



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

(CORAM: CHERERE-J)

CRIMINAL APPEAL NO. 18 OF 2019

BETWEEN

MARK OTIENO OWUOR.....APPELLANT

AND

REPUBLICRESPONDENT

(Appeal against conviction and sentence in Criminal Case Number 127 of 2017 the Senior Principal Magistrate's Court at Maseno by Hon. C.N.Oruo (RM) on 16th August, 2018)

JUDGMENT

1. **MARK OTIENO OWUOR**, the Appellant and another were jointly with charged with stealing by servant Contrary to Section 281 of the Penal Code (*the Act*).
2. The prosecution called 6 witnesses in support of the charges. **PW1 Mathews Apokolo Esikore** the complainant stated that he had employed the Appellant to roof his house and his co-accused as a storeman. He stated that on 24.03.17, he was informed him that his store had been broken into and items stolen from therein. He stated that he lost 180 iron sheets, 50kgs roofing nail and a roll of electric cable all valued at Kshs. 500,000/- out of which 62 iron sheets were recovered.
3. **PW2 Fredrick Omollo Olwande** from whom police recovered 60 iron sheets and a roll of electric cable said that they were sold to him for Kshs. 58,000/- by the Appellant on 24.03.17 and that he had already paid him Kshs. 50,000/-. He told court that he reported to the police after he was informed that some items had been stolen and that that was where he met the complainant.
4. **PW3 Linus Isabwa Janano**, stated that on 24.03.17, he sold a cow to the Appellant for Kshs. 14,000/- out of which he received Kshs. 7,000/-.
5. **PW4 Joseph Owino** stated that on 24.03.17, he worked at complainant's home with the Appellant who was the supervisor and others and left at 06.00 pm. It was his evidence that when they reported on duty the following day, they found the door to the store was broken into and the matter was reported to the complainant.
6. **PW6 CPL Moses Wangwe**, the investigating officer stated that after receiving complainant's report, he arrested Appellant and another who led him to PW2 from where he recovered some iron sheets and electric cables that had been stolen. He produced photographs of some iron sheets and electric cables as **PEXH. 1** to **PEXH. 3** and receipt for 200 iron sheets and 50 kg nails among other items as **PEXH. 4**.
7. In his sworn defence, the Appellant denied the offence. He denied selling any items to PW2 and stated that the exhibits were taken to the police station after his arrest.
8. In a judgment dated 16th August, 2018, the Appellant was convicted and sentenced to serve 5 years' imprisonment.

The Appeal

9. Being dissatisfied with the conviction and sentence, the Appellant lodged the instant Appeal on 09.05.19 raising 6 grounds of Appeal which I have summarized into 2 grounds **THAT**:

- 1) *His right under Article 49(1) (f) of the Constitution was breached*

2) The prosecution case was not proved

10. When the Appeal came up for hearing on 26.09.19, Appellant opted to wholly rely on his grounds of appeal and submission filed on 26.09.19.

11. The state submitted that there was evidence that the Appellant stole complainant's property and sold them to PW2 and that the sentence of 5 years was lawful since the section under which the Appellant was charged prescribes a sentence of 7 years.

Analysis

12. The duty of the 1st appellate court was explained by the Court of Appeal in the case of **Kariuki Karanja Vs Republic [1986] KLR 190** that: -

"On first appeal from a conviction by a judge or magistrate, the appellant is entitled to have the appellate court's own consideration and view of the evidence as a whole and its own decision thereon. The court has a duty to rehear the case and reconsider the material before the judge or magistrate with such materials as it may have decided to admit."

13. I have carefully considered the appeal in the light of the evidence on record and submissions filed on behalf of both parties and I will address the issues for determination as hereunder.

Was Article 49(1)(f) of the Constitution breached

14. Article 49 (1) provides that: **an arrested person has the right**

(f) to be brought before a court as soon as reasonably possible, but not later than—

(i) twenty-four hours after being arrested; or

(ii) if the twenty-four hours ends outside ordinary court hours, or on a day that is not an ordinary court day, the end of the next court day

15. There is evidence that Appellant was arrested on 25.03.17 which was Good Friday and was arraigned in court on 29.03.17 which was the Tuesday after Easter Monday. There was no delay in arraigning Appellant before the court and Article 49(1) (f) of the Constitution was therefore not breached.

Was the prosecution case was not proved beyond any reasonable doubt

16. None of the prosecution witnesses stated that they saw the Appellant steal the complainant's goods. Appellant's co-accused who was the one employed to guard complainant's premises stated that there were no iron sheets at the site and denied that any were stolen. In order to link the Appellant to the theft, prosecution relied on the alleged recovery of some of the stole items from PW2's shop. Appellant denied that he led police to PW2's shop and that any items were recovered from there. Evidence that the Appellant sold iron sheets to PW2's is that of PW2 against that of the Appellant. Similarly, the evidence of recovery is that of the investigating officer against that of the Appellant. The investigating officer did not prepare an inventory of the recovery. The uncorroborated evidence of the sale and recovery having been denied by the Appellant cast a doubt on the prosecution case which ought to have been construed in Appellant's favor.

Determination

17. From the preceding analysis, I am in agreement with the Appellant that the evidence presented by the prosecution is not watertight. I therefore find that the conviction and sentence entered against the Appellant was not safe and ought not be allowed to stand. I allow the Appeal, quash the conviction and set aside the sentence. I order that the Appellant should be set be at liberty unless otherwise lawfully held.

DELIVERED AND SIGNED IN KISUMU THIS 07th DAY OF November 2019

T. W. CHERERE

JUDGE

In the presence of-

Court Assistant - Amondi/Okodoi

Appellant - Present in person

For the State - Ms. Gathu