



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO. 63 OF 2018

KASSIM ALASOW ABDULLAHI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the Judgment of Hon. Mugendi Nyaga (RM) in the Senior Principal Magistrate's Court at Wajir Criminal Case No.263 of 2018, delivered on 16th August, 2018)

JUDGEMENT

1. The appellant was charged with the offence of breaking into a building and committing a felony contrary to section 306(a) of the Penal Code Cap. 63 Laws of Kenya. Particulars of the offence being that on the 21st day of June 2018 at Halane Location in Wajir East Sub-County within Wajir County he broke and entered into a building namely a shop owned by Mohamed Hussein Ali and committed a felony namely theft of Kshs.75,000/= and a Nokia TA 1010 valued at Kshs.2,500/= the property of the said Mohamed Hussein Ali.
2. In the alternative he was charged with the offence of handling stolen property contrary to section 332(1) (2) of the Penal Code Cap. 63 Laws of Kenya. The particulars were that on the 21st day of June 2018 at Halane Location in Wajir East Sub-County within Wajir County otherwise than in the course of stealing, he dishonestly retained one Nokia TA 1010 phone knowing or having reason to believe it to be stolen.
3. He was convicted after trial and sentenced to serve 5 years imprisonment on main count.
4. Being aggrieved by the said decision he appealed and set out (5) five grounds of appeal which amounted to; ***whether the prosecution proved its case beyond reasonable doubt and whether the defence was considered and whether the sentence was excessive?***
5. The grounds are:
 - (1) **That appellant pleaded not guilty to the charges.**
 - (2) **That he was not conversant with court processes and in the state of confusion when arraigned before the court.**
 - (3) **That it is his believe that he was not accorded fair trials since he had hearing impairedness and the interpreter was communicating in a lower voice hence he could not understand most allegations levelled against him.**
 - (4) **That on the claims of his national identification card being collected from the scene of crime, he wish to state that the document lost from him and was not in his possession close to a year and he was surprised how it ended up into the hand of PW1.**
 - (5) **PW1 was his employer sometimes two (2) years ago as his donkey rider but developed a grudge against him for failing to pay him back Kshs.2,000/= which he was indebted to surrender daily Kshs.500/= for hire of the donkey cart but failed to surrender to his wife the daily payment for 4 days during his absence on a trip to Nairobi.**

6. The appeal was directed to be canvassed via submissions.

APPELLANT'S SUBMISSIONS:

7. The appellant submitted that he was found guilty of breaking and stealing in a shop; that is in accordance to the evidence on record while the charges read were that breaking into a building and committing a felony.

8. The appellant submitted that, the trial magistrate would have noted that as per the law a shop is not just as the ordinary building and committing a felony is not necessarily stealing. Therefore continuing with the case without putting much weight, on the issue of the law was a prejudice to the appellant herein.

9. He argues that, the person who brought all this and the best witness who closely saw what was happening and reported to the rest of the witnesses, adduced that nothing was stolen from the shop on the material date. The issue of recovering that and that was a frame up in order to add weight to the prosecution case.

10. He contends that it was evident that the person in the shop was only escaping to save his life since people were gathered outside and the issue of stealing was no longer in his mind.

11. He argues that, PW4 stated very well that the man did not steal anything from the shop. It's also from the evidence of PW4 that the fugitive did not drop his shirt or ID where he fell down since on the material date no one reported of having collected the ID at the place of falling. But the report of the ID was brought after the arrest. It's possible that since at the time of arrest the appellant was drunk, the complainant could have come with his phone and pretended to have recovered it from me.

12. He submits that, the issue of the money also was reported as an afterthought, the alleged shop is just a kiosk locally instigated within a plot of resident. The same cannot hold such an amount of money.

13. He contends that it's true that in his defence he stated that he was once attending the complainant's car and washed it where he worked in a carwash. The complainant failed to pay him and again he was also complainant's tenant although they have a home where his mother resides. It is at a distance from complainant's shop. They know each other well.

14. The appellant contends that, if he was the person who stole from therein even the locals would have named him by name since he is popular character due to his hard work. The evidence of the PW4 was inconsistency and uncorroborated with that of the other witnesses. The other witnesses testified on what they don't know while PW4 being the source of everything alluded to what he saw and witnesses.

15. He argues that, there is clear indication that if the alleged ID was collected where the alleged fugitive fell, what made them to take the report of the ID the following day? It's crystal clear that this case was instituted maliciously in order to destroy appellant's life in order that he would not follow up his money which he was owed the complainant.

First appellate court duty:

16. The first appellate court is obliged to analyse and evaluate afresh all the evidence adduced before the lower court and to draw its own conclusions while bearing in mind that it neither saw nor heard any of the witnesses. See **Okeno vs Republic [1972] EA 32** where the Court of Appeal set out the duties of a first appellate court as follows:

“An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya vs. Republic (1957) EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vs. R. (1957) EA. 570). 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 finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should 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, see Peters vs. Sunday Post [1958] E.A 424.”

23. Similarly, in **Kiilu & Anor vs. Republic [2005]1 KLR 174**, the Court of Appeal stated thus;

“1. An Appellant on a first appeal 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.

2. 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; only then can it decide whether the Magistrate's findings should 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.”

EVIDENCE ADDUCED:

Prosecution's Case:

17. **Mohamed Hussein Ali (PW1)** testified that on 21st June 2018 around 2.10 am he received a call from his neighbour Ismail Ragoi Bule. Ragoi told him that his shop had been broken into. PW1 testified that he went to the shop and threw stones at the roof. It was PW1's evidence that after he threw the stones someone ran out of the shop in the process dropping his shirt. As the person was picking his shirt he also dropped his ID. PW1 told the court that he was in company of his wife Nasteha Maalim Ali.

18. According to PW1, Ismail and one Mohamed Abdisirat Khalif picked the ID. PW1 testified that in the morning he reported the matter at Wajir Police Station. After that he went to the Chief of Wagberi Location and gave him the ID they had collected. PW1 told the court that the ID bore the name Kassim. The chief took them to the appellant person's home. PW1 testified that the appellant person was arrested and a phone that was stolen from his shop was recovered from him.

19. According to PW1, when he left the shop it was closed. They found a wooden pole next to the shop's metallic door. It was his suspicion that the pole had been used to break into the shop. PW1 testified that Kshs.75,000/= was stolen from the shop.

20. In cross examination, PW1 testified that the appellant person was arrested by police officers who accompanied the chief. PW1 told the court that it was the appellant person's mother who directed them where the appellant person was. PW1 told the court that he did not have any relationship with the appellant person. He explained that the wooden pole was used to push the door and create a space.

21. **Nasteha Maalim (PW2)** testified that on 21st June 2018 around 2.00am their neighbour namely Ismail called her husband and told him that their shop had been broken into. PW2 told the court that they went to the shop and PW1 threw stones at the shop's roof. They were accompanied by their neighbours. PW2 testified that after the stones were thrown a person ran out of the shop in the process dropping his shirt and ID. PW2 told the court that the ID had the name Kassim Abdullahi Alasow. According to PW2, when they entered into the shop they found Kshs.75,000/= and a Nokia phone missing. PW2 testified that in the morning PW1 reported the matter to the police. According to PW2, the shop had been locked. It was further her testimony that the thief used a pole to pull the door apart.

22. In cross examination, PW2 denied that he had any relationship with the appellant person.

23. **Mohamed Abdisirat Khalif (PW3)** testified that on 21st June 2018 around 2.00 am he heard some noises coming from his neighbour's place. The neighbour was PW1. PW3 went to the place and found that PW1's shop had been broken into. He found PW1 and PW2 at the scene. PW3 testified that a pole had been used to break the shop. PW3 testified that the door had been pulled apart and the shop's lock was on the ground. According to PW3, someone ran out of the shop. Together with PW1 they gave a chase. The person dropped his ID. PW3 testified that in the morning he recorded a statement.

24. **Ismail Rahoy (PW4)** testified that on 21st June 2018 around 2.00am he was sleeping outside his house when he heard the door to PW1's shop being banged. PW1 called PW2 and informed him that his shop had been broken into. PW4 testified that he did not leave his compound. It was his testimony that PW1 threw stones at the shop's roof. According to PW4, at the point he saw a man escaping from the shop. The man was carrying a shirt. PW4 testified that PW1 and another person followed the suspect. PW4 testified that he saw an ID card on the ground. The same bore the name Kassim Alasow Abdullahi.

25. In cross examination PW4 testified that he did not see the appellant person into the shop. PW4 testified that he could not apprehend the appellant person because he was physically disabled.

26. **No. 100111 PC David Mutua** of Wajir Police Station (PW5) testified that on 21st June 2018 around 8.00 am PW1 reported to him that his shop at Halane had been broken into. PW5 told the court that PW1 reported that on the same day around 2.00 am his neighbour had called him and informed him of unusual noise coming from his shop. PW2 testified that PW1 and PW2 went near shop. PW1 threw stones at the shop's roof and a man came out of the shop. PW5 testified that he was told that the man dropped an ID bearing the name of Kassim Alasow Abdullahi in the process of escaping.

27. According to PW5, PW1 reported that he lost Kshs.75,000/= in the shop and a Nokia TA 1010 phone. PW5 testified that a cedar pole that had been used to break into the shop was found at the scene. PW5 testified that after the report was made he proceeded to the scene accompanied by PC Ochieng. They found that the door to the shop had been pulled apart. They also found the cedar pole at the scene. PW5 testified that the local chief led them to the appellant person using the ID that had been dropped at the scene. PW5 told the court that when they searched the appellant person they recovered the Nokia TA 1010 from him. It was PW5's testimony that the phone had a Safaricom line number 0720xxxxxx registered in the name of PW2. After the arrest PW5 took witness statements and charged the appellant person.

28. PW5 produced the Nokia TA 1010 as exhibit 1. He produced the appellant person's ID card as exhibit 2. The cedar post was produced as exhibit 3. PW5 produced the 5 photographs taken at the scene of crime as exhibit 4.

Defence Case:

29. The appellant person was found with a case to answer and placed on his defence. The appellant elected to give unsworn statement. He denied committing the offence. It was his defence that he was being framed for the offence. He denied that he dropped his ID at the scene of crime. According to the appellant person, he had issues with PW1. He explained that there was a time he cleaned PW1's car and PW1 failed to pay him. He reported the matter to the police. The appellant person also told the court that he used to be PW1's tenant.

ISSUES:

30. After going through the evidence on record and the submissions, I find the issues are; ***whether the prosecution proved its case beyond reasonable doubt? Was appellant defence considered?***

ANALYSIS AND DETERMINATION

31. PW1 testified that on 21st June 2018 around 2.00 am he received a call from PW4. PW4 told him that his shop had been broken into. PW4 corroborated this piece of evidence. According to PW1, after he threw stones at his shop he saw a suspect escaping. In the process of escaping the person dropped an ID Card bearing the name of Kassim.

32. The foregoing evidence was corroborated by PW2, PW3 and PW4. All the three witnesses were at the scene when the incident took place. PW2 and PW4 testified that the ID that was dropped on the ground bore the name Kassim Abdullahi Alasow. That is the appellant person's name. The appellant person in his defence denied that he committed the offence. It is not in issue that on the material night none of the prosecution witnesses identified the appellant person.

33. PW1 and PW5 testified that using the ID that was recovered at the scene the local chief assisted them to trace the appellant person. The appellant person did not challenge the evidence that his ID was picked from the scene. PW1 and PW5 testified that when the appellant person was arrested a Nokia TS 1010 phone that was stolen from the shop was recovered from the appellant person.

34. The appellant person merely denied that he stole the phone. His denial was an afterthought. The phone was recovered from the appellant person barely hours after the offence was committed. The appellant person did not offer explanation as to how he came into possession of the phone.

35. From the foregoing the court has no doubt that the appellant person was the person who entered into PW1's shop on the material night. Also the court has no doubt that it was the appellant person who stole Kshs.75,000/= that was in the shop.

36. PW1 testified that before the break in into his shop it was closed. He told the court that he found a wood outside his shop. PW2 testified that the appellant person used the pole to open the door. This was corroborated by PW3.

37. According to PW5, when they visited the scene they recovered the wooden pole that was used to break into the shop. The appellant person merely denied committing the offence. However, his denial did not convince the court that a wooden pole was used to open the door. From the foregoing I have no doubt that the door to PW1's shop was broken.

38. The court is of the view that, it was the appellant person who was in PW1's shop on the material day. Further he was the one who stole a sum of Kshs.75,000/= and a Nokia TA 1010 phone.

39. Having found that, the court has no doubt that it is the appellant person who broke into PW1's shop. The upshot of the foregoing is that the court finds that the prosecution case was proved beyond reasonable doubt. I therefore hold that the appeal has no merit and same is dismissed accordingly.

DATED, DELIVERED AND SIGNED AT GARISSA THIS 6TH DAY OF NOVEMBER, 2019.

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C. KARIUKI

JUDGE