant in the matter; and 2 police officers, 1 who arrested the accused, and the other the investigator. More witnesses would, surely, have been necessary, for the purpose of joining all the dots, in order to establish the case to the required threshold. That would be more so as the appellant and complainant appeared to be persons who were well acquainted with each other, with the complainant claiming that the appellant was a habitual thief, and the appellant saying that there was a money dispute between them.

28. The appellant faulted the trial court for dismissing his alibi defence as a mere denial. The appellant was the only defence witness. He stated that, on the material date, he met two people, who were on a motorcycle, and they accused him of not having a driving license. They demanded Kshs. 3000.00, from him, which he did not have, and he was taken to the police station, and booked, on claims that he had stolen the motorcycle and liquor. He claimed that PW1 had his money, and that was why he had framed him.

29. The said alibi defence was not corroborated by other defence witnesses, for the appellant was the sole defence witness, On the alibi defence, it was said, in Victor Mwendwa Mulinge vs. Republic [2014] eKLR (Kihara Kariuki (PCA), Musinga & Gatembu, JJA), that:

> " It is trite law that the burden of proving the falsity, if at all, of an accused's defence of alibi lies on the prosecution ...this Court held that in a proper case, a trial court may, in testing a defence of alibi and in weighing it with all the other evidence to see if the accused's guilt is established beyond all reasonable doubt, take into account the fact that he had not put forward his defence of alibi at an early stage in the case so that it can be tested by those

responsible for investigation and thereby prevent any suggestion that the defence was an afterthought."

30. Was there an alibi defence? An alibi defence is the claim by an accused person that he was not at the scene of the crime, at the material time the offence was committed, and, therefore, he could not have been party to it, for he was at another place altogether. The defence offered by the appellant, with respect to the break-in, was not in the nature of an alibi. The break-in allegedly happened in the night of 11th and 12th March 2022. His explanation was about where he was during the day on 12th March 2022, and not where he was that previous night. There could be an element of alibi, with regard to possession, for it was alleged that he had the liquor at a bar, within Port Victoria, when PW3 came, but, in his defence statement, the appellant made no reference to that bar, saying that PW3 found him at a place other than at that bar, and that wherever he was found by PW3, he did not have any liquor on him at the time. That alleged alibi was not supported by any other evidence.

31. In view of everything stated above, I am persuaded that the conviction of the appellant was not safe, and, therefore, the appeal herein is merited. I accordingly allow it, with the consequence that the conviction of the appellant, on January 16, 2024, in Busia CMCCRC No. E300 of 2022, is hereby quashed, and the sentence imposed on him, on 2nd February 2024, set aside. He shall be set free from prison custody, unless he is otherwise lawfully held. Orders accordingly.

JUDGMENT IS DELIVERED, DATED AND SIGNED IN OPEN COURT, AT BUSIA, THIS 18TH DAY OF OCTOBER 2024

W MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant.

Ms. Eva Adhiambo, Legal Researcher.

Mr. Nephton Ochieng, the appellant, in person.

Advocates

Mr. Onanda, instructed by the Director of Public Prosecutions, for the respondent.