Mugambi v Republic (Criminal Appeal E013 of 2024)
[2024] KEHC 17054 (KLR) (21 November 2024) (Judgment)

Neutral citation: [2024] KEHC 17054 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT GARISSA

CRIMINAL APPEAL E013 OF 2024

JN ONYIEGO, J

NOVEMBER 21, 2024

BETWEEN

DOUGLAS MUGAMBI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the conviction and sentence by Hon. Baraka Xavier Francis RM, in Wajir Principal Magistrate's Court Criminal Case No. E393 of 2023 delivered on 08.03.2024)

JUDGMENT

1. The appellant was charged with the offence of shop breaking and stealing contrary to section 306 (a) of the *Penal Code*. The particulars of the offence were that on the night of 05th and 6th December, 2023 at Wajir Township location in Wajir East Sub-County within Wajir County jointly with others not before the court broke and entered the retail shop of Abraham Kiranki Mutuma and stole therein cash Kes. 6,000/-, 3mobile phones make Tecno spark 4, Nokia TA – 1203, Itel, 36 packets of cigarettes of Rothman cigarettes, safaricom credit cards, 2 packs of coca cola sodas, 1 pack of maize flour, 1 box of powder milk and 1 packet of pasta valued at Kes. 41,500/- the property of the said Abraham Kiranki Mutuma.

2. The appellant was tried of the said offence, convicted and thereafter sentenced to 6 years in imprisonment. The court however took into account the time spent in custody during the trial.

3. The appellant being dissatisfied by both the conviction and sentence proffered the instant appeal. He therefore 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 both law and facts by shifting the burden of proof to him.

c. That the trial magistrate erred in both law and facts by failing to consider his defence.

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 in which the appellant urged that the case against him was precipitated by an existing grudge between him and the wife of the complainant. That the prosecution did not prove its case 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 of and thereafter stealing from the complainant. It was urged that the alleged stores belonging to the complainant were found with the appellant and he failed to give an account how he came across the same. 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 set out by the Court of Appeal in Okeno vs Republic [1972] EA 32 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, Mutuma Abraham testified that on 06.12.2023, he was at home when he was informed that his shop had been broken into. He thus went to the location of the shop which was opposite KMTC where he confirmed that indeed, his shop had been broken into. He called one Amos, his employee who joined him in confirming the stores that had been stolen which were as follows: 36 packets of cigarettes valued at Kes. 14,500/-, 2 crates of soda valued at Kes. 2,000/-, safaricom and airtel credit valued at Kes. 5,000/-, a phone worth Kes. 2,000/-, Big G and several other things. He proceeded to take a photo of the footsteps left behind and then visited a neighbour, a shopkeeper by the name of Gideon Koome to explain his predicament.

8. While there, the appellant showed up offering to sell Gideon Koome goods at a throw away price. He stated that he informed Gideon Koome about the theft and proceeded to demand from the appellant the source of the stores he was selling to Gideon Koome. That the appellant informed him that he took the said goods from a person who had hidden them. It was his case that the appellant took took them to the said place where the goods had allegedly been hid. Upon searching the appellant, they found a Nokia phone and 19 packets of sportsman Rothman. On cross examination, he stated that the appellant was found with his m-pesa line.

9. PW2, Amos Muteithia testified that on the material day, he received a call from PW1 informing him that his shop had been broken into and some stores stolen. That PW1 informed him that he had found a person who allegedly was involved in the offence. He reiterated thereafter, that he joined PW1 in recording a statement at the police station. He identified the appellant as the person who allegedly stole from PW1's shop.

10. PW3, 91040 PC Fredrick Wahome, the investigating officer testified that on 06.12.2023, he was at the office when PW1, PW2 and the appellant arrived at the station. The appellant was accused of breaking into a shop and thereafter stealing stores. Together with the complainant and the appellant, they went to the said shop where he confirmed that indeed the shop had been broken into. He reiterated the evidence of PW1 in regards to the stores that were stolen and added that he arrested the appellant and brought him to the station.

11. It was his evidence that upon searching, a Nokia phone was found in his pocket and further, the complainant confirmed from the mpesa messages in the said phone were his. He produced the Nokia phone and the cigarettes as Pex 1 and 2 respectively. On cross examination, he stated that the door to the shop was broken and that the appellant was found with the stolen goods. He denied the allegation that there existed a grudge between the appellant and PW1's wife and further reiterated that the appellant was not able to account for the goods that he was found with.

12. When put on his defence, the appellant in his sworn testimony stated that he eked a living by selling cigarettes. That he received cigarettes on 05.12.2023 when he took the same to Koome as they had an agreement that he would sell him cigarettes. He stated that Koome had agreed to pay him Kes. 1,000/- and that he would visit him for the rest. That at city cabanas, Koome joined him for some food and later, he went home to rest. It was his testimony that Koome thereafter declined pick his call. That the morning of the following day, he met Mr. Piny whom he asked for Kes. 300/-.

13. Upon visiting Koome for the remaining unpaid amount, the complainant arrested him alleging that he had stolen from him. He alleged that there existed a grudge between him and the complainant's wife. On cross examination, he stated that he started selling cigarettes in November in as much as he had no shop.

14. I have considered the record of appeal herein, grounds of appeal and parties submissions thereof. The only issue for determination is whether the prosecution proved its case beyond reasonable doubt.

15. The appellant is charged with the offence of shop breaking 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

    (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.

16. It is clear from the above provision that the offence prescribed has two elements, that is; breaking and entering into dwelling house or building and committing a felony to wit; stealing.

17. The above notwithstanding, this court is alive to the holding by the Court of Appeal in the case of Njoka vs Republic [2001] KLR 175 that:

> " Section 304(2) of the *Penal Code*, cap. 63, was the main section under which the appellant was charged. The section does however create two offences rather than one offence. The first offence it creates is burglary and the second offence it creates is stealing from the house. Both offences, however, are usually committed in the course of one transaction and they carry no mens rea. They are, also, usually laid as one offence in one count. The charge is then said to carry two limbs namely one for burglary and one for stealing from the house".

18. In the same breadth, the Court of Appeal in Reuben Nyakango Mose & Another vs Republic KSM CA Criminal 606 of 2010 [2013] eKLR observed that:

> "It will in any event be seen that the framing of the charge of burglary in the *Criminal Procedure Code* envisages that another offence may be committed in the course of burglary. That is why the relevant form is couched to include burglary and stealing in the same charge. The authorities we have visited and all relevant law envisage that because a thief who breaks into a dwelling house or a vessel will have had ulterior motives when he formed the intention to break into the house or vessel then what follows – this will ordinary but not necessarily be stealing – should be included in the burglary charge. There cannot therefore be duplicity when the offence of burglary and stealing are combined in the same charge".

19. Section 268 of the *Penal Code* defines "stealing"" in the following terms:

(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;

20. The above notwithstanding, it is clear that the various elements in a) to d) above are disjunctive hence satisfaction of any element combined with e) will lead to an accused person being found guilty. [See the holding in Michael Maundu Wambua vs Republic [2006] eKLR].

21. 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."

22. 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 enter the building.

23. The facts given by PW1 are that on the material day, he was sleeping when a woman by the name Justa called his wife informing her that their shop had been broken into. That the door was open and so, he went to the said shop where he confirmed that his shop had been broken into. From the said facts, it was stated that the perpetrator had broken the shop's door and gained access thus stealing the listed stores. The break into the shop and thereafter stealing of the stores was confirmed by the prosecution witnesses. As such, there was evidence of breaking in and thereafter stealing of the stores belonging to the complainant. The only question to be answered thereafter is by whom?

24. In this case, no one saw the appellant break into and thereafter steal from the complainant's shop save for the fact that he was found with the stores after the alleged breaking.

25. The trial court thus relied on the doctrine of recent possession in convicting the appellant. The principles for application of the doctrine of recent possession are well known and were set out in Arum vs R (2006) 1 KLR 233 as follows:

> " 1. The property was found on the suspect;
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> 2. The property was positively identified by the complainant;
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> 3. The property was stolen from the complainant; and
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> 4. The property was recently stolen from the complainant."

26. The principle is that if recently stolen goods are found in possession of an accused who cannot explain his possession, there is a presumption that the person is the thief or handler of the stolen goods. In Chaama Hassan Hasa vs Republic (1976) KLR 6, 10, the Court (Trevelyan & Hancox, JJ.) put the matter as follows:

> " [W]hat is generally referred to as the doctrine of recent possession, often expressed in this way: that where an accused person has been found in possession of property very recently stolen, in the absence of an explanation by him to account for his possession, a presumption arises that he was either the thief or a handler by way of receiving (though not by way of retaining). But this doctrine does not apply to all the cases. What has been laid down is that, where it is proved that property has been stolen and very soon after the stealing the accused has been found in possession of it, it is open to the tribunal of fact to find him guilty of stealing, or of handling it by way of receiving: see R v Seymour (1954) 38 Cr App Rep. 68;

27. It therefore follows that for the doctrine to stand, the evidence of recovery of the material property must be sufficient and credible. There must also be sufficient and credible evidence for positive identification of the property as belonging to the victim.

28. In the instant case, the prosecution witnesses and more so PW1 testified that the appellant was found selling some stores to one Koome and during the same time, the complainant noted that the stores that the appellant was selling to Koome were indeed his. He proceeded to state that upon searching the appellant, he found in his pocket a Nokia phone belonging to him. That he switched it on and the same brought about his messages. It therefore follows that in a case like this, the appellant was expected to give an explanation on how he came across the said stores.

29. Section 111of the *Evidence Act* stipulates that:

> Burden on accused in certain cases:
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> 1. When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him:
>
> Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecution, whether in cross-examination or otherwise, that such circumstances or facts exist:
>
> Provided further that the person accused shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either the prosecution or the defense creates a reasonable doubt as to the guilt of the accused person in respect of that offence.

30. The appellant upon being found to be in possession of the stores stolen from the complainant, the onus rested on him to account on how he came across the said stores. I have taken the liberty to peruse his defence which he alleged was not considered and I find that the same was not tenable as his evidence did not displace that of the prosecution.

31. In the same vein, the appellant alleged of an existing grudge between him and the complainant's wife but did not explain the nature of the alleged grudge. As such, it is my finding that the appellant was guilty of the breaking into the complainant's shop and thereafter stole the stores. As a consequence of the foregoing, I hereby find that the conviction was safe and as such, grounds 1,2 and 3 of the petition of appeal are found to be baseless.

32. 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.

33. 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].

34. The section under which the appellant was charged provides that:

> ...
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> SUBPARA (a)
>
> (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.

35. Taking into account the mitigation on record that his father is deceased and the mother is insane; he is a first offender; he has a girl whom he is educating and an old grandmother whom he supports and further, considering the value of the property stolen, I find the sentence a bit harsh. In the circumstances, I am inclined to set aside the sentence of 6 years and substitute the same with a sentence of two years imprisonment to start running from the date of sentence.

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

J. N. ONYIEGO

JUDGE