



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HCCRA NO. 5 OF 2019

ERICK MUSYOKI MUTUNGA.....APPELLANT

VERSUS

REPUBLICRESPONDENT

(From the original Judgment of Hon. E. Muiro (SRM) in Kilungu Senior Resident Magistrate's Court CMCRC No. 638 of 2018 issued on 3rd January, 2019).

JUDGMENT

1. The Appellant Erick Musyoki Mutunga was tried in the magistrates' court with Stephen Kioko Nthenya who appears not to have appealed. He was charged in the magistrates' court jointly with his co-accused in **count 1** with burglary contrary to section 304(2) and stealing contrary to section 279(b) of the Penal Code. The particulars of the offence were that on the night of 22nd August 2018 and 23rd August 2018 at Masaini in Sultan Hamud township within Makueni county jointly with others not before court broke and entered the dwelling house of **Raphael Kasyoki** with intent to steal therein and did steal from therein Samsung Tv 32 inch, worth Kshs.30,000/= (2) DVD make Philips worth Kshs.10,000/= cash Kshs.50,000/=, Samsung phone make J3 worth Kshs.14,000/=, two bed sheets valued at Kshs.2,000/=, all valued at Kshs.106,000/= the property of **Raphael Kasyoki**.

2. Under count 2, he was charged alone with being in possession of forged currency contrary to section 359 of the Penal Code. The particulars of the offence were that on the 31st August 2018 at Sultan Hamud police station within Makueni county without lawful authority had in his possession of 2 forged Kenya currency notes in denominations of Kshs.1,000/= knowing them to be forged.

3. The co-accused Stephen Kioko Nthenya was alone charged under count 3 with having suspected stolen property contrary to section 323 of the Penal Code, the particulars of which being that on the 2nd September 2018 at Kiunduan market in Nzau sub-county within Makueni county, having been detained by police constable Johnstone Changote had in his possession one Primary Laptop yellow in colour S/N. GOK MOEST LDD 2055342, Hass gas cylinder of 3kg blue in colour, one Woofer make Sony Digital S/No 57850 reasonably suspected to have been stolen or unlawfully obtained.

4. Both denied the charges. After a full trial, the appellant was alone convicted on count 1. He was also convicted on count 2. He was sentenced to 10 years imprisonment on the limb of burglary and 10 years imprisonment on the limb of stealing. In count 2, he was sentenced to 3 years imprisonment sentences to run concurrently. The co-accused was convicted and sentenced to 1 year imprisonment on count 3.

5. As I have said earlier in this judgment, the appellant has now come to this court on appeal alone. The grounds of appeal relied upon are as follows :-

1) That he was convicted and sentenced to 10 years for burglary and stealing while he pleaded not guilty to the charges.

2) That he was arrested when he was not found in possession of any exhibits.

3) That the lady who was found in possession of the stolen DVD (Philips) was not his wife.

4) That the fake Kshs.1,000/= notes which were exhibited by the police were not his property.

5) That the mobile phone J3 was not in his possession.

6) That the woman who's (on whom) some properties were in her possession said her husband was Muoka and that was not his name.

7) That he begs the court to consider, and let the sentence be non-custodial or let him at liberty.

6. Both the appellant and the Director of Public Prosecutions filed written submissions to the appeal, which I have perused and considered.
7. This being a first appeal, I am required to evaluate all the evidence on record afresh and come to my own independent conclusions and inferences – see **Okeno –vs- Republic (1972) E.A 32**.
8. I have evaluated the evidence on record. In order to prove their case, the Prosecution called four (4) witnesses.
9. Pw1 was Raphael Kasyoki Musau a police officer attached to Machakos police station but having a house at Sultan Hamud. It was his evidence that on the night of 22/23 August 2018 he slept in his house at Sultan Hamud with his wife and child. At 4am he woke up to proceed to Machakos when he noted that the main door was open and 32 inch Tv missing, DVD make Philips and its remote, and phone also missing. His wife’s handbag which was in the sitting room had the purse containing cash and ATM card missing. He then woke up his wife and told her to report the incident to the police later in the day and proceeded to Machakos. On 30/8/2018 the Sultan Hamud police informed him that they had arrested someone with a phone fitting the description of the lost phone which he later positively identified as his phone.
10. According to this witness, the person who was arrested with the phone led them to the house of the person who sold it to him, but because it was locked they told the caretaker that the owner should report to the police and later the house owner a woman, reported to the police next day and when police inspected the house they found a DVD which she said belonged to her friend MUOKA with whom they lived. On the TV, the woman said that it had been taken to Kiundwani to a person called STEVE. However, on searching the house of STEVE they did not find anything allegedly stolen, but found a Government laptop, a torch, woofer and cylinder which they suspected were stolen. The police thus charged Muoka and Steve.
11. Pw2 was Christine Wayua the owner of the house at Sultan Hamud who stated that she was married to Eric Musyoka the 1st accused (appellant). She stated that a phone and DVD were found in her house, and that she did not know where her husband brought the items from. She did not know the 2nd accused, but identified the appellant in court.
12. Pw3 was Samuel Muli Musyoka whose evidence was that the 1st accused (appellant) was called Muoka. That on 25/8/2018 Muoka told him that he had a phone for sale. At 2pm they went to Muoka’s house where Muoka asked his wife to give him the phone a Samsung J36 whose screen was damaged. He identified the phone in court and stated that he was offered the phone at Kshs.3,500/= but they agreed on a price of Kshs.2,000/= and that he paid the amount in the evening. He was arrested later by police at Muli’s M-pesa shop.
13. Pw4 was Pc Johnstone Kyangole who received a report on 23/8/2018 by Pw1’s wife of a breaking in their house, and that Tv, remote and Samsung phone had been stolen. He contacted the complainant who was a police officer on phone and investigations commenced.
14. On information received, they arrested Pw3 with a phone, who told them that it was sold to him by 1st accused (appellant). They then tracked down the 1st accused and found him in a shop, and though he tried to run away they arrested him. On searching him they found a brown wallet with fake currency. Though Pw3 told the police that he bought the phone from the 1st accused (appellant), on going to the house it was locked and the police later came to know the wife of the appellant and contacted her.
15. The said wife later reported to the police station and in a search conducted in the house by the police in her presence they recovered a DVD and remote control. The police prepared an inventory of the items recovered. According to him, the woman said that the items were brought there by her husband on 23/8/2018. She also said that she heard her husband talking to someone at Kiundwani. The police then phoned that person and proceeded to Kiundwani, surrounded the building where the suspect lived, and spotted the suspect because his phone was ringing.
16. That suspect tried to run away but was arrested. On searching his house the police saw a school laptop, a torch, a gas cylinder and speaker – none of which belonged to the complainant. They then charged this suspect with possession of stolen property. He was 2nd accused.
17. When put on their defences both the appellant and co-accused gave unsworn testimony. The appellant who was 1st accused stated that on 30/8/2018 he took his phone for repair when three police officers entered the shop and took him to the police station. He was searched and Kshs.600/= was found on him. According to him it was at the police station that a young man said “*he was the one*” without any clarification. He added that Pc Kitur also produced something from a drawer and said that he would be charged with its possession.
18. The co-accused who was the 2nd accused stated that on 2/9/2018, he was arrested at Makindu and locked up at Sultan Hamud police station. He was then tortured by the police at Masimba area, before being charged in court.
19. This being a first appeal, I am required to evaluate the evidence on record afresh and come to my own independent conclusions and inferences. See **Okeno –vs- Republic (1972) E.A 32**.
20. I have re-evaluated the evidence on record. The co-accused did not appeal. From the grounds of appeal, the appellant is stating that the conviction is unsafe as the Prosecution evidence is insufficient. He also says that the woman in whose possession the DVD was found, was not his wife.
21. With regard to the woman not being his wife, in my view that is an afterthought. Though that woman Pw2 Christine Wayua initially said that the items were brought to the house by her friend Muoka, she said in court that the items were brought to the house by her husband the appellant herein, and the appellant in his own unsworn evidence also referred to her as his wife.

22. Though initially Pw2 referred to her husband as Muoka, Pw3 Samuel Muli Musyoka confirmed that Muoka was the appellant's name. Thus they were in my view husband and wife. Consequently, the trial court had to make a decision in the judgment as to the admissibility of her evidence as a witness and the trial magistrate admitted that spousal evidence because the issue would turn on whether it was the appellant or herself who was the criminal, and ruled that since it was a matter between her and her husband with regard to criminality of either, the evidence fell within the exceptions to admissibility of such evidence under section 127(3)(c) the Evidence Act (Cap 80) and ruled that though she was the wife of the appellant, her evidence is admissible against the appellant.

23. The appellant cannot thus come on appeal, and deny what he said himself in his defence. Infact allowing that ground will not be to the advantage of the appellant. I find that the appellant is playing with words. I disallow that ground.

24. On the sufficiency of the evidence, the burden is always on the Prosecution in a criminal case to prove the accused person guilty beyond any reasonable doubt. See **Woolmington –vs- DPP** – an **English** case which has been consistently followed in Kenya. An accused person has no burden to prove his innocence.

25. In the present case, Pw1 the Complainant identified the DVD and mobile phone as his. Pw2 stated that the items were brought home by the appellant. Pw3 identified the appellant as the person who sold him the mobile phone. There was thus no contradiction at all in the evidence of these three prosecution witnesses. In my view, burglary and stealing was proved against the appellant on the doctrine of recent possession.

26. The 2nd count of possession of fake currency was also proved as the evidence of Pw4 the Investigating Officer was clear on this. The defence of the appellant that the said fake currency was produced by a police officer from a drawer at the police station was an afterthought as the appellant did not in cross-examination put any question to challenge how the said fake currency was recovered from him.

27. On sentence, the maximum sentence for burglary under section 304(2) is 10 years imprisonment, and for stealing under section 279 (b) is 14 years imprisonment. The appellant being a first offender and having asked for leniency, I find that the sentence imposed herein a 10 years imprisonment on each limb is harsh and excessive. I will reduce it to 6 years imprisonment on each limb. The sentence for possession of fake currency is however, not harsh and I will uphold the same.

28. Consequently, I dismiss the appeal on conviction and uphold the conviction of the trial court. With regard to sentence, I set aside the sentence imposed on the two limbs of burglary and stealing and instead order that the appellant will serve 6 years imprisonment for burglary and 6 years imprisonment for stealing. The 3 years imprisonment for count 2 is hereby upheld. The sentences will run concurrently from the date on which the appellant was sentenced by the trial court. The cumulative sentence will be 6 years imprisonment from that date.

Delivered, signed & dated this 5th day of May, 2021, in open court at Makueni.

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GEORGE DULU

JUDGE