



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO. 34 OF 2019

HARUN MOHAMED SUGOW.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the decision of Honourable A. K. Makoross, Senior Resident Magistrate, Wajir, in Senior Principal Magistrate's Court Criminal Case No. 597 of 2017)

JUDGEMENT

1. This is an appeal arising from the Judgement of Hon. A. K. Makoross, Senior Resident Magistrate Wajir, in Criminal Case No. 597 of 2017 where the appellant together with another not before court were charged as follows

COUNT I Office breaking contrary to Section 304(1) (b) and stealing contrary to Section 279(b) of the Penal Code.

The particulars of the 1st count are that between the nights of 11th to 13th December 2017 at Wajir Township Location in Wajir East Sub-County within Wajir County jointly with another not before court broke and entered Wajir Social Development Office and stole therein a trophy valued at Kshs.30,000/- and Inua Jamii ATM cards the properties of the Wajir Social Development Office.

COUNT II Handling suspected stolen properties contrary to Section 322 (1) (3) of the Penal Code.

2. The particulars of the said count were that on the 23rd day of December 2017 at Wajir Police Station, Report Office in Wajir East Sub-County within Wajir County otherwise than in the course of stealing dishonestly received twenty-seven (27) Inua Jamii ATM cards knowing or having reason to believe them to be stolen properties.

3. The accused persons pleaded not guilty to all the counts and the matter proceeded to trial. The trial court convicted the accused on both counts and convicted them to 5 years imprisonment for the 1st count and 3 years imprisonment for the 2nd count. The sentences were to run concurrently.

4. The appellant who was the 1st accused being dissatisfied with the conviction and sentence appealed to this court on grounds that:

- **Evidence was contradictory.**
- **The prosecution called witnesses from one family.**
- **The trial court failed to consider that the appellant was a first offender and an orphan.**
- **No exhibits were produced in evidence.**

5. The State opposed the appeal and the matter proceeded by way of written submissions.

6. In his written submissions the appellant mitigated, sought to have the sentences run concurrently and for the court to consider time served as sufficient and allow the rest of the sentence be served in the community. Further for the 6 months he spent in custody to be considered.

7. In its submissions the State urged that there was cogent evidence against the appellant. That the Appellant on being arrested pointed out his co-accused who was found in possession of the trophy. He is the one who indeed led PW2 and PW3 to its recovery. Further the relationship between the witnesses is immaterial. He was found in possession of 27 Inua Jamii cards. And the appeal has no merit.

8. Though in the grounds of appeal the appellant challenged both the conviction and sentence in his submissions he did not submit on conviction.

9. The prosecution case before the trial court was that the appellant together with 2 others broke and entered the offices of Wajir Social Development Office, stole a trophy worth Kshs.30,000/- and 80 Inua Jamii cards. As the appellant was arrested for another crime not subject of this court, he was found in possession of 27 of the stolen cards, 27 cards in number. Further, on interrogation the appellant admitted the offence and pointed to his co-accused and who was found in possession of the stolen trophy.

10. The appellant when put on his defence denied the offence stating that he had not been found with any house breaking weapons and that he had been framed.

11. **PW1** in evidence informed the court that he discovered the appellant in his house on the 2nd of December 2017 at around 11 p.m., he sought help and had the appellant apprehended and after the Appellant was taken to the police, the police on searching, found him with 27 Inua Jamii cards.

On her part **PW2** confirmed that on 13th July, 2017 their offices were broken into and 80 Inua Jamii cards stolen together with a trophy bearing her name. Further, that when she was summoned at the police station and informed that 27 cards had been recovered from the appellant, she spoke to the appellant who in the conversation revealed that 3 people including himself had broken into the said offices, the other was the 2nd the co-accused and one other at large.

Further the appellant herein informed **PW2** that upon stealing they divided the items amongst the three of them. The Appellant directed the police and **PW2** to his co-accused where the trophy was recovered. Notable is that at the hearing of the case the appellant chose not to cross-examine **PW2**.

On his part **PW3** stated in his evidence that 27 cards were recovered from the appellant. He further reiterated the evidence of **PW2**.

12. Evidence in court placed the appellant at the scene of crime. Further he was found with 27 Inua Jamii cards that had been stolen. He failed to explain how he came across them. He is also the one who pointed out his co-accused in whose possession the trophy was found.

13. Based on the evidence on record I find the conviction on the 1st Count safe as the prosecution proved its case. Against the first conviction the 2nd count cannot stand. It will be double jeopardy to convict him twice for the same offence.

14. Sentencing is discretionary. I do not fault the decision of the trial court in sentencing on the 1st count. However, it is quite evident that the 6 months the appellant spent in custody were not taken into account by the trial court while passing sentence.

15. Taking into account the 5 years meted out I will reduce the 6 months spent in custody and sentence the appellant to a period of 4½ years. The appeal succeeds to that extent.

DATED, DELIVERED AND SIGNED AT GARISSA THIS 8th DAY OF JULY, 2021.

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ALI-ARONI

JUDGE