REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL NO. 132 OF 2017

(consolidated with HCCRA Nos. 133 and 134 of 2017)

(From Original Conviction and Sentence in Kakamega Chief Magistrate's Court Criminal Case No. 2419 of 2017 (Hon. E Malesi, SRM) of 19th October 2017)

BRIAN MOMANYI.....1ST APPELLANT

ELISHA KHAISA MULEMA.....2ND APPELLANT

ELIJAH MAIGWA.....3RD APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

JUDGMENT

1. The appellants were convicted by Hon. E Malesi, Senior Resident Magistrate, of burglary and stealing contrary to section 304(1) (2) of the Penal Code, Cap 63, Laws of Kenya, and were accordingly sentenced to serve two years imprisonment for burglary and four years for stealing. The particulars of the charges against them, and others, were that on the night of 13th August 2017 at Matende Estate, Municipality Division, Kakamega County, they broke and entered the dwelling house of Syphrose Kasachoon with intent to steal and stole therefrom one LG fridge, LG TV 24 inch, 13 kilogrammes Total gas cylinder, gas cooker, Ramton toaster, extension cable, decoder, all valued at Kshs. 95, 100.00.

2. They also faced counts of handling stolen goods, contrary to section 322(1) (2) of the Penal Code. It was alleged that they, jointly and severally, within Kakamega town, otherwise than in the course of stealing, dishonestly retained a LG fridge serial number CM 53806NL031021NEand an LG television 24 inch knowing or having reason to believe them to be stolen goods.

3. At the trial court four witnesses testified against the appellant. PW1 testified that when she got home from work she found her house had been broken into and items stolen. She made a report to the police, investigations were done, and a number of person were arrested, including the appellants, and some of the items were recovered. The appellants were found with the television set which was hidden under a bed. Two of the witnesses were her colleagues who witnessed the arrests and recoveries. An investigating officer also testified on the investigations, arrests and recoveries.

4. The appellants were aggrieved by their convictions and sentence and lodged the instant appeal. In his petition of appeal they alleged that the trial court did not rely on photographic evidence on the break in, ownership of the items alleged to have been stolen was not established, the alleged recoveries were not supported by an inventory, critical witnesses were not called to testify, burden of proof was shifted to them, the convictions were against the weight of the evidence, the trial court believed the probation report which was influenced and biased, their defence were rejected, and the trial court failed to meet the requirements of Article 50 of the Constitution. .

5. The appeal was argued on 17th October 2019. The case for the 1st appellant was articulated in his written submissions filed on his behalf by Mr. Ombaye. The 2nd and 3rd appellants, who were unrepresented, made oral submissions. The 1st appellant's written submissions dwelt on violation of the constitutional provisions in Articles 49 and 50 of the Constitution. The 2nd appellant raised issues relating to his being kept in custody for a long time before he was presented in court, not being given a copy of the investigation diary, inadequate evidence, no evidence being led on the *tuk tuk*, the owner of the MPesa shop not being called as a witness, no evidence being presented on the ownership of the goods, being harassed while in custody by the complainant who was also his custodian, all the prosecution witnesses being colleagues of the complainant, the trial process taking too short, his mitigation not being taken into account, and the probation report being influenced by the complainant. On his part, the 3rd appellant submitted about there being no inventory of the items recovered, the complainant not producing receipts as evidence of ownership of the items allegedly stolen and recovered, no photographic evidence of the scene of crime, the fact that he did not sign any document showing that he was found in possession of recovered items, and the investigating officer not visiting

the scene of crime. He urged the court to reduce his sentence. The respondent, through Ms. Omondi, relied on the record of the court.

6. Being a first appellate court, I have re-evaluated all the evidence on record. I have drawn my own conclusions, whilst bearing in mind the fact that I did not have the benefit of observing the witnesses as they testified. The decision of the Court of Appeal in the case of ***Okeno vs. Republic*** **(1972) EA 32** has consistently been cited on this issue. In its pertinent part, it is stated that: -

> *"An appellant is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. 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 findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrates' findings can 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."*

7. The three appellants had filed separate appeals and listed diverse grounds of appeal. I shall not advert to the issues raised in the said petitions of appeal, but shall concentrate on the grounds argued in the written and oral submissions.

8. I will start with the 1st appellant's written submissions. His first ground is that his rights as an arrested person, as enshrined in Article 40(1) (f) of the Constitution, were violated. That ground was also argued by the 2nd appellant. They argued that they were arrested on 14th August 2017 but were not taken to court until 16th August 2017. They were, therefore, held in pre-arraignment custody for a period in excess of the twenty-four hours prescribed under Article 49(1) (f) of the Constitution.

9. 14th August 2017 was Monday, while 16th August 2017 was Wednesday. The law requires that a suspect be presented in court within the shortest time possible, and at any rate within twenty-four hours. It would appear that the appellants were not produced or presented in court within the period envisaged by the Constitution. There could always be explanations or good reasons for delays in presenting suspects in court. It is for this reason that the courts have previously stated that that issue ought to be raised before the trial court so as to obtain explanations from the prosecution. Raising it on appeal would be of no consequence for a conviction cannot possibly be overturned or a trial vitiated on grounds that the pre-arraignment detention exceeded the period allowed in law. The real remedy or redress lies in civil law and process. The appellants should, if they are so minded, seek compensation in damages at the civil court for false imprisonment or unlawful detention.

10. The 1st appellant further argues that his constitutional rights, as articulated in article 50(2) (g) of the Constitution, had been violated. This relates to the right to choose and be represented by an advocate of one's choice and to be informed of that right. There are two aspects to that right. The first is the right to be informed by the trial court that one has a right to be represented in the proceedings by an advocate of his own choosing. The second aspect is that the person has the right to choose that advocate. He has the liberty to choose the advocate, and once he has picked an advocate of his own choose, the court cannot prevent that advocate from appearing for him. There are of course restrictions with respect to the advocate being qualified to practice in terms of holding a current practicing certificate.

11. With respect to this right, the appellant's case is not that his right to legal representation had been curtailed, in terms of being prevented from choosing an advocate to represent him or his advocate of choice being denied a right of audience, but rather that the trial court failed to inform him of the right to engage counsel of his own choice. I have gone through the record of the trial court, and I agree with the 1st appellant that the trial court did not inform them of that right. The record is silent on the matter and, therefore, I presume that the issue was not adverted to by the trial court. It amounted to a violation of that aspect of Article 50(2) (g) of the Constitution. Does the omission to inform accused person of the right to legal presentation vitiate the trial? I do not think so, unless it can be demonstrated that the failure to inform them and their failure to instruct counsel as a result highly prejudiced them. The appellant merely raised the issue, he made no effort to demonstrate that he suffered any prejudice thereby. I have gone through the record and I do note that the appellant did in fact cross-examine the witnesses presented by the state. I believe that they suffered no prejudice and none has been demonstrated.

12. Related to that is that the appellants argue that Article 50(2) (h) was also contravened by not causing the appellants to be availed advocates to defend them at state expense. They submit that the charges they faced were serious and warranted assistance of an advocate. Again, the record is silent as to whether the trial court addressed this issue. I presume that it was not addressed. Legislation has been passed to facilitate provision of advocates at state expense in obedience to Article 50(2) (h) of the Constitution. However, that law is yet to be fully operationalized. There are still some logistical bottlenecks. Currently, only very serious offence such a murder merit such counsel being availed. Burglary and stealing are relatively minor, and do not merit provision of advocates at state expense as of now. In any event, the appellants have not demonstrated that the failure to avail advocates at state expense greatly prejudiced them.

13. The other ground relates to the appellants being linked to the commission of the offence as there was no eyewitness. From the record it is clear that the state case is founded on the doctrine of recent possession of recently stolen goods. The trial court did not specifically mention the doctrine, but it is clear that that is the foundation. There were no eyewitnesses, the complainant came home to find her house burgled and goods stolen. She saw no one do it and no other person came forward to say they witnessed it. The appellants were only arrested because they were found to be in possession of some of the items. Two issues arise from that. Were they found in possession of those items and did the complainant establish that the items recovered belonged to her?

14. From the alternative counts of handling stolen goods, the items that were recovered were two, the fridge and the television set. The 1st and 2nd appellants were charged with respect to handling the fridge, while the 3rd appellant was accused of handling the television set.

15. Regarding the fridge, the witness who testified on its recovery was PW4 a police officer. He stated that he received information from a *boda boda* rider that he had seen persons carrying a fridge from a maize plantation, they put it on a *tuk tuk* and took it to town. He allegedly followed them to town and saw where they placed it, behind a certain club. The informer took him to the place, where they found the 1st and 3rd appellants. The officer asked the 1st appellant about it, and he said it was his. The 1st appellant attempted to escape but PW4 caught him,

however, the 3rd appellant managed to escape. Evidently, the fridge was not found at the residence of either of the appellants, but at a public place outside an MPesa shop. It would appear that the two appellants happened to be at the scene, and the witness said that he questioned one of them about it. It was not disclosed by the witness whether the informer identified the two as the persons that he saw move the fridge from the maize plantation. Even though he stated that the informer showed him the place where the fridge was taken and the people who carried it, after that they went to the MPesa shop and found the fridge and the two appellants. The testimony is equivocal as to whether the persons that he was shown as having been seen carrying the fridge were the same as the two appellants that he said he found near the fridge. This is what he said:

> *"He showed us the place where the fridge was taken and also showed us the people who had carried the said fridge . . . the place is behind signature club opposite capital power. Outside an MPesa shop was a fridge outside. We went upto the place and outside was Accused 1 and Accused 3. I asked Accused 1 about the fridge and he answered that the fridge was his."*

16. Regarding the television, PW4 said it was the 2nd appellant who led him to the house of the 3rd appellant who they found washing clothes. When asked about the television, he said he did not know anything about a television set. Whereupon the police conducted a search within the house, and recovered the television set under a bed. The 3rd appellant said that the set belonged to the 2nd appellant. The recovery of the television set was done in the presence of PW1 and PW2, and their evidence on the events leading up to the recovery largely mirror that of PW4.

17. I have carefully read and reread the testimonies of the prosecution witnesses. It is clear that it was the arrest of the 2nd appellant that led to the arrest of all the other appellants. He was apparently told on by an informer and was found near one of the stolen items, where he claimed that it was his. He led the police to recover the television set which was at the house of the 3rd appellant, who claimed it belonged to the 2nd appellant. The 1st appellant was with the 2nd appellant near the fridge but took off after PW4 gave chase to the 2nd appellant. The 2nd appellant is the common denominator. The recovery of the television set was witnessed by PW1 and PW2. They both attested that it was the 2nd appellant who took them to the house of the 3rd appellant. Quite clearly, therefore, the 2nd appellant handled the fridge, while the 3rd appellant handled the television set, and the 2nd appellant was in the mix as the 3rd appellant said that it belonged to him. The 2nd appellant also led PW4 to other places where various other items were recovered. There does not appear to be much against the 1st appellant save that he was found together with the 2nd appellant near the fridge and that he ran away after PW4 started to chase after the 2nd appellant. He did not claim to be the owner of the fridge, and the only comment attributed to him by PW4 was that he was a broker. It cannot, therefore, be said that he had possession or custody of the fridge or even that he handled it. The material on record clearly connects the 2nd and 3rd appellants to the items that were recovered, and which PW1 identified as stolen from her house after it was burgled. It is true and correct that the witnesses presented did not witness the break in and theft, but there is evidence that the items stolen after the break in were found in the possession the 2nd and 3rd appellants. It is doubtful whether the 1st appellant played any role in the matter based on the evidence on record save for being found with the 2nd appellant.

18. Upon being found in possession of the items in question, the burden shifted to the two appellants to render an account of how they came to be in possession of property that had been recently stolen. None of them explained how they came to be in possession of the items. All they did was to deny the allegations.

19. Within that ground the 1st appellant argues that PW1 had not established that anything was stolen from her to the extent that she was unable to produce any receipts. She had testified that these were old items that she had had for a long time. In the absence of receipts ownership of household goods can be proved by identifying marks or other features. It was argued that no such marks or features were pointed out. All what PW1 said was that she confirmed the items to be hers.

20. For most household goods it is not practical that the owner would keep the receipts for long. That would be especially the case with regard to a public servant like PW1, who would be moved from one station to another. Keeping a record of receipts could be a difficult task in the circumstances. I am prepared to presume that a person who has held on to items or goods for a considerable period would be able to identify them without any difficulty even without having to pick out any peculiar features on them. In this case, it has not been demonstrated that PW1 was challenged on the ownership of the said goods and that she was spectacularly unable to show that they belonged to her.

21. The last ground argued by the 1st appellant is that the sentences on burglary and stealing should have been made to run concurrently since they were committed in the same transaction. His case is that it was wrong for the trial court to order that they should serve consecutively. I agree the trial court should have ordered that the sentences run concurrently.

> *"I have noted the Probation Officer's Report in respect of the accused persons. All the accused shall serve two years imprisonment each for the burglary charge and four years imprisonment each for the stealing charge. The sentences shall run consecutively."*

22. I will turn to the submissions by the 2nd appellant. I shall only address those issues that I have not addressed in regard to the submissions by the 1st appellant. He has raised the issue of the investigation diary, saying the same would have revealed the contradictions on when he was arrested. I have addressed that issue above. The issue that he was taken to court outside the twenty-four hour period allowed in law is matter that should have been raised before the trial court for explanations. It is now water under the bridge. It can only be relevant to a civil court in an action for damages for false imprisonment.

23. He addressed me on the failure to call the driver of the *tuk tuk* who allegedly transported the fridge and the owner of the MPesa where the fridge was. With regard to these claims the position is that the prosecution is not bound to call every single person mentioned. The legal position is that the state should call such number of witnesses as are sufficient to establish their case, and there is no requirement that the state calls any particular number of witnesses.

24. He also submitted that PW1 was a prisons officer. She was stationed at the Kakamega GK Prison, where they were being held, and he

alleged that she harassed him, he complained to her supervisors but nothing was done. The appeal before me is about the proceedings that were conducted before the trial court and the outcome of that trial. I can only address my mind to what happened before the trial court. What might have happened at the remand home is outside the scope of the appeal. Those are matters that the appellant ought to have raised administratively with the administrators of the remand home, and in the event the administrators declined to act then it was open to him to file a suit for judicial review or escalate the matter with the ombudsman. As it is the issue is not relevant to the appeal, and is of no consequence.

25. He further argued that the other prosecution witnesses were the colleagues of PW1 and therefore they could not contradict him. An appellate court only acts on the evidence as placed on record by the witnesses presented at the trial court. The court cannot dismiss evidence merely because the witnesses were coworkers or friends. What is tested is not the relationship between the witnesses but the credibility of the evidence they tender. The evidence of PW1 and PW2 is on all fours with that of PW4 in many respects. The same was not shaken during cross-examination.

26. Then there is the incredible argument that the trial took a very short time, that is from the date the appellants were charged and the time when they were sentenced. He submitted that that took 78 days. There can be no merit in this argument. Under the Constitution, players in the criminal justice system are enjoined to afford an accused person a speedy trial. There is no stipulated time for completion of a trial. The appellant should be thanking the court and the prosecution for complying with the Constitution by affording him a speedy trial. The ideal should be that these cases be disposed of within the shortest time possible. Indeed, hearings should be conducted on a day to day basis. The challenge tends to be shortage of judicial officers and prosecutors to facilitate day to day hearings, and unavailability of witnesses, particularly when they have to come from far-flung areas. In this case all the witnesses were within Kakamega town and, therefore, there were no delays.

27. On the sentencing process, he submitted that his mitigation was not considered and that the probation officer's report was influenced and biased. I note that the trial court in sentencing the appellants did not mention their respective mitigation, but that alone does not mean that the mitigation was ignored. In any event the appellants did not express remorse and ask for leniency. There is no evidence that the probation report was influenced or biased. In any event, it is not binding on the court. Sentencing is guided by the totality of the evidence and the circumstances of the matter, and of the victim of the crime and the antecedents of accused persons.

28. Let me consider the aspects of the 3rd appellant's submissions that do not repeat or overlap with those made by the other appellants.

29. He raised the issue of the recovery inventory, saying that none was produced. It is not a legal requirement that where stolen items are recovered from a suspect an inventory be prepared and submitted in evidence at the trial. The courts have repeatedly said that the regulations that require investigators to prepare an inventory of recovered items is administrative and not legal. It is meant to guide detectives and investigators. It is a tool for gathering evidence. It is not part of evidence and, therefore, there is no obligation for inventories to be submitted as part of the evidence. The failure to submit an inventory is not fatal to the prosecution's case.

30. He argued that no photographs were taken of the scene of crime. There is no legal requirements that the same be taken. It may be prudent in certain cases for photographic evidence to be taken, but it is not a mandatory requirement. The most critical evidence is the oral statement of the witness, which may be supplemented by other information, either through documents, pictures or articles. The failure to rely on pictorial evidence was, therefore, not of any consequence.

31. Finally he submits that nothing was recovered from him. PW4 testified that the television set was recovered from his house under a bed. That testimony was corroborated by PW1 and PW2. The 3rd appellant did not in any way shake those testimonies during cross-exanimation, nor displace them when he gave his sworn statement. The trial court was, as I am, persuaded that the three witnesses told the truth, and made the finding that he was indeed found in possession of the television set.

32. In the end, I find that the appeal herein is not merited with respect to the 2nd and 3rd appellants save on sentence. I shall accordingly uphold their conviction, and uphold the sentences imposed on them save to order that the said sentences shall run concurrently. I am of the opinion that the appeal against the conviction of the 1st appellant has merit, and I hereby quash the said conviction, and set aside the sentences imposed against him. He shall be set free from prison custody unless he is otherwise lawfully held.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 17th DAY OF January, 2020

W. MUSYOKA

JUDGE