



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CRIMINAL APPEAL NO. 33 OF 2019

(From Original Conviction and Sentence in Kakamega CMCCRC No. 3315 of 2017 by Hon. W. Lopokoiyit, Resident Magistrate, of 13th March 2019)

MUTINGE MORGAN NAUNA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

1. The appellant was convicted by Hon W. Lopokoiyit, Resident Magistrate, of burglary and stealing contrary to sections 304(2) and 279(b), respectively, of the Penal Code, Cap 63 of the Laws of Kenya, and was accordingly sentenced to pay a fine of Kshs. 150, 000.00 for the burglary or 12 months in default. He had been charged with one count, with an alternative count of handling contrary to section 304(2) of the Penal Code. The particulars of the main count were that on the 2nd March 2017 at Kakamega Township, within Kakamega Central Sub-County within Kakamega County he broke and entered into a dwelling house of Nuru Imran, with intent to steal, and stole therein one Sony TV model KDL48R562C serial number S01-4051570-8, a mobile phone Samsung Galaxy Tab and 6 kilogramme gas cylinder, all valued at Kshs. 155, 000.00, the property of Nuru Imran. The particulars of the alternative charge were that on 18th April 2017 at Kaptech trading centre, in Hamisi County, within Vihiga County, otherwise than in the course of stealing, he dishonestly retained one Sony TV model KDL48R562C serial number S01-4051570-8, a mobile phone Samsung Galaxy Tab and 6 kilogramme gas cylinder, knowing or having reason to believe that they were stolen property.

2. The appellant pleaded not guilty to the charges before the trial court, and the primary court conducted a full trial. The prosecution called two (2) witnesses.

3. Nuru Imran, the first complainant, testified as PW1. She stated that on 2nd March 2017 at about 8.00 PM, she locked the door to her house and took her child, who was sick, to a clinic. When she returned from the clinic, she found that the door has been broken and opened, and assorted items stolen. She made a report to her neighbour, who was a police officer, who in turn alerted the police who came to the scene. On 28th April 2017, she was called to the police station to identify items that had been recovered. She identified three of them, a tablet, a TV set and a gas cooker.

4. Number 69287 Police Constable Peter Maritim testified as PW2. He was the investigating officer in the matter. He testified that PW1 had telephoned him on 2nd March 2017, and reported that her house had been broken into and household items stolen. He and his colleagues went to the scene, and found that the house had indeed been broken into. They took the serial number (IMEI) of the phone tablet to Safaricom, from where they got data of the phone. They traced the phone to Albert Bahati, who was using it. One of the members they called was traced to Yevone Adhiambo Risper, and they went and arrested her. She informed them that the phone had been given to her by Albert Bahati, who they arrested. He informed them that he had bought the phone from the appellant. They traced the appellant at Maundu, Vihiga County, but when the appellant saw them he ran away. They traced him to his house, which they searched and recovered some items, which included the items that PW1 later identified as the items that had been stolen from her house.

5. The appellant was put on his defence. He gave a sworn statement, and did not call witnesses. He denied the offences. He stated that he was not arrested in the manner narrated by the police witness.

6. After reviewing the evidence, the trial court convicted him of the main charge, and sentenced him as stated in paragraph 1 of this judgement.

7. Being dissatisfied with the sentence the appellant appealed to this court, where he raises grounds that the case was not proved beyond reasonable doubt, that the trial court failed to interrogate the testimonies of the witnesses, that the court had relied on an inventory that was

improper for it was not prepared at the recovery of the items, that the evidence was biased malicious inconclusive and doubtful, that his defence was disregarded and that the findings of the trial court were against the evidence tendered.

8. Being the 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 Court of Appeal's decision in the case of *Okeno vs. Republic* (1972) EA 32 has consistently been cited on this issue. In its pertinent part, the decision is to the effect 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.”

9. The appeal was canvassed on 10th March 2020. Ms. Omondi stated that she relied on the record of the trial court, while the appellant relied on his written submissions. In the written submissions he has argued three grounds. The first is that his fair trial rights were violated, and in particular Article 50(2)(c)(g)(l)(j) of the Constitution. He submits that he was not supplied with the prosecution evidence in advance of the trial, he was not afforded time and facilities to prepare his defence. He also submits that vital and crucial witnesses were not summoned to give evidence. He mentions Yevone Adhiambo Risper, Albert Bahati and Victor Wanjala. He has cited *Bukenya and others vs. Uganda* [1972] EA 549, with respect to an inference being drawn where certain witnesses are not called. Finally, he has submitted that there was inadequate and doubtful evidence of recovery and inventory of the items allegedly recovered from his house.

10. I shall first deal with the ground that the fair trial rights of the appellant were violated. He raised only one sub-issue under this general ground, that is that he was not furnished with the prosecution's case in advance. That would mean that he was placed in a position where he was ambushed with evidence at the trial unprepared to cross-examine the prosecution witnesses thereafter.

11. The right to be informed of the evidence the prosecution intends to rely on is provided for in Article 50(2)(j) as a right 'to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence.'

12. The High Court in *Joseph Ndungu Kagiri vs. Republic* [2016] eKLR said that Article 50(2)(j), correctly interpreted, means that an accused person should be furnished with all the witness statements and exhibits which the prosecution intends to rely on in their evidence in advance. The sole purpose of doing so is so as to avail the accused sufficient time and facilities to enable him prepare his defence and challenge the prosecution's case at the opportune time, both in cross-examination and in defence, adding that the provision should be read together with sub-Article 2(c), which provides for the right of an accused person to a right to a fair trial, which includes the right to have adequate time and facilities to prepare a defence. The issue was also addressed in *Richard Munene vs. Republic* [3018] eKLR and *Thuita Mwangi & 2 others vs. Republic* [2015] eKLR.

13. I have scrupulously gone through the record of the trial court. It would appear that the appellant had not been furnished with the prosecution's evidence before he took plea, but an order was made on 10th January 2018 that he be supplied with copies of witness statements. It would appear that the statements were not supplied by 26th February 2018, as the appellant was placed on record as asking to be furnished with the statements, and an order was made that the said statements be supplied that day. The hearing commenced on 29th May 2018. Between then and 26th February 2018, there is nothing to indicate that the appellant had been supplied with the statements. However, when the hearing commenced, the appellant did not object on grounds that he had not been supplied with witness statements, instead he indicated that he was ready for the hearing. That would suggest that the statements had been supplied, otherwise he would have raised issue about it. He never again raised issue about the statements thereafter. I am, therefore, not persuaded that he had not been furnished with the evidence in advance, nor that he had not been given adequate time and facilities to prepare a defence.

14. The principal offence charged was burglary contrary to section 304(2) of the Penal Code. The provision states as follows:

“304. (1) Any person who –

(a) breaks and enters any building, tent or vessel used as a human dwelling with intent to commit a felony therein; or (b) having entered any building, tent or vessel used as a human dwelling with intent to commit a felony therein, or having committed a felony in any such building, tent or vessel, breaks out thereof, is guilty of the felony termed housebreaking and is liable to imprisonment for seven years.

(2) If the offence is committed in the night, it is termed burglary, and the offender is liable to imprisonment for ten years.”

15. The twin offences of burglary and housebreaking are committed by a person who breaks into a building or structure with intent to commit a felony therein. It was stated in *Njoka vs. Republic* [2001] KLR 175, that the two are committed in one transaction with the felony intended, in the instant case stealing, and the count of either should include the felony intended. It was stated in *Rex vs. Charles Awala* [1948] 23 (1) KLR 61, that the prosecution must prove both the elements of the breaking in and the commission of the felony alleged. As I have stated above, the burglary alleged was the principal offence, with the theft being secondary to it. The burglary must be established first before the issue of theft is adverted to.

16. I have carefully considered the provisions upon which the appellant was charged with, as well as case law, and I have come to the conclusion that, to the extent that the charge relates to breaking into premises, it would be critical for the prosecution to establish existence of the premises alleged to have been broken into. There must be some proof that the said premises existed and were connected to the complainants. PW1 testified that it was her residence that was broken into, and PW2 confirmed going to those premises the same day he got

the report, and, therefore, there is evidence that the premises existed.

17. Secondly, on the break in, there ought to be some evidence, beyond the oral narrative of the complainant. What amounts to breaking in is set out in section 303 of the Penal Code. It includes opening by unlocking, pulling, pushing, or by any other means a door, window, cellar flap or other thing intended to close an opening in a building or by any opening giving passage from one part of the building to another. It could involve some form of actual breaking of some part of the building in order to gain access. Photographic evidence is critical in such cases.

18. PW1 testified at the trial that when she went home, after visiting the clinic, she found that her door had been broken and it was open. She did not describe how the door was broken. No details were given save for the claim that the door had been broken. PW2 visited the scene shortly thereafter. He merely said that the door had been broken. He did not describe what he saw. What was broken? Was the door just opened with a key? Was it forced open? Was some part of it broken? Were any pictures taken of the scene by scenes of crime personnel? What evidence was there to support the allegation of a break in?

19. From the testimonies of the two witnesses it cannot be said that the offence of breaking in was proved beyond reasonable doubt. The prosecution should have made an effort to obtain concrete evidence that would have established these matters beyond the mere oral stories of PW1 and PW2.

20. It is critical for the prosecution and the court to note that the charges, the offence created under section 304 of the Penal Code attracts a maximum penalty of ten years in prison, while that created under section 279(b) of the Penal Code, stealing, attracts a penalty of fourteen years' imprisonment. The offence of handling stolen property, charged under section 322(2) of the Penal Code attracts a maximum of fourteen years in prison.

21. The right to liberty is fundamental and is guaranteed by the Constitution, and in various international legal instruments that Kenya is party to. It cannot be taken away by the state unless there is legal justification. It is for that reason that the principle of criminal law that a criminal charge ought to be proved beyond reasonable doubt exists, as justification for taking away the liberty of any person. For that reason, those charged with prosecuting suspected offenders must endeavour to justify the criminal charges they bring, by way of credible evidence, to persuade the court that reasons exist for it to take away a person's liberty.

22. So far as the charge of breaking and entering is concerned, I am not persuaded that the prosecution marshalled evidence that should have justified conviction of the appellant, and I do not think that the trial court had before it any material upon which it could say that it had been persuaded beyond reasonable doubt that the crime of breaking and entering had been committed.

23. The prosecution relied on circumstantial evidence to establish both the offence of burglary and that of stealing. No eyewitness account was given by any of the persons who testified in the matter. The appellant is linked to the crimes by the claim that items were found in his residence that were alleged to have been stolen from the premises of the complainant.

24. Ownership is critical to the offence of theft, for the same is established where the accused is alleged to have dealt with it in a manner inconsistent with the rights of the owner or that denies the owner's right to it. It must, therefore, be established that the goods allegedly stolen belonged to the complainant, or, in cases of recent possession, that the goods allegedly found in possession of a suspect belonged to the complainant. In *Michael Karimi Kamunyu vs. Republic* [2005] eKLR, in dealing with that issue, where the prosecution witnesses, including the complainants, stated that the recovered items had been found with the accused persons without more, that it should come out in the prosecution's evidence that the complainants were laying claim to ownership of the recovered items, and that the evidence showed that they had a better claim of ownership.

25. The court in *Elijah Nguji Kimemia & another vs. Republic* [2010] eKLR addresses the matter of proof of ownership of stolen goods by alleged owners. It was stated that proof of ownership of such goods is determined on the basis of the facts of each case. It may be way of producing receipts or other documentary proof, or by way of showing identifying marks on the items or other features such as initials. It could also be by evidence that the same was gifted to the complainant or that he had used it for such a long time such that it developed features or characters that could be pointed out to aid identification. See also *Lawrence Omondi Ojunga vs. Republic* [2010] eKLR.

26. In the instant case, PW1 categorically stated that the items that were allegedly recovered from the appellant belonged to her. She produced receipts relating to all three items.

27. Closely related to that is the issue of the ownership of the house where the stolen goods were recovered. It was said in *Boniface Gitonga Muchira & another vs. Republic* [2013] eKLR, that the ownership of the house where stolen goods are recovered is critical for it provides an essential link between accused person and the goods allegedly recovered. It would also eliminate the possibility that the goods were in the custody or possession of persons other than the accused. See also *James ole Silanga vs. Republic* [2010] eKLR.

28. According to the record before me, the goods were allegedly recovered from a house to which the arresting officer was directed by the person who had allegedly bought the phone from the appellant. The appellant allegedly saw them and ran away. No evidence was led as to whom the said house belonged, and as to whether there were other individuals in the house save the appellant. PW2 produced an inventory signed by persons who were said to be neighbours of the appellant, yet those individuals were not presented as witnesses on the occupancy of the said house, especially since the recovery was done in the absence of the appellant.

29. The other issue is that an item relating to the identity card of a Victor Wanjala was found at the house, it was not established whether or not the said Victor Wanjala was also an occupant of the subject house, and whether he had anything to do with the items that were recovered from the house.

30. The appellant has raised the ground that the court relied on an inventory that was improper because it had not been prepared at the place

of recovery of the items. He faults the said inventory on the grounds that the same was not prepared at the scene of recovery but at the police station. The courts have underscored the fact that the inventory is a record kept by the police of the items recovered during investigation. It is not a requirement of the criminal process that an inventory must be prepared, and the failure to prepare or produce one at the trial cannot prejudice the trial process in any way. See *Stephen Kimani Robe vs. Republic* [2013] eKLR, *David Letera Lokai vs. Republic* [2016] eKLR, *Leonard Odhiambo Ouma and another vs. Republic* [[2011] eKLR, *Kamulak Shum vs. Republic* [2016] eKLR, among others. It has also been stated that there is no requirement that the same be prepared at the place of recovery.

31. Going through the record of the trial court, I am not persuaded that the court relied on the said inventory as the basis for the conviction of the appellant. In any event the same is of little probative value as it is more of an administrative tool for the investigators during the investigation process. It is not a requirement of the law, and it adds little value to the trial process. Therefore, whether it was prepared at the police station or at the scene of crime is neither here nor there.

32. The appellant took issue with the fact that some persons were mentioned as being having been potential witnesses, yet they were not called to testify. There was Albert Bahati to whom the appellant had allegedly sold the phone, Yevone Adhiambo Risper, Victor Wanjala and the neighbour who allegedly signed the inventory as a witness.

33. It is a principle of law that there are no required number witnesses to testify in criminal matters. That position is stated in section 143 of the Evidence Act, Cap 80, Laws of Kenya. That position has been restated and repeated in such cases as *Keter vs. Republic* [2007] EA 135 and *Republic vs. George Onyango Anyang & another* [2016] eKLR, where it was emphasized that the prosecution must call such number of witnesses as are sufficient to establish the charge beyond reasonable doubt. Then there is the caution in *Bukenya & Others vs. Uganda* [1972] EA 549, where the court stated that where the evidence called was barely adequate the court may infer that the evidence of the uncalled witnesses would have been adverse to the prosecution.

34. In this case the prosecution called only two witnesses, the complainant and the police officer who investigated the matter. There was no obligation on the prosecution's part to call more witnesses so long as the ones they called were adequate to establish their case. There are of course glaring gaps in the evidence that could have been filled by the witnesses that the appellants say the prosecution did not call. I agree with the appellant that the evidence of some of the persons not called as witnesses was critical and the failure to call them fundamentally undermined the case for the prosecution. The evidence of Albert Bahati, in particular, was crucial. He allegedly bought one of the items from the appellant, and he allegedly led PW2 to the residence where the rest were recovered. He was the link between the appellant and the offence. The gap left by the failure to call him as a witness is so glaring that it could not be sealed by the testimonies of PW1 and PW2.

35. The other ground is that the evidence of the prosecution had contradictions and inconsistencies. I have read and reread the testimonies of PW1 and PW2, and I have not noted any inconsistencies or contradictions. The appellant has not submitted on them, nor pointed out any. If there were any then they must be minor. The courts have consistently held that not every inconsistency or contradiction is material. See *Richard Munene vs. Republic* [2018] eKLR.

36. The trial convicted on the basis of the doctrine of recent possession. The Court of Appeal in *Isaac Ng'ang'a Kahiga alias Peter Ng'ang'a Kahiga vs. Republic* CA Criminal Appeal No. 272 of 2005 (Nyeri)(unreported), said:

“It is trite that 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; that 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 ... in order to prove possession there must be acceptable evidence as to search of the suspect and recovery of the allegedly stolen property; and in our view any discredited evidence on the same cannot suffice no matter from how many witnesses.”

37. Going by the principles stated above, it cannot be said that the doctrine as set out in *Isaac Ng'ang'a Kahiga alias Peter Ng'ang'a Kahiga vs. Republic* (supra), applied to the instant case. I have already found that the evidence on record did not establish that the house from which the items were recovered belonged to the appellant.

38. I believe that I have said enough. Upon review of the entire evidence on record, and for the reasons that I have given above, I am not persuaded that the conviction of the appellant was safe. I accordingly, hereby, quash the said conviction and set aside the sentence imposed on him. If he has paid the fine imposed, the same shall be refunded to him; and if he is serving time in default, he shall be set free from prison custody unless he is otherwise lawfully held.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 21ST DAY OF MAY, 2020

W. MUSYOKA

JUDGE