



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MIGORI

CRIMINAL APPEAL NO. E10 OF 2020

KEVIN ODIRA ODONGO.....APPELLANT

RICHARD OWINO ODERA.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(Being an appeal from the judgment by Hon. P. Areri Principal Magistrate in Migori

Chief Magistrate's Court Criminal Case No. 441 of 2019 delivered on 10/11/2020).

JUDGMENT

The two appellants namely **Kevin Odira Odongo and Richard Owino Odera** (hereinafter referred to as 1st and 2nd Appellants) were jointly charged with the offence of burglary and stealing contrary to Section 304 (2) and Section 279(b) of the Penal Code.

The particulars of the charge were that between the nights of 15th and 16th July 2019, at Kamiembe village North Kanyamkago Location, in Migori County, broke and entered the dwelling house of Dr. Edward Okoth Obworo with intent to steal and stole from therein several items that were listed in the charge sheet, worth Kshs. 600,000/= the property of the said **Dr. Edward Okoth**.

In the alternative, each appellant was charged with the offence of handling stolen property contrary to Section 322(1) of the Penal Code.

The particulars of the charge were that on 22/7/2019, at Ogejo village in Nyasare Location, the 1st appellant was found with several stolen items listed in the charge sheet on 15th and 16th July 2019 while the 2nd appellant was found in possession of two items, a lamp and an empty wine bottle.

The first appellant was charged with a second count of breaking into a building and committing a felony contrary to Section 306 (a) of the Penal Code. The particulars of the charge are that on 16/2/2019, at Othoo shopping Centre, Amoya Location Nyatike Sub County, broke and entered the shop of Osman Ochieng Awino and stole a motor cycle Registration number KMER 105Q the property of James Otieno Matinde.

In the alternative, he was charged with handling stolen property contrary to Section 322(1) of the Penal Code in that on 22/7/2019 at Ogejo village, was found in possession of a motor cycle, knowing it to be stolen. The appellants were acquitted of the main charge in count 1 and each was convicted of the alternative charge to count one under Section 322(1) and (2) of the Penal Code. The 1st Appellant was also convicted on the alternative charge to Count two.

Both were discharged on Count three under Section 35 of the Penal Code. The 1st Appellant was sentenced to seven years imprisonment on each of the two alternative counts (1 and 2) and the sentences were ordered to run consecutively.

The 2nd Appellant also sentenced to seven years imprisonment on the alternative charge in Count one.

The appellants are dissatisfied with the whole judgment, and each appealed to this court. **Kevin Odira** filed Criminal Appeal No. E10 of 2020 while **Richard Owino Odera** filed Criminal Appeal No. E032 of 2021. The appeals were consolidated on 21/10/2021 and the lead file was E10 of 2020. The appeals were based on the following grounds of appeal,

i) **That the court violated their rights by failing to comply with Article 50(2) (g) and (h) of the Constitution;**

ii) **That the case was not proved to the required standard;**

iii) **That the sentence is harsh and excessive;**

The appellants therefore pray that the convictions be quashed and sentences set aside.

This being the first appeal, it is the duty of this court to revisit all the evidence tendered in the trial court, analyse it and arrive at its own conclusions. This court has however to make allowance for the fact that it neither saw nor heard the witnesses testify. This court is guided by the decision of **Okeno vs Republic (1972) E.A. 32.**

The prosecution called a total of seven witnesses in support of their case. **PW1 Edward Okoth Obworo (1st complainant)** testified that his house is in Uriri and he lives in Nairobi. On 17/7/2019, his mother **Grace Omollo (PW2)** called to inform him that security lights had gone off in his premises and PW1 asked PW2 to go and check on the house. PW2 found that the door to PW1's house had been broken and noticed that a TV, gas cooker and solar panel which were missing. PW1 went to Uriri on 19/7/2019, reported to Uriri police Station and on checking his home, found the items listed in the charge sheet were missing. He reported to the Chief who informed the media and later he was informed that some people had been arrested with some stolen property. He reported to the police and later they called him to go and see if some of the recovered goods were his. PW1 identified them and produced a receipt for the drill which was one of the recovered items. He did not know the appellants before.

PW3 James Otieno of Othoo recalled that on 4/1/2019, he bought a motor cycle registration number KMER 105Q Boxer Bajaj at Ritu Shop and on 5/1/2019, he gave it to his brother PW4 to use. On 17/2/2019, his brother called to inform him that the same had been stolen and he reported to Muhuru Police Post. He was called by police from Uriri Police Station on 2/8/2019 and informed that the motor cycle had been recovered. He produced in evidence, the log book and receipts, Insurance in respect of the motor cycle.

PW4 Hesbon Obwonyo a cousin to PW4, recalled having been given the motor cycle on 5/2/2019 and that he kept it at the house of Ochieng Owino on 16/2/2019. On going to pick it next day, found it had been stolen. He informed PW4 and reported at Mihuru Police Post. He had made an inscription on the motor cycle but found it partially erased.

PW5 CPL James Orago of DCI Migori who is a scene of crime officer, recalled that on 16/10/2019 he was requested to photograph a motor cycle KMES 501P Bajaj Boxer Blue, and the chassis engine number. He verified that the engine and chassis number had not been interfered with and tallied with Log Book for KMER 105Q.

PW6 PC Isika Munyoki on 21/7/2019 accompanied the OCS and other officers to Ajigo Area in Nyasare, Where they were shown two houses belonging to the appellants and upon opening the houses, recovered the items produced in court as exhibits. They prepared an inventory of the goods which suspects signed.

PW7, the Investigation Officer recalled the 20/7/2019 when a burglary report was made by PW1. They visited the scene and on 22/7/2019, they received a report that suspects had been arrested in Migori. He went to Migori with PW1 where PW1 identified his property. He took the appellants and the recovered items to Uriri Police Post where the appellants were charged.

After close of the prosecution case, the appellants were called upon to defend themselves, The 1st Appellant made an unsworn statement to the effect that on 20/7/2019, when going back where he sleeps, at about 11:00 p.m, he met three people who stopped him, interrogated him, and asked him to follow them but he refused. A struggle ensued and they over powered him, placed him a land rover and took him to Migori Police Station, then transferred to Uriri Police Station and charged him for an offence he does not know about.

The 2nd Appellant also made an unsworn statement to the effect that on 18/7/2019, he was from a Club going home about 10:00p.m when he met police in uniform who stopped and interrogated him, let him go but he was called by two people who told him to accompany them to the police station to assist with a matter. He was taken to Migori police station and 22/7/2019 he was taken to Uriri Police Station and later charged with an offence he did not know.

In his written submissions the first appellant merely repeated the grounds of appeal and so did the 2nd Appellant. The second appellant in his submissions tried to disassociate himself with the first appellant arguing that he was not arrested with anything.

Mr. Kimanthi, Senior Assistant Director DPP filed his submissions dated 22/11/2021 in which he submitted that the appellants were found in possession of the stolen items as per the alternative charges; that under Section 323, the appellants were required to give an explanation as to how they came by the said items which they failed to do.

Counsel further submitted that the offences were committed on 22/7/2019 in the same transaction and that the court has powers to order the sentences to run concurrently under Section 354 of the Penal Code.

I will first address the question **whether the appellants rights under Article 50(2)(g)(h) of the Constitution were violated.** Article 50(2) (g) and(h) provide as follows:-

“Every accused person has the right to a fair hearing which includes the right....

(g)to choose, and be represented by an advocate and to be informed of this right promptly.”

(h) to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly.”

These are some of the rights that guarantee an accused person's a right to a fair hearing and the same cannot be limited. The court has to comply with them. The rights should be explained to an accused person promptly so that he can decide whether or not to hire the services of counsel or if he cannot, and he wishes to have the services of counsel, he can make an application to the Legal Aid Committee to avail him one. Courts have held that an accused person should be informed of this right under Sub Articles (2) (g) promptly meaning before plea is taken or as soon as reasonably possible which at least must be before trial. I have perused the record of the trial court. The appellants were arraigned in court for plea on 25/7/2019. The court did not inform them of their rights under the said provision. The case was fixed for hearing on 28/8/2019 with a mention on 7/8/2019 but again they were not informed of the right. On 28/8/2019 when the matter came up for hearing. **Mr. Mboya Advocate** came on record for both the appellants. He prosecuted two witnesses and abandoned the matter. Having had counsel when the hearing began, I find that the appellants were aware of their rights under Article 50 (2) (g) and failure by the court to explain to them those rights did not prejudice them in anyway. That ground must fail. As regards Sub Article 2(h), the accused had counsel and therefore his right were not violated. This ground also fails.

Whether the offence was proved:

Nobody witnessed the breaking into and theft from PW1's house. PW2 discovered the theft on 17/7/2019 after she noticed lights off at the house on 15/7/2019. PW1, PW2, PW7 all confirmed to having found PW1's house was broken into. PW6 was in the team that recovered the stolen items identified as exhibits in the houses of the appellants. PW6 told the court that after they knocked on the doors, they found the appellants alone in their respective rooms following which they arrested them. The explanation that each appellant was arrested on the road for no reasons is not believable and was rightly dismissed by the trial court. PW1 specifically said that in one house, they found a techno lamp, empty wine glass, and wirelines. PW6 who did the actual recovery said that these items were found in the 2nd appellant's house while most of the items were in the 1st appellants' house. The appellants failed to give a reasonable explanation as to how they came to possess PW1's property which had been stolen in Uriri. PW1 positively identified his goods. Most of the stolen goods were found in the first appellant's house whereas in the 2nd appellant's house were about nine items. The things had been stolen between 15/7/2019 and 16/7/2019 and were recovered on 21/7/2019 about 5 to 6 days later. Since most of the stolen goods were recovered, I find that the appellants were either the thieves or knew the goods to be stolen. The appellants were properly convicted on the alternative to count 1.

The same argument applies to the second count. The motor cycle was stolen on the night of 16/2/2019 and it was recovered in the 1st appellants house on 22/7/2019. It was positively identified by PW3 who produced a Log Book, receipt and insurance cover for it. The chassis and engine numbers tallied with those in the log book. The first appellant did not give any explanation as to how he came to be in possession of the motor cycle, that did not belong to him. It had been missing for about five (5) months. The court recognizes the fact that a motor cycle is not an item one can easily dispose off. I have no doubt that the court arrived at the correct finding that the 1st appellant handled the said motor cycle knowing it to be stolen or had reasons to believe it was stolen.

I am satisfied that the offences were proved beyond reasonable doubt and the appeal on conviction on both alternative counts to Count 1 and II are hereby dismissed.

Whether sentence was excessive and harsh:

As regards the first appellant, he was sentenced to seven (7) years imprisonment on each count. Contrary to the Respondents submissions, the offences were not committed in the same transaction. PW1's house was broken into between 15th and 16th July 2019 while the PW3's motor cycle had been stolen much earlier on 17th February 2019. It is only the recovery of the items that was made on the same day. The court did not err in ordering that the sentences run consecutively as respects the first appellant.

The appellants were treated as first offenders. Upon conviction under Section 322 (2) of the Penal Code, one is liable to imprisonment for a term not exceeding fourteen (14) years. The sentence was before. However, since the appellants were said to be first offenders. In the exercise of my discretion and considering all the sentence of this case, I will set aside the sentence of seven (7) years. Instead, the appellants are sentenced to serve five (5) years imprisonment each on the alternative to Count 1. As regards the alternative to Count II, the first appellant will also serve three (3) years imprisonment. Sentences will start running from the date the appellants were sentenced on 7/5/2020.

Sentences to run consecutively as respects the 1st appellant. The appeal succeeds to that extent.

DATED, SIGNED AND DELIVERED AT MIGORI THIS 15TH DAY OF NOVEMBER 2021

R. WENDOH

JUDGE

Judgment delivered in open court and in the presence of: -

Mr. Kimanthi. State Counsel

All Appellants present in person

