



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KITUI
CRIMINAL APPEAL NO. 61 OF 2018

MICHAEL MATUKU.....APPELLANT

-VERSUS-

REPUBLIC RESPONDENT

(Being an appeal from the original conviction and sentence in Mutumo Senior Principal Magistrate's Court Criminal Case No. 122 of 2017 by Hon. S. K. Ngii (SRM) – judgement delivered on 24th May 2018)

JUDGEMENT

1. The appellant Michael Matuku was charged with four counts of breaking into a building and committing a felony contrary to section 306(a) of the Penal Code.
2. The particulars of Count 1, 2, 3 and 3 were that on the night of 12th March 2017 at 2.00 am at Kisuna market in Simisi Location of Ikutha Sub-County, jointly with another not before court broke and entered four shops each belonging to Wanzia Mutinda, Mutinda Mukala, Celestine Kavithe Makange, and Jossylater Mutia respectively and stole from each of the premises some cash money and goods which had been described in details in the charge sheet.
3. Each of the counts save count 3 had an alternative charge of handling stolen goods contrary to section 322(1) of the Penal Code particulars whereof were contained in the charge sheet.
4. The background of the prosecution's case according to the evidence on record is that on the night of 12th March 2017 at about 2.00 am at Kisuna marked one Mulu Mwanzia (PW5) who resides within the market heard bangs within the market as if doors to the shops were being broken.
5. He woke up and spotted two people attempting to open a particular door. He ran to the neighborhoods and woke up some people who with whom he went back to the shopping Centre.
6. On arrival someone emerged from a shop owned by the area chief and ran away. They gave a chase. As they ran towards the same direction as the first suspect, another man emerged from Dodoma bar and attempted to run away towards the same direction as the first suspect.
7. Mulu and others managed to arrest him but the first suspect disappeared. The man who was arrested was the appellant in this appeal.
8. Few meters from where they had arrested the appellant a jerrican containing paraffin was recovered. The appellant was then taken back to Dodoma bar. Soon thereafter, the area chief and his wife among

others arrived.

9. It was later discovered that two other shops besides the chief's shop and Dodoma bar had been broken into and various items stolen therefrom some of which were recovered from the appellant. The appellant had in his possession a bag which contained an assortment metallic items which were believed to be master keys, pliers and a T-shaped metallic rod.

10. There was also some amount of money which was found in his wallet. It was under those circumstances that the appellant was on 20/3/2017 charged with the offences aforesaid which he denied and matter went into full trial.

11. The appellant was found guilty after hearing of case and was convicted and sentenced to serve 3 years' imprisonment for each of the 4 counts to run concurrently.

12. Being aggrieved by the said decision the appellant has lodged appeal. He basically raised the grounds:

i. Whether the charge was defective?

ii. Whether the trial was fair?

iii. Whether prosecution case was proved beyond reasonable doubt?

13. Parties directed to file submissions to canvass the appeal but only the appellant filed the same.

APPELLANT'S SUBMISSIONS

14. The appellant submits that the failure by the trial magistrate to indicate the language used by various witnesses and the failure by the prosecution to abide by the requirements of the law was not to be disregarded. He relied on the case of *Antony Njeru Kathiari & Anor vs Republic [2007] eKLR*, where the Court of Appeal at Nyeri held that:

“The failure by the trial magistrate to keep record of atleast the name of an interpreter and the nature of the interpretation was a serious defect in the trial and must render the conviction of the appellants unsafe and unsustainable.”

15. The said yellow jerrican containing paraffin wasn't recovered in his possession as the evidence on the trial record shows. Appellant relied in the case of *Mwangi vs Republic [1974] EA 105* where it was held that:

“when an exhibit is not found in possession of the accused, then he is not liable for it.”

16. The trial magistrate erred in holding that the act of a doctrine of recent possession in the matter obtained yet the evidence pertaining to the recovery was not clear. He cited the case of *Searle vs Rep [1971] CA 593* where it was held that, ***“a mere allegation by prosecution is not enough to constitute possession.”***

17. Appellant submits that trial magistrate shifted the onus of proof to the defence whereas same lies on the prosecution.

18. The appellant also contended that the sentence was manifestly harsh and cruel since the court ordered same to run consecutively.

EVIDENCE ADDUCED:

19. PW1 DORCAS WANZIA MUTINDA who is the complainant in Count 1, on arriving at the scene on

the same night shortly after hearing screams thereat, she found the appellant sitting on the ground surrounded by many people. He was wearing a purple shirt, brown trouser and next to him there was a brown jacket which she later learned it was his.

20. There was also a jerrican containing paraffin which she had left in her shop. The jerrican had her name; Wanzia Mutinda written on it. She went to her shop and established that it had been broken into and a sum of Kshs.600/- being sales proceeds from the previous day was missing. Only Kshs.17/- was left.

21. She had kept the money in a can. She produced in evidence the said jerrican and a sales record booklet. When the police came they searched the jacket aforesaid and recovered therefrom some padlocks and a Nokia phone belonging to Mutinda (PW2).

22. In cross examination Dorcas denied that she was the one who gave out the jerrican containing paraffin for him to be burnt.

23. PW2 MUTINDA MUKALA the complainant in Count 2 told the trial court that she runs a shop known as East General Stores at Kisuna Shopping Centre. On 11/3/2017 he securely locked her shop and left for home. On 12/3/2017, she went to the shop in the morning and found the padlock with which she had locked the door missing.

24. On checking inside she found a sum of Kshs.16,950/- missing. The money had according to her being given to her by her husband to buy a cow. The money was in a green purse which she had hidden in a box. Two phones, a Nokia and a Techno were also stolen from the shop.

25. The Techno phone was dominantly greyish in colour and had initials "MM" written at the back. Upon this discovery she went to the chief's office who referred her to Ikutha. At Ikutha Police Station she found her Nokia phone (Pexh 5) which had been stolen from her shop.

26. PW3 CELESTINE KAVITHE MAKANE who is the complainant in Count 3 testified to the effect that she is a barmaid at Dodoma bar situate at Kisuna market. On 11/3/2017 she locked the door to the bar with a solex padlock and left for home which is close to the Shopping Centre. Later in the night she heard screams in the market.

27. She woke up and in the company of other family members they proceeded to the market. At the market she found the area chief and others. The chief advised her to go and have check on her bar. She went to the bar and found that the padlock with which she had locked the door was missing. The latch on the door to the counter had also been pulled off.

28. From the counter an adapter and 2G memory card were missing. Outside the bar there was a suspect who had been arrested by members of the public and some items which had been recovered from him. Among those items, she identified the padlock (Pexh 10) with which she had locked the door to the counter.

29. Another lady by the name Jossylater (PW4) whose shop had also been broken into, identified a padlock which had been removed from the door to her shop and which had also been recovered from the suspect. The suspect was according to Celestine, wearing a brown trouser and a purple shirt.

30. On the ground next to him there was also a brown jacket. There were also a bunch of keys, metal plates, pliers and a metal rod that were recovered from the suspect.

31. In cross examination Celestine denied that the items aforementioned were planted on the appellant.

32. PW4 JOSSYLATER MUTIA the complainant in Count 4 also went to the subject Shopping Centre on hearing screams thereat and found the appellant having been arrested by members of the public among them; the area chief. When the police showed up and searched a jacket belonging to the appellant, they

recovered the padlock which had been removed from her door. She identified the padlock in court and was later produced as Pexh 12.

33. In cross examination Jossylater insisted that the padlock that was recovered from the appellant was hers and went on further to state that she had its keys in court. The court permitted her to try the key on it and indeed the key was able to unlock the padlock. She also denied that she and others had framed the appellant.

34. PW5 MULU MWANZIA an eye witness testified to the detection of the incident, mobilization of members of the public, and the arrest of the appellant and the escape of his accomplice.

35. In cross examination he added that it is the accomplice to the appellant who had attempted to run away with the jerrican of paraffin which had been stolen from the first complainant's shop. He also maintained that the appellant had the bag which was produced in evidence and its contents. He further reiterated that the jacket from which some items were recovered belonged to the appellant and not his accomplice.

36. PW6 FRANCIS MUTINDA SUA, Chief Simisi Location told the trial court that when he arrived at the scene he found the appellant having been arrested by Mulu and others. When he asked him for his name he said he is known as Michael Matuku and that he was on his way from Kisuu to Kitui. He claimed that he had been dropped at Kisuna by a motorcyclist because he had run out of fare.

37. Contrary to this explanation the chief was told by Mulu that they caught the appellant and another stealing from the shops. The chief further testified that the appellant had in his possession among other items a padlock which had been removed from Jossylater's shop.

38. The chief also told the trial court that the accused later owned up to the commission of the offences and he led them to a place where he and his accomplice had left their motorcycle but the same had since been moved away. According to the chief there were visible tyre marks on the ground.

39. In cross examination, Francis denied suggestions by the appellant that the paraffin that was produced in evidence had been given out after his arrest with a view to burn him. The chief further added that he indeed guarded the appellant against being lynched by members of the public.

40. In his defence the appellant told the trial court that on the material day he left Mwala market at 2pm to consult a witchdoctor at Kisuna market. He boarded a lorry which dropped him near Kanziku. From there he walked on foot for one and half hours to Kisuna market. He walked a bit past Kisuna market and came across two men to whom he introduced himself at their request.

41. The two men nevertheless arrested him on suspicion that he had been involved in the many incidents of shop breakings in the area. They called the chief who in turn called police officers to the scene. Among the police officers who visited the scene was PC Njue.

42. The appellant claims in essence that PC Njue abhors a personal grudge against him because they had earlier met at Mbeke club and argued over a certain lady whom the appellant alleges was known to him as PC Njue's girlfriend.

43. The appellant is thus of the view that PC Njue with help from the area chief pressed false charges against him in order to settle personal scores. The appellant further informed the court that the paraffin which the witnesses spoke about was meant to burn him.

44. In cross examination the appellant added that he was arrested at 2.30am by youths who claimed to be members of community policing.

ISSUES, ANALYSIS AND DETERMINATION

45. After going through the evidence on record and filed submissions, I find the issues are; **whether the trial court language was indicated and whether same renders proceedings a nullity? If above in negative, was prosecution case proved beyond reasonable doubt? Was sentence excessive?**

46. On language of court, the court notes that the appellant participated in trial via cross-examination of witnesses and defence testimony thus implying that he understood the language thus was not prejudiced and thus court rejects that ground.

47. On the ground of prove of the offences charged, evidence was called to establish the same as follows. In **Count 1** Dorcas Wanzia Mutinda positively identified the jerrican containing paraffin as hers. It had her first two names written on it. According to Mulu eye witness this jerrican was dropped by another suspect who escaped from the scene.

48. The trial court considered the facts and circumstances of the case and was convinced that the subject incident did not involve one person. Indeed, there was uncontroverted evidence by the prosecution witnesses in particular PC Njue and Francis Mutinda that at one point in time the appellant disclosed that he was in the company of another person with whom they had left a motorcycle at a particular place and even volunteered to take them to the place.

49. Considering further that when the appellant emerged from Dodoma bar he attempted to run towards the same direction as the other suspect who had escaped as testified by Mulu, the trial court was satisfied that the appellant and another person were acting together and it does not matter in law that it is not the appellant who was in actual possession of the paraffin. They were both accomplices to each other to the commission of the offence.

50. Further it was noted that the appellant claimed that the paraffin was brought to the scene after his arrest so that he could be burnt but this explanation did not hold water for various reasons. Dorcas from whose shop the paraffin was stolen and his husband; Francis Mutinda went to the Shopping Centre after the appellant had been arrested and the paraffin recovered.

51. In deed the two witnesses and others denied vehemently that the paraffin was meant to burn the appellant. With the foregoing the trial court was satisfied that the appellant was found in possession of a jerrican containing paraffin which had been stolen from the shop of Dorcas Wanzia Mutinda.

52. In **Count 2**, Mutinda Mukala told the trial court that a Nokia phone (Pexh 5) bearing initials "MM" at the back and which had been stolen from her shop was found with the appellant. This evidence is corroborated by Dorcas and the investigating officer and it is proof beyond reasonable doubt that the appellant had in his possession the mobile phone.

53. In **Count 3**, the evidence by Mulu that they arrested the appellant soon after he had suddenly emerged from Dodoma bar as they ran after the first suspect, coupled with the evidence by the complainant in that count one Celestine that she found the padlocks to the main door and the door to the counter missing and the subsequent recovery of one of the padlocks; solex in make, from the appellant's jacket leaves no doubt that the appellant had broken into the bar.

54. In **count 4**, there is similar evidence that the appellant was found with a padlock; tricycle 266 in make, which had been removed from the door of a shop belonging to the complainant thereof one Jossylater Mutia.

55. The defence adduced by the appellant was to the effect that he was framed by PC Njue but same was found incredible as no reason was found to believe th te same theory. First and foremost, when PC Njue testified in court, there was no suggestion in cross examination or otherwise that there existed had blood between him and the appellant.

56. Also no such suggestion was made against the other witnesses particularly Mulu; the eye witness and Francis Mutinda; the area chief who the appellant accuses of conspiring to press false charges against

him. If indeed there existed any enmity between the appellant and some of the prosecution witnesses, no doubt that this would have been subject of cross examination.

57. Thus the defence adduced by the appellant that he was framed for offences he never committed had no merit.

58. The trial court was guided by the case of *Martin vs Republic [2004] 1 KLR 510* in which the Court of Appeal quoting from the English case of *R vs Loughin 35 Cr. Appeal No. 69* pronounced itself as follows:

“If it is proved that premises have been broken into and that certain property has been stolen from the premises and that very shortly afterward, a man is found in possession of that property, that is certainly evidence from which the jury can infer that he is the house breaker or shop breaker.”

59. In the present case, the appellant was not only found with some items which had been stolen from the shops which had been broken into but was also spotted escaping from one of the shops i.e. Dodoma bar, before he was arrested.

60. Also with him were an assortment of items suited for opening padlocks to wit a bunch of conventional keys, pieces of metal plates cut into improvised keys, pliers and a strong T-shaped metal rod among other items.

61. This evidence sufficiently laid a basis for inferring that the appellant was involved in the subject breakings and thefts and the appellant failed in his defence to offer a reasonable rebuttal to the prosecution’ case.

62. On sentence the court finds no error on the part of the trial court in the orders it made as it hand the mandate to make same orders.

63. Thus the court finds no merit in the appeal and makes the following orders;

i) The appeal is dismissed, conviction is upheld and sentence confirmed.

DATED, SIGNED AND DELIVERED AT KITUI THIS 17TH DAY OF JANUARY, 2020.

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C. KARIUKI

JUDGE