



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 108 OF 2019

CONSOLIDATED WITH

CRIMINAL APPEAL NO. 207 OF 2019

BETWEEN

YUKUBU OMUNGA OMULAMA.....1ST APPELLANT

DAVID OCHOLLA2ND APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an Appeal from the original conviction and sentence in the Senior Principal Magistrate's Court

at JKIA in Criminal Case No.101 of 2017 delivered by Hon. C. M. Nzibe (RM) on 29th March 2019).

JUDGMENT

1. The Appellants, **Yukubu Omunga Omulama** and **David Ocholla** were charged alongside six others with various offences. In count one, they were all charged with the offence of stealing contrary to **Section 268(2)** as read with **Section 275** of the **Penal Code**. The particulars were that: on the night of 18th and 19th April, 2017 at Airside Area in Jomo Kenyatta International Airport within Nairobi County, they jointly stole one black travelling bag, four call torch model C-201, two HP laptops, three mobile phone batteries, one camera lense, two pairs of sunglasses, three USB cables, two sets of earphones, one spotlight, one AC adapter, five bottles of designer perfumes and thirty four assorted mobile phones, all items valued approximately at Kshs. 400,000/=, the property of Kenya Airways.

2. In the alternative, the Appellants herein were charged with the offence of handling stolen property contrary to **Section 322** of the **Penal Code**. The particulars of the same were that on the night of 19th day of April, 2017 at Terminal 1'A' International Arrivals in Jomo Kenyatta International Airport within Nairobi County, otherwise than in the course of stealing, jointly dishonestly received and retained one black travelling bag, four call torch model C-201, two HP laptops, three mobile phone batteries, one camera lense, two pairs of sunglasses, three USB cables, two sets of earphones, one spotlight, one AC adapter, five bottles of designer perfumes and thirty four assorted mobile phones, all items valued approximately at Kshs. 400,000/=, the property of Kenya Airways, knowing them to be stolen goods.

3. The Appellants pleaded not guilty to the charges. Upon trial they were found guilty of handling stolen property contrary to **Section 322(1)** of the **Penal Code** and were sentenced to serve five years imprisonment each. Aggrieved by both their conviction and sentence, they preferred separate appeals to this Court. The appeals were consolidated and heard together for purposes of this Judgment.

Grounds of Appeal

4. The 1st Appellant raised five (5) grounds of appeal in his Petition of Appeal filed on 6th July, 2017 whereas the 2nd Appellant raised eight (8) Grounds of Appeal in his Memorandum of appeal filed on 19th July, 2019. The said grounds can be condensed into two namely:

i) That the learned trial magistrate erred in both law and fact by failing to find that the offence was not proved to the required standard which is beyond a reasonable doubt.

ii) That the learned trial magistrate erred both in law and fact by imposing a manifestly harsh sentence on the Appellants.

Summary of Evidence

5. I am minded that this is a first appellate court whose duty is to reevaluate the evidence and make independent conclusions. See: **Okeno v Republic (1972) EA,32** and **Kiilu & Another v Republic (2005)1 KLR, 174**. I thus summarize the evidence adduced as follows.

6. On 19th April, 2017 **PW5, Veronica Nyunga**, a Kenya Airports Authority security warden was at Terminal 1A Arrivals and Staff Entrance where she had been deployed to screen passengers and luggage as well as control access. At around 8.00 am, the Appellants herein approached the exit where she was stationed. She asked them to stop for screening but they defied and walked out. PW5 called her colleague **PW1, Robert Rotich Cheruiyot** to help her stop the Appellants from escaping. PW1 went outside, apprehended the Appellants and took them back to the baggage hall for interrogation. PW1 and PW5's colleague **PW2, Daniel Muinde Kimenye** identified the Appellants as employees of Oneway Cleaning Services, a company that had been contracted to supply cleaning services within the airport. This was confirmed by **PW7, Julius Mutua Charles**, an assistant manager at the said company.

7. While interrogating the Appellants, the security wardens noticed something protruding from the 2nd Appellant's shirt. As such, they subjected the Appellants to a physical search. They recovered mobile phones from the 2nd Appellant's pockets, socks and some strapped along his waist. The 1st Appellant had nothing on his body but several items were recovered in a black bag which he had been carrying. These were; assorted mobile phone models, three mobile phone batteries, a camera lens, two sets of sunglasses, USB cables, two sets of earphones, spotlight torch, call touch, AC adapter and five bottles of perfumes. The security wardens confiscated the Appellants staff passes and informed their supervisor about the incident. They also made a report to the police.

8. The supervisor sent **PW3, Edwin Wakoli Opicho** and **PW5, Gordon Ochieng Ocholla** from the anti-pilferage section to handle the issue. Upon further interrogation, the Appellants informed the security personnel that they had been given the items by another staff member. Soon thereafter, **PW11 Sergeant Cyrus Kitetu** and his colleague CPL Mwita from JKIA Police Station Crime Branch arrived and took over the matter. The police were informed that the Appellants were caught exiting the airside with items suspected to have been stolen from passengers' luggage. They were shown the items recovered from each of the Appellants. The police prepared an inventory of the items, confiscated them and then arrested the Appellants.

9. The Appellants were taken to the police station where a further interrogation was conducted. The Appellants informed the police that the goods were stolen from the luggage of passengers travelling to Amsterdam via a KLM flight the previous night. They said that the theft was conducted by workers from Tradewinds who were loading the luggage in conjunction with the security personnel who had been manning the said aircraft. The Appellants' work was therefore to remove the goods from the airside and distribute them later. After the interrogation, the Appellants led PW11 and his three other colleagues to arrest the 3rd, 4th and 5th accused persons who were allegedly involved in the theft. Police accompanied the three to their respective houses where searches were conducted and further goods suspected to have been stolen recovered. The police also arrested the security personnel who had been manning the conveyer belts at the time when the pilferage took place.

10. **PW10, Benard Gikaru Mbugua**, a security agent at Kenya Airways identified the Appellants herein in CCTV footages of the night of 18th April, 2017 cleaning the baggage sorting area where there were six bags left on the floor which was unusual as the same were supposed to be in trolleys. The bags seemed to have been left for unlawful interference. The footage also showed the 2nd Appellant moving the trollies as though trying to use them to conceal the bags from the view of the camera. However, PW10 did not see any footage of the Appellants stealing from the luggage.

11. The case was investigated by **PW12, PC Joseph Okutto** of JKIA Police Station. He visited the scene of crime where he recorded statements. His investigations revealed that the 3rd and 4th accused persons stole the goods from passengers' luggage in conjunction with one Kosgey and Mwalengo. They then gave them to the Appellants herein to help them remove them from the airside. PW12 summed up the prosecution's case and produced in evidence the goods recovered from the accused persons, their security passes as well as the inventory prepared in that regard.

12. Upon being placed on their defences, both Appellants gave unsworn testimonies. **DW1, the 1st Appellant** herein testified that on 18th April, 2017, he reported to work at 6.00 pm for the night shift. He was assigned work in the baggage sorting area where he was to clean the bridges and collect garbage after the plane was loaded. As he was going to clean bridge 13 with the 2nd Appellant, Mwalengo, Kennedy Okello and another man stopped them. Mwalengo told them that there was a package in Bay 15 which he wanted them to take to PW1. While at bridge 16, Okello gave him a bag and told him that it had 'Wasafiri' books. They were not allowed to have the books but he told him to give them to PW1. He took the bag, kept it at bay 15 and continued to clean.

13. While leaving in the morning, he carried the bag with confidence knowing that it belonged to a Kenya Airports Authority security officer. PW1 did not search him when he reached the security area. He gave PW1 the bag as instructed. PW5 asked him what was in the bag. He left the security area but before he could reach Paul's Café, PW1 went and got hold of him then asked him to follow him. They went back to the screening area where they found PW1's bosses. He was shocked to see the contents of the bag when it was opened. Thereafter, he was arrested and escorted to the police station and later charged with the offences in question. He however denied leading the police to arrest his co-accused persons.

14. On his part, **DW2, the 2nd Appellant** herein stated that on 19th April, 2017 at about 5.00 am while working at bridge 15, he saw a Tradewinds employee with phones and other items in his pockets. The man requested him to help him carry the items as he had been assigned other duties. DW2 enquired to know where he had gotten the items and he assured him that they had not been stolen. He told DW2 that no one would question him on the same. However, while on his way out, he was stopped by security officers at the exit. On interrogation, he told them that the Tradewinds official who had given him the items was still in the airport. The police were called

whereupon he was arrested and escorted to the police station. The person who gave him the items was later arrested by the police at Taj Mall. The 2nd Appellant stated that he was used by a person he trusted. He pleaded for forgiveness and swore never to repeat the mistake again.

Analysis and determination

15. The Appeal was canvassed by both written and oral submissions. The Appellants filed their respective written submissions on 12th November, 2019 and appeared in person whilst the Respondent's oral submissions were tendered by the learned State Counsel, Ms. Akunja.

16. Upon a careful re-evaluation of the evidence on record and consideration of the parties' respective submissions, I find that only three issues arise for determination, namely whether the charge sheet was defective, whether prosecution established the offence of handling stolen property against the Appellants beyond a reasonable doubt and whether the sentence imposed was proper in the circumstances.

Whether the charge sheet was defective

17. As regards this issue, the 2nd Appellant contended that the charge sheet was defective as it did not itemize the specific goods that were recovered in his possession. He argued that the omission made it difficult for him to properly defend himself.

18. I concur that the charge sheet did not itemize the specific goods found in the 2nd Appellant's possession. However, it is evident it contained sufficient information to enable him understand the offence he was facing as required by **Section 134** of the **Criminal Procedure Code**. The said section provides thus:

“Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged.”

19. Indeed, it is clear from the record that when the charge was read out to him, he denied and a plea of not guilty was entered. Further, during trial, an inventory of the specific goods recovered from him was identified and exhibited in evidence. He did not object to the production of the inventory. He was also able to defend himself accordingly against the charge. In the premises, this court finds that the charge sheet was not defective and the failure to itemize the goods recovered from him did not prejudice him in any way.

Whether the prosecution established the offence of handling stolen property beyond a reasonable doubt.

20. The 1st Appellant submitted that the offence was not proved since the prosecution did not establish that the goods recovered from him were stolen. He argued that to date, no one has ever complained about losing any of the goods recovered from him at the airport. Further, he contended that Kenya Airways did not give the particulars as well as the serial numbers of the goods that he had allegedly stolen. He also denied signing the inventory form adduced in court.

21. As for the 2nd Appellant, he submitted that Kenya Airways did not prove ownership of the recovered goods. It was also his submission that it was never established how the value of the goods namely Kshs. 400,000/= was arrived at. Further, that the inventory was improperly prepared since he was not informed that he had a right to have a witness present.

22. Learned state counsel on the other hand submitted that the prosecution witnesses proved the offence to the required standard. She argued that their failure to sign the inventory forms did not lessen the fact that the Appellant's were arrested while in possession of the goods.

23. **Section 322(1)** of the **Penal Code** defines the offence of handling stolen property as follows:-

“(1) A person handles stolen goods if (otherwise than in the course of the stealing) knowing or having reason to believe them to be stolen goods he dishonestly receives or retains the goods, or dishonestly undertakes, or assists in, their retention, removal, disposal or realization by or for the benefit of another person, or if he arranges to do so.

24. It is trite law that to establish this offence, the prosecution must first prove theft. (See **Ratil & Another versus Republic (1971) E.A at 577** and **Halsbury's Criminal Law, Evidence and Procedure (Volume 11(1) (2006 reissue), Paragraph 303**). It is also well settled that such proof may be by direct evidence of theft or the circumstances in which the accused person handled the goods.

25. In the instant case, it is not in dispute that no theft had been reported prior to the recovery of the goods. However, PW5 gave uncontroverted testimony that when she asked the Appellants to stop for screening at the exit, they defied and attempted to escape and she had to call PW1 to help her stop them. It was also PW1's testimony that when interrogating the Appellants after he had called them back to the baggage hall, he noticed something protruding from the 2nd Appellant's shirt. This prompted the security guards to subject the Appellants to a physical search. Further, PW1, PW2 and PW5 gave consistent evidence that the search resulted in the recovery of the exhibited items from the 1st Appellant's bag and the 2nd Appellant's body. Notably, the Appellants did not lay any claim on the items. They also did not tender any reasonable explanation as to how they came to be in possession of the goods recovered from them.

26. In the circumstances, I find that the recovered items constituted stolen property and the Appellants knew and/or had reason to believe that the same were stolen.

27. This conclusion is fortified by PW11's uncontroverted testimony that upon further interrogation at the police station, the Appellants informed them that the goods had been stolen by Tradewinds workers the previous night from the luggage of passengers travelling to

Amsterdam vide a KLM flight and that their role was only to assist in removing the loot from the airside. The prosecution therefore discharged its burden in establishing that the Appellants were guilty of handling stolen property. I have no reason to interfere with the conviction.

Whether the sentence meted out to the Appellants was proper

28. Both Appellants questioned why they were handed different sentences from the 3rd, 4th and 5th accused persons with whom they underwent the same trial. They argued that the prison terms imposed on them were harsh and excessive compared to that imposed on the other three accused persons who were handed non- custodial sentences. The 1st Appellant urged for a similar sentence.

29. On her part, the learned state counsel submitted that the 3rd, 4th and 5th accused persons were convicted of a different offence hence the difference in the sentences. She therefore urged the court to uphold the Appellants' sentences.

30. Unlike the Appellant's herein, the 3rd, 4th and 5th accused persons were convicted of a misdemeanor namely, being possession of suspected stolen property contrary to **Section 323** of the **Penal Code**. The said Section provides as follows:

“Any person who has been detained as a result of the exercise of the powers conferred by section 26 of the Criminal Procedure Code (Cap. 75) and is charged with having in his possession or conveying in any manner anything which may be reasonably suspected of having been stolen or unlawfully obtained, and who does not give an account to the satisfaction of the court of how he came by the same, is guilty of a misdemeanour.”

31. A misdemeanor is defined in **Section 4** of the **Penal Code** as any offence which is not a felony. Further, the black's law dictionary defines a misdemeanor as:

“A crime that is less serious than a felony and is usually punishable by fine, penalty, forfeiture or confinement (usually for a brief term)....”

32. The general punishment for misdemeanor is provided for in **Section 36** of the **Penal Code**. The Section provides thus:

“Where in this code no punishment is specifically provided for any misdemeanor, it shall be punishable with imprisonment for a term not exceeding two years or with a fine or to both”

33. The foregoing explains why the 3rd, 4th and 5th accused persons were ordered to pay fines of Kshs. 50,000/= each and in default to serve six months imprisonment. In contrast, the punishment for the offence of handling stolen property which the Appellants were convicted of is prescribed in **Section 322(2)** of the **Penal Code** as follows:

“A person who handles stolen goods is guilty of a felony and is liable to imprisonment with hard labour for a term not exceeding fourteen years.”

34. The Appellants were sentenced to serve five years imprisonment each. I note that these sentences were proper and reasonable in the circumstances of the case. The act of stealing goods from flight passenger baggage is a serious thing. The Appellants as cleaners were entrusted with loyalty that they are, in addition, custodians of the luggage checked in by passengers. Instead of taking care of such luggage, they turned out as thieves. The act causes pain to the passengers on arrival to their respective destinations and is as well an embarrassment to the country of origin, Kenya. The offence can only be discouraged by imposing custodial sentences which should serve as deterrence. Hence, I find no reason to disturb the sentences.

35. In the result, I find that the Appellants respective appeals lack merit and dismiss them forthwith. I uphold both their conviction and sentence. It is so ordered.

DATED and DELIVERED this 2nd day of **March, 2020**

G.W. NGENYE-MACHARIA

JUDGE

In the presence of:

1. 1st Appellant in person.

2. 2nd Appellant in person.

3. Mr. Momanyi for the Respondent.