Isaack v Republic (Criminal Appeal E004 of 2024)
[2024] KEHC 14604 (KLR) (21 November 2024) (Judgment)

Neutral citation: [2024] KEHC 14604 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT GARISSA

CRIMINAL APPEAL E004 OF 2024

JN ONYIEGO, J

NOVEMBER 21, 2024

BETWEEN

ELIAS ISAACK ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the conviction and sentence by Hon. R. Aganyo PM, in Wajir Principal Magistrate's Court Criminal Case No. E025 of 2023 delivered on 04.12.2023)

JUDGMENT

1. The appellant was charged with the offence of breaking into a building and committing a felony contrary to section 306 (a) of the Penal Code. The particulars of the offence were that on the night of 25th and 26th day of May, 2023 at Habaswein Township in Habaswein Sub County within Wajir County, he broke and entered the shop of Salat Ugas and committed therein a felony namely theft of assorted mobile phones valued at Kes. 76,000/-.
2. The appellant was tried and convicted of the alternative charge and thereafter sentenced to 5 years in prison and upon completion, to be deported back to Ethiopia.
3. The appellant being dissatisfied by the conviction and the sentence filed the instant appeal. He listed the following grounds of appeal:
    a. That the trial magistrate erred in both law and facts by convicting notwithstanding the fact that the prosecution did not prove its case.
    b. That the trial magistrate erred in law and fact by convicting and thereafter sentencing him by relying on evidence marred with gross contradictions.
    c. That the trial magistrate erred in both law and facts by shifting the burden of proof to him.

d. That the sentence meted was harsh and excessive having regard to the circumstances of the case.

4. The appeal was canvassed by way of oral submissions wherein the appellant urged that the case against him was not proved to the required standard and therefore, he ought to be released.

5. The prosecution in opposing the appeal argued that the case against the appellant was proved beyond any reasonable doubt. That the appellant was responsible for breaking into the building and thereafter, he was found being in possession of the stolen phones which he could not account for. This court was also urged that the sentence meted out by the trial court was commensurate to the offence and therefore, the appeal herein is bereft of any merit and thus ought to be dismissed.

6. This being a first appeal, the duty of the court was set out by the Court of Appeal in Okeno vs Republic [1972] EA 32 where it was held that: "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 vs Republic (1957) EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. [Also see Shantilal M. Ruwala vs R (1957) EA 570].

7. Briefly PW1, Salat Ugas testified that he is a businessman who owns a shop at Habaswein and trades in mobile phones and accessories. That on 26.05.2023, he was informed that his shop had been broken into and so he rushed to the scene. On arrival, he discovered that the back steel door was broken and all the phones stolen. He stated that the shop had 10 pieces of Nokia 2100, 8 pieces of Neo Ray phones and 5 pieces of V2160.

8. That the stolen phones were worth Kes. 76,000/- including spray perfumes. He subsequently reported the incident to Habaswein Police Station. It was his evidence that upon reaching the following day, he was called by the police who informed him to report to the Police Station to possibly see whether he could identify some smart phones found in the accused person's possession while on sale at throw away prices. Upon checking the said phones, he picked a Neo Ray phone of IMEI No. 351XXXXX69020 as listed in his Safaricom Pick list.

9. PW2, No. 238714 PC Ojwang Michael, the investigating officer stated that he was at the station when the matter was reported. Together with Cpl. Kazungu, they visited the said shop where they found that entry had been gained through the back door as the padlock was broken. He recorded statements from the complainant as he continued with his investigations. That on 27.05.2023, they received information from members of the public that there was a suspect who was selling phones at throw away prices.

10. In his possession, they found one smart phone Neon Ray black in colour. They arrested the suspect for further interrogation. Based on the report made by the complainant, they summoned him to the station. That the complainant was able to identify his Neon Ray black phone. After concluding his investigations, he preferred the charges before the court.

11. Having considered the record of appeal, grounds of appeal and submissions by both parties, issues that stand out for consideration are;

    i. Whether the prosecution proved its case to the required standard.

    ii. Whether the sentence was harsh and severe.

12. The appellant is charged with breaking into a building and committing a felony therein contrary to Section 306 of the Penal Code which provides as follows: breaking into building and committing felony

> Any person who—
>
> (a) breaks and enters a schoolhouse, shop, warehouse, store, office, counting-house, garage, pavilion, club, factory or workshop, or any building belonging to a public body, or any building or part of a building licensed for the sale of intoxicating liquor, or a building which is adjacent to a dwelling-house and occupied with it but is not part of it, or any building used as a place of worship, and commits a felony therein; or
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> (b) having entered any building, tent or vessel used as a human dwelling with intent to commit a felony therein, or having committed a felony in any such building, tent or vessel, breaks out thereof, is guilty of the felony termed housebreaking and is liable to imprisonment for seven years.

13. It is clear that under section 306(b) of the Penal Code, the offence prescribed has two elements that is; breaking and entering into a dwelling house or building and committing a felony which in this case is stealing the phones.

14. Breaking is defined in section 303 of the Penal Code as follows:

> " 303. Definition of breaking and entering
>
> (1). A person who breaks any part, whether external or internal, of a building, or opens by unlocking, pulling, pushing, lifting or any other means whatever any door, window, shutter, cellar flap or other thing intended to close or cover an opening in a building, or an opening giving passage from one part of a building to another, is deemed to break the building.
>
> (2). A person is deemed to enter a building as soon as any part of his body or any part of any instrument used by him is within the building."

15. It follows therefore that for the prosecution to prove that the appellant broke into the said shop, it ought to have adduced evidence that the person got entry into the building by breaking any part of the building or opened any part of the building so as to gain entry into the building.

16. In this case, the complainant narrated that he was informed that his shop had been broken into and upon going there, discovered that the back-steel door was broken and all the phones stolen. He stated that he reported the matter to the police and was later called to identify his phone if any from the assorted phones recovered from the appellant.

17. Critical to note is the fact that the appellant was charged with the offence of breaking into a building and committing a felony contrary to section 306 (a) of the Penal Code. Notably, the complainant's phones inter alia other properties were stolen but the only question to be answered is by whom?

18. Having perused the record clearly the prosecution failed to lead evidence on the offence of 'breaking into the shop' of the complainant. It is not lost to this court that the burden of proof rests with the prosecution to prove its case against an accused person beyond reasonable doubt. [See Stephen Nguli

Mulili vs Republic [2014] eKLR]. I say so for the reason that no witness testified of seeing the appellant break into and thereafter commit any felony which in this case is stealing from the complainant's shop save for the fact that he was found with one of the stolen phones after the alleged building breaking. It therefore follows that the alternative charge was more appropriate in such a scenario based on the doctrine of recent possession.

19. In the case of Tembere vs Republic [1990] KLR 393 the court held 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 etc...".

20. In the instant case, it was stated that the appellant was reportedly selling the said phones at a throw away price and further, he could not account for the said phones. Additionally, from his defence, he simply denied the offence by stating that nothing was recovered from him. Further, that the complainant was the one who visited the police station with the said phone and as such, he was innocent. On the other hand, the complainant testified that from the assorted phones that the appellant was found with, he recovered his Neo Ray phone of IMEI No. 35188180969020 as listed in his Safaricom Pick list and that the same was stolen from his shop.

21. The appellant does not claim ownership of the phone. He simply claims it was planted on him. However, pw2 pc Ojwang told the court that they recovered the phone from the appellant after receiving a report that there was somebody who was selling phones at throw away prices. Pw1 and pw2 had no reason to frame the appellant. I am satisfied that the trial court properly applied its mind in convicting the appellant in respect of the alternative count as the appellant did not give a proper account as to how he came into possession of the stolen phone.

22. On sentence, the general principles upon which the first appellate court acts are now well settled. It has jurisdiction to interfere with sentence imposed by the trial court if it is satisfied that in arriving at the sentence, the trial court did not take into account a relevant factor or that it took into account an irrelevant factor or that in all the circumstances of the case, the sentence is harsh and excessive.

23. However, the Court should not lose sight of the fact that in sentencing, the trial court exercises discretion and as long as the discretion is exercised judicially and not capriciously, the appellate court should be slow to interfere with that discretion [see Wanjema vs Republic [1971] EA 493].

24. Section 322(1) (2) under which the appellant was charged as an alternative count provides that:

    (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.

25. As a consequence of the above finding, the conviction by the trial court is hereby affirmed. However, considering the gravity of the offence committed and the value of what was stolen, I find the sentence of 5 years imprisonment a bit harsh. Accordingly, I am inclined to set aside the said sentence and thereof substitute the same with an imprisonment term of 3 years to run from the date of his sentence.

ROA 14 days.

DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 21ST DAY OF NOVEMBER 2024

J. N. ONYIEGO

JUDGE