



REPUBLIC OF KENYA

IN THE HIGH COURT

AT BUNGOMA

CRIMINAL APPEAL NO. 11 & 12 OF 2020

WILLIAM MASAVA ININGILO.....1ST APPELLANT

WILLIAM MASAVA LITURIAN.....2ND APPELLANT

VERSUS

REPUBLICRESPONDENT

[Arising from the conviction and sentence by Hon G.P Omondi (S.R.M) in original Bungoma CMC Criminal Case No. 847/2016 delivered on 16/1/2020]

JUDGMENT

1. The appellants were charged with the offence of stealing goods in transit contrary to Section 279(c) of the Penal Code. Particulars being: on 29/3/2016 at around 4.00 am at Lwandeti Market within Kakamega County jointly with others not before the court stole 22 bags of wheat valued at Kshs 44,000/= which were being conveyed in a train D149/LOCO No. 9609 on transit from Mombasa to Uganda, the property of Rift valley Railways.
2. In Count II they were charged was handling suspected stolen goods contrary to Section 322(1) as read with Section 322(2) of the Penal Code. The particulars were that on 29/3/2016 at around 4.00 am at Lwandeti Market within Kakamega County jointly with others not before the court, otherwise than in the course of stealing dishonestly retained 22 bags of wheat all valued at Kshs 44,000/= knowing or having reason to believe it to be stolen goods being the property of Rift Valley Railways.
3. Both appellants pleaded not guilty to the charges and the case went to full trial whereupon the prosecution called 7 witnesses in support of its case.
4. Briefly, the case against the appellants was that 2 train wagons were broken into and 22 bags of wheat stolen from there on 29th March 2016. That same night the police found the 22 bags of wheat and a number of other assorted items in the home of the appellants following a tip off by a member of the public. The locomotive driver discovered the breakage while at Webuye. He made a report at Bungoma Railways police station. The appellants, who were found in the homestead where the 22 bags were recovered, were arrested, and charged.
5. The court found that each appellant had a case to answer and put them on their defence. Each appellant opted to keep silent and say nothing in their defence.
6. Upon analysis of the evidence tendered by the prosecution, the trial magistrate subsequently convicted both appellants for the offence of stealing goods in transit and sentenced each to serve 6 years imprisonment.
7. The appellants were aggrieved by both the conviction and sentence and appealed to this court on the grounds: that they were convicted on the basis of unreliable and contradictory evidence that had no probative value; that no photographs or inventory of the cargo carried by the train or what was allegedly recovered by the police was produced; that nothing was recovered in the appellant's house and the trial magistrate shifted the burden of proof to the defence; and did not consider the evidence of the defence.
8. The appeal was canvassed by way of written submissions and the submissions filed on each side have been duly considered. This being a first appeal, the court is aware that:

It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the

advantage of hearing and seeing the witnesses.

See *Peters vs. Sunday Post [1958] E.A 424*.

9. I have therefore carefully analyzed and re-evaluated the record and find that the only issue for determination is whether the prosecution proved the elements of Section 279(c) of the Penal Code against the appellants to the required standards.

10. The appellants were charged and convicted under Section 279 of the Penal Code which provides various classes of theft. In particular Section 279(c) under which they were convicted provides as follows;

If the thing is stolen from any kind of vessel or vehicle or place of deposit used for the conveyance or custody of goods in transit from one place to another.

11. For a conviction under Section 279(c) of the Penal Code to stand therefore there should be proof that:

- a) Goods of some value were stolen;
- b) From a vessel, vehicle or place of deposit used for conveyance or custody of goods; and
- c) The goods were in transit from one place to another.

12. It is therefore the duty of the court to analyze the evidence to satisfy itself that the evidence on record supported such findings. It is not in dispute that the police who were manning a roadblock were tipped off by members of the public who had seen persons moving the suspected stolen bags of wheat to their house. Following the tip, the police went to the said house where they found and recovered the 22 bags of wheat and a number of other items suspected to have been stolen.

13. None of the recovered goods were produced in court. There were however, 2 photographs of the 22 bags of wheat which were presented during the trial together with a certificate of authentication as required under section 78 of the Evidence Act, was also produced.

14. The offence of stealing is defined by Section 268(1) of the penal code as;

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.

Under section 268(5) a thing cannot be said to be taken unless the accused person has moved the thing, or caused it to move from where it reposed.

15. Having carefully perused the record, there is no evidence who or how the appellants actually moved, or caused the movement of the bags of wheat from the train to the location where it was recovered. There was evidence available however that the missing 22 bags of wheat were found in the 2nd appellant's house on the same night that they went missing from the train. The 2nd Appellant is the father of the 1st Appellant, and their houses were in the same homestead.

16. The appellants opted not to testify in their defence. This was however a criminal trial and the burden of proof lay with the prosecution to prove the guilt of the appellants and their silence did not take away the constitutional right to be presumed innocent until, by evidence to be supplied by the prosecutor, proven guilty. An accused person can only be convicted on the strength of the prosecution's case and not on the weakness of his defence.

17. While there is no evidence of the actual act of stealing the 22 bags of wheat from the train, since the witnesses to the theft did not testify, the appellants' complicity in the robbery can be established by application of the doctrine of recent possession. The thrust of the appellants' case before this court was that there was no evidence that the Appellants broke into the train and stole the bags of wheat. The doctrine of recent possession is however properly applicable in the circumstances.

18. The doctrine of recent possession entitles the court to draw an inference of guilt where the accused is found in possession of recently stolen property in unexplained circumstances. The Court of Appeal summarised the essential elements of the doctrine of recent possession in **Eric Otieno Arum v Republic KSM CA Criminal Appeal No. 85 of 2005 [2006] eKLR**, where the court held as follows:

In our view, before a court of law can rely on the doctrine of recent possession as a basis of conviction in a criminal case, the possession must be positively proved. In other words, there must be positive proof, first; that the property was found with the suspect; secondly, that the property is positively the property of the complainant; thirdly, that the property was stolen from the complainant, and lastly; that the property was recently stolen from the complainant. The proof as to time, as has been stated over and over again, will depend on the easiness with which the stolen property can move from one person to the other.

19. This court finds that the elements required to apply the doctrine of recent possession have been met in these circumstances given the fact that it was positively proven that the 22 bags of wheat were found within the appellants' home. That the 22 bags of wheat were proved to belong to the complainant Rift Valley Railways is also not in doubt. Lastly, the 22 stolen bags were found in the possession of the appellants on the same night, or shortly after they were reported stolen. As was held in the case of **Kelvin Nyongesa & 2 others v Republic [201] eKLR**:

Once the primary facts are established, the accused bears the evidential burden to provide a reasonable explanation for the possession. This burden is evidential only and does not relieve the prosecution from proving its case to the required standard.

20. The prosecution having proved that the goods of some value were stolen from wagons while in transit, it now lay with the Appellants to give a probable explanation as to how they came to be in possession of the stolen goods. As held in the Court of Appeal case of **Paul Mwita Robi v Republic KSM Criminal Appeal No. 200 of 2008**;

Once an accused person is found in possession of a recently stolen property, facts of how he came into possession of the recently stolen property is (sic) especially within the knowledge of the accused and pursuant to the provisions of section 111 of the Evidence Act Chapter 80, the accused has to discharge that burden.

21. The Appellants chose to keep silent and say nothing when put on their defence. They gave no reasonable explanation to why they came to be in possession of the stolen goods.

22. The trial magistrate did in fact, find that the stolen goods were found in the possession of the appellants. After carefully reviewing the evidence on record, this court arrives at this conclusion too.

23. I find that the evidence points irresistibly to the guilt of both Appellants. I therefore find that the trial court's conviction to be lawful and is upheld by this court.

It is so ordered.

DATED, SIGNED AND DELIVERED IN VIRTUAL COURT THIS 10TH DAY OF NOVEMBER 2021.

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L.A. ACHODE

HIGH COURT JUDGE

In the presence ofAppellant in person

In the presence of.....State Counsel