



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL NO. 27 OF 2019

(From Original Conviction and Sentence by Hon. T. Mwangi, Senior Principal Magistrate (SPM), in Kakamega SRMCRC No. 1615 of 2015, of 5th March 2019)

SAMSON KHASAI.....APPELLANT

VERSUS

REPUBLICRESPONDENT

JUDGEMENT

1. The appellant was convicted by Hon. Mwangi, Senior Principal Magistrate, of stealing contrary to section 268, as read with section 275, of the Penal Code, Cap 63, Laws of Kenya. The particulars of the charge against the appellant were that on 21st May 2015 at Musembe village, Kakamega Forest, Ileho Location of Kakamega East District within Kakamega County, he stole two sensitive bushness HD game cameras, two cables of wafers, two safety boxes, two padlocks, and two 8 GB memory cards, all valued at Kshs. 70, 000.00, the property of Christopher Amutabi Kefa. He also faced a second count of assaulting a police officer, contrary to section 254(b) of the Penal Code.
2. He pleaded not guilty to the charges before the trial court, and a full trial was conducted. The prosecution called five (5) witnesses.
3. Christopher Amutabi Kefa was the first to take the witness stand, as PW1. He was a student who, as part of his university studies, had mounted cameras in forests to track animals. On 17th July 2015, he mounted such cameras at Ihuywa, to stay there for three days to collect data. On 22nd May 2015, he discovered that the cameras had been stolen. He reported the matter to the local Assistant Chief and the area forest officer. He explained how the cameras were secured in padlocked boxes to protect them against theft. He said that he had two cameras with their batteries, two cable locks, two padlocks and two memory cards, all of which were stolen. He put the value of the stolen items at Kshs. 70, 000.00.
4. During cross-examination, he stated that the report he made at the Shinyalu Police Station indicated that the incident took place at Shirere Village, within Kakamega Forest. He stated that he was a resident of Shirere Village. He said his report to the police was made two or so weeks after the theft, even though he had made a report earlier to the Assistant Chief and the Forest Officer. He said that the Assistant Chief mentioned to him that he had suspect in mind, although he did not disclose the name to him. He said he got to know the name in court. He stated that he was assisted by Herbert Imbuga and Isaac Khamati to mount the cameras. He said he could not tell whether the security cable could be cut with a *panga*.
5. Haron Matayo testified as PW2. He was the Assistant Chief of Ikuywa Sub-location, Ileho Location. He said that he received a report of the theft from PW1 on 22nd May 2015. He conducted investigations, and was informed that Solomon Khasai had been seen removing the cameras. Those who allegedly saw him were named as Timothy Muruli, Peter Imoli, Simon Chivini, Kevin Asutsi and Kenneth Kimondo. He met them and they confirmed seeing Solomon taking the cameras. On 12th June 2015, he led police officers to the home of Solomon. They found many young men at the home, and when the police indicated that they wanted to search the house of Solomon, he, and others, began screaming. He took a stick and tried to hit a police officer with it but the witness grabbed it from him. Solomon then bit the officer's finger. There was utter chaos, forcing the police to shoot in the air. Eventually the search could not be conducted, and Solomon was arrested. During cross-examination, he stated that he did not interview the suspect during his investigations, he had sent for him but he never went to see him. He said that the appellant was also known as Overseer. He said that he never reported the matter to the police since he was not the complainant.
6. PW3, Herbert Imbuga, was assisting PW1 with his research at Kakamega Forest. They mounted cameras at Musembe Forest on 19th May 2015. On 21st May 2015, they found the cameras had been stolen. They made reports to PW2 and a forest officer. After sometime, PW2 informed them that someone might have been seen with the cameras, and he advised them to report to the police. They reported to the police, who raided a house in the Musembe area. The suspect was found among a crowd of young people at the home. He became violent and started screaming, and a crowd gathered. The police had to shoot in the air to disperse the crowd. The suspect was violent and resisted arrest, and even tried to hit a police officer with a piece of wood. He was disarmed, but he bit the officer's finger. No recoveries were made.

7. Timothy Muruli testified as PW4. He was a herdsboy who used to graze his employer's cattle close to where the cameras were mounted. On 21st May 2015, Sammy Livasi asked him to show him where the cameras were. He took him to the forest, and stood by as he saw Sammy Livasi cutting the cables. He left him at the scene and reported the matter to the village elder. He was with Peter Imoli. He and Peter Imoli left Sammy Livasi at the scene. Donboss Mbolli testified as PW5. He was a clinical officer who came to present documents relating to the second count. PW6 was the police officer who investigated the matter, Number 48476 Police Constable Joseph Okiru of Shinyalu Police Station.

8. The appellant was put on his defence. He gave a sworn statement, and did not call witnesses. He testified as DW1. He described how he was arrested on 21st May 2015. He said that he was not found in possession of anything.

9. After reviewing the evidence, the trial court convicted the appellant of the count of stealing, but acquitted him of the second count of assaulting a police officer, and sentenced him to pay a fine of Kshs. 60, 000.00 or one year in jail in default.

10. Being dissatisfied with the sentence the appellant filed the appeal herein, and raised several grounds of appeal. He avers that the case was not proved to the required standard, the conviction was against the weight of the evidence, the prosecution's case was riddled with material contradictions, the evidence lacked corroboration, the trial court did not analyze the evidence, and the trial court failed to analyze the defence evidence properly.

11. The appeal was canvassed on 9th March 2020. The appellant relied on written submissions that he had placed on record, while Ms. Omondi, Prosecution Counsel, relied on the trial court record.

12. I am sitting as 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 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.”

13. I have reviewed the entire record of the trial court. The name of the accused according to the charge documents is Samson Khasai. PW1, the complainant, and PW3, his research assistant, did not know the identity of the suspected thief of their cameras. PW2, the Assistant Chief to whom the initial report was made, and who got information about a suspect, stated the name of the suspect to be one Solomon Khasai. He took the police to the home of the said Solomon Khasai, who was arrested. When witness testified in court he did not identify the appellant as the Solomon that he was informed was the suspect nor as the person to whose home he took the police. PW4, the herder, took Sammy Livasi, to where the cameras were, and he left him there, allegedly trying to remove them from the tree where they were mounted. When he testified, he did not identify the appellant as Sammy Livasi, the person that he took to the forest where the cameras were and he that he left dismounting the cameras.

14. The identity of an accused person is critical to a successful prosecution. None of the witnesses presented by the prosecution made any effort to identify the appellant by name or by sight. The testimony of PW4 was critical. He was the one who allegedly took the person who was last seen handling the cameras to the scene. He should have been asked to confirm whether the person that he took there was the appellant. He was not asked to, and he did not point him out as the one. That identification was critical given that the person that he alleged to have taken there was a Sammy Livasi, and not Samson Khasai. No effort was made to draw a connection between Sammy Livasi and Samson Khasai.

15. Similarly, it was PW2 who led the police to arrest the appellant. When he testified in court, he did not identify the appellant as the person that he had received intelligence about, and the person that he led the police to arrest. In his oral statement he did not mention the name Samson Khasai, instead, he talked about Solomon Khasai. He made no attempt to demonstrate that Solomon Khasai and Samson Khasai were one and the same person.

16. The prosecution had a burden of establishing the charge against the appellant beyond reasonable doubt. The starting point is always with the identity of the person at the dock. The evidence adduced must be about that person, and where the same does not mention the person at the dock, but refers to other names, an effort must be made to demonstrate that those other names refer to no one else but the person at the dock.

17. The trial court did not address itself to the issue. If it had, it would, no doubt, have come to the conclusion that the evidence recorded from the witnesses had not referred to the appellant at all. The testimonies did not implicate the appellant; he should have been acquitted of the charge of stealing.

18. In the end I find that the appeal herein does have merit. It is hereby allowed. The conviction of stealing is hereby quashed, and the sentence imposed set aside. If the appellant had paid any fine, then the same ought to be refunded. If he is serving time in default, he should be set free forthwith, unless he is otherwise lawfully held.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 22ND DAY OF MAY, 2020

W. MUSYOKA

JUDGE