REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

CRIMINAL APPEAL NO. 155 OF 2017

(FORMELY MACHAKOS HCRA NO. 17 OF 2017)

STEPHEN MUTUA…….……..…. APPELLANT

-VERSUS-

REPUBLIC……..……....RESPONDENT

JUDGEMENT

INTRODUCTION

1. The appellant was tried and convicted by Hon. P. Wambugu (SRM), Kilungu Law Courts, for the offence of breaking into a building and committing a felony therein contrary to Section 306(a) of the Penal Code. He was sentenced to 4½ years imprisonment.

2. Being dissatisfied with the conviction and sentence, the appellant through his Advocate filed an appeal on 21st November 2016 and raised the following grounds:

> ***i. That the learned trial Magistrate erred in law and fact by delivering a judgment and convicting the appellant on the basis of evidence which was full of contradictions and which ought to have been interpreted in favour of the appellant.***
>
> ***ii. The learned trial magistrate erred in law and fact by convicting the appellant on a charge that was not proved beyond reasonable doubt.***
>
> ***iii. The learned trial magistrate erred in law and fact by failing to consider and appreciate the evidence tendered by the appellant in his defence.***
>
> ***iv. The learned trial magistrate erred in law and fact by shifting the burden of proof from the prosecution to the appellant.***
>
> ***v. The learned trial magistrate erred in law and fact by dismissing the testimony of the appellant as sham, unbelievable and in bad taste.***

PROCEEDINGS BEFORE THE TRIAL COURT

3. **PW1** was **Sergeant Julius Nzomo**. He said that both accused persons were known to him. The first accused was the assistant chief, Ndiani sub location while the 2nd accused became known to him during the arrest. He recalled that on 23rd September 2014, at around 8.20 p.m., while at the AP camp, they

received a tip off from the public. They were told that strange noises were emanating from the chief's office, about 100 meters' from the camp.

4. Together with APC George Muthiani, they headed there and hid along the fence to survey what was happening. They saw a person standing by the wall outside and another inside the corridor against a window. They could also hear dragging noises. They illuminated them with a torch and then headed towards them. The one on the corridor started to run away and dropped the jerry can. He was however able to arrest him (1st accused).

5. APC George Muthiani was able to arrest the 2nd accused (appellant herein). He had four jerry cans inside a bag. They then called the area chief whose office was broken into. She went to the scene, opened the store and they checked inside.

6. The store had relief food in bags and cartons donated by the Government of Kenya. One window was opened and a carton was on the window site. It had only one jerrycan inside. The jerry cans had vegetable cooking oils. Each jerry can was 3 litres. They therefore recovered 15 litres of vegetable oil.

7. He marked the jerry can dropped by the 1st accused as MFI-1. It was a Government Issue. The 4 jerry cans recovered from the 2nd accused were marked as MFI-2. The sack was marked as MFI-3.

8. They interrogated the accused persons but they remained silent. According to PW1 they gained access through the window as it was open. They escorted them to Kilome police station where they recorded statements and handed over the exhibits. On cross examination, he stated that they found the accused persons in the act.

9. **PW2** was **Ann Nduku Mwau,** the chief of Kithembe Location. She stated that both accused persons were known to her. She said that there is a store in her office where relief food is stored. In September, the store had; maize beans and oil.

10. On 23rd September, 2014 while at home, she received a call from PW1 who told her that they had caught the two accused persons stealing relief food. She went there and found that they had arrested the two accused person and had also recovered the stolen items. They were seated at the door to the office. The window was opened. The window had been broken into. She went into the store and discovered that she had lost 3 jerry cans of oil. On cross examination, she stated that the (DSCC) Sub County Committee is the one that keeps the inventory. She said that they kept records but had not presented any in Court.

11. **PW3, George Muthiani,** an Administration Police Constable stated that on 23rd September 2014, he was called by PW1 and informed that there was noise at the chief's office. They proceeded there and found the two accused persons passing cooking oil through the window. One was on the corridor while the other one was outside. He arrested the one outside while PW1 arrested the one on the corridor. They found them with oil. They called Kilome chief and the police station. On cross examination, he stated that they found the accused persons in the act.

12. **PW4, PC Wilson Nderitu** of Kilome Police station crime branch stated that on 23rd September 2014, he was at his house when he received a call from the OCS and informed about a case that had been reported and suspects arrested with stolen goods. He proceeded to the police station and found PW1, PW2 and the two accused persons. They also had a sack which contained five jerry cans of vegetable oil. He booked the accused persons.

13. On 24th September, 2014, he visited the chief's office and was shown the scene. He saw an open window and it was grilled. According to him, the accused persons could pass in through the top. There were fifty cartons of oil inside as well as maize. On carton had been pulled to the window. He charged the accused persons with the offence before Court. The jerry cans belonged to the Government of Kenya. The sack was used to carry the items. He produced them as exhibits.

THE SUBMISSIONS

14. When the appeal came up for hearing on 31st October 2017, the appellant was represented by learned Counsel Mr. Mwongela and the state was represented by learned prosecution Counsel Mr. Kihara. Both of them highlighted their written submissions.

15. Mr. Mwongela submitted that the evidence used to convict the appellant was full of contradictions. For instance, PW1 testified that he arrested the appellant and his accomplice with 5 jerry cans of oil while on the other hand; PW2 testified that she had lost 3 jerry cans of oil. According to him, the learned trial magistrate did not address himself as to the quantity of oil stolen if any.

16. He went on to submit that the learned trial magistrate did not take into consideration the appellants testimony and that in light of the contradictions in the prosecution case, he should have believed that the appellant was actually framed by PW1 and PW2 because he (appellant) refused to bribe them.

17. It was his further submission that the learned trial magistrate tended to shift the burden of proof to the appellant contrary to the law. According to him, the sentiments of the learned trial magistrate i.e. saying that the defence was a sham, were in bad taste and showed bias. He urged the Court to allow the appeal.

18. In opposing the appeal, the learned prosecution Counsel submitted that the charges against the appellant were proved beyond reasonable doubt. He submitted further that PW1 who was on the ground on the material day heard strange noises emanating from the chief's office and proceeded to confirm what was happening in the company of PW4. They found the appellant in the act and apprehended him.

19. According to the prosecution Counsel, the learned trial magistrate analyzed the evidence properly and was satisfied that the appellant had committed the offence. He submitted that the defence was weak and incredible. He urged the Court to dismiss the appeal. In the written submissions however, the prosecution prayed for a re-trial on the basis that the appellant did not cross-examine the complainant.

DUTY OF COURT

20. The duty of a first appellate Court was set out in the celebrated case of **Okeno V. Republic (1972) E.A. 32** in the following terms;

> ***"An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to afresh and exhaustive examination (Pandya Vs. Republic (1957) EA. (3365) 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) E.A. 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 Vrs. Sunday Post [1958] E.A. 424."***

ANNALYSIS

21. **Section 306** of the Penal Code, Chapter 63 Laws of Kenya provides as follows;

Breaking into building and committing felony

Any person who—

> ***(a) breaks and enters a schoolhouse, shop, warehouse, store, office, counting-house, garage, pavilion, club, factory or workshop, or any building belonging to a public body, or any building or part of a building licensed for the sale of intoxicating liquor, or a building which is adjacent to a dwelling-house and occupied with it but is not part of it, or any building used as a place of***

worship, and commits a felony therein; or

(b) breaks out of the same having committed any felony therein, is guilty of a felony and is liable to imprisonment for seven years.

22. From the judgment of the learned trial magistrate, it is clear that the 5 jerry cans of cooking oil and a sack were produced as evidence before the trial Court.

23. PW1 and PW3 (*indicated on the record as PW4*) were the arresting officers. Their evidence was to the effect that they caught the appellant and his accomplice in the act and recovered 5 jerry cans of cooking oil as well as the sack that was used to carry. Their evidence was direct and corroborative.

24. PW4 (*indicated on the record as PW 5*) proceeded to Kilome police station upon being informed that a case had been reported and suspects had been arrested. He found the appellant with his accomplice as well as PW1 and PW3. He also stated that they had a sack and 5 jerry cans. Clearly, his evidence corroborated what PW1 and PW3 had said.

25. The only point of departure, in my view, was in the evidence of PW2, who testified that upon being informed that theft had occurred in her office, proceeded there and confirmed that she had lost 3 jerry cans of oil. She however proceeded to say that the jerry cans of oil were packed in cartons and one carton would contain 6 jerry cans. In his evidence, PW1 testified thus;

"One window was opened and a carton was on the widow site and had only one jerry can inside"

26. The import of this is that it further corroborated the evidence of PW1, 3 and 4 that indeed the number of jerry cans recovered from the appellant and his accomplice was 5. It is my considered view that the mention of 3 jerry cans by PW2 was inadvertent and a minor contradiction in light of the overwhelming evidence by the other prosecution witnesses. Of importance is that she confirmed that theft had actually taken place in her office.

27. The appellant chose to give an unsworn statement which was well within his rights. He testified that on the material day, he was at Nunguni Market where he met his accomplice. They went to sweet waters bar. At 7.30 p.m. they headed home and on the way, they got a lift from the Administration Police (AP) vehicle. He saw gallons of oil in the vehicle. The AP officers asked *(from appellant)* for what had remained after drinking. They were then taken to the police station and charged with the offences.

28. I keenly looked at the defence offered by the appellant's accomplice before the trial Court and noted that he did not mention the gallons of oil anywhere. In my view, if indeed they were given a lift by the AP vehicle and there were gallons of oil inside and then charges of stealing oil were preferred against them, there is no way he would have failed to mention it in his defence. It is also noteworthy that the appellant's accomplice did not prefer an appeal.

29. Further, I noted that while the appellant was cross examining PW2, he asked her questions about the circumstances of his arrest. PW2 responded as follows;

"I don't know the circumstances of your arrest. I don't know whether you were arrested between sweet waters and Joyland bar"

30. The appellant seemed to be suggesting that they were arrested between sweet waters and joyland bar yet in his defence, the implication is that they came into contact with the AP officers because they had been offered a lift in their vehicle. It is my considered view that the appellant's defence was an afterthought and the learned trial magistrate rightly dismissed it.

31. Further, the appellant in his defence testified that the case against him and his co accused was a frame up because they refused to give the AP officers a bribe. The suggestion that they were offered a lift which they readily accepted indicates that they related cordially with each other. It therefore beats logic

that the officers would suddenly turn around and frame them with theft charges.

32. The issue of re trial raised in the prosecution's submissions does not hold as it is clear from the record that the appellant cross-examined all the prosecution witnesses.

CONCLUSION

The appeal is therefore dismissed and sentence affirmed.

SIGNED, DATED AND DELIVERED THIS 10TH DAY OF APRIL, 2018, IN OPEN COURT.

C. KARIUKI

JUDGE

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