REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

CRIMINAL APPEAL NO. 62 OF 2017

DAVID NGALA)

JOSEPH KIOKO)

MWEMA KASYOKA)..............................APPELLANTS

VERSUS

REPUBLIC..RESPONDENT

(Being an Appeal from the conviction and sentence of ***Hon. T. Odera***

(Principal Magistrate) in Mavoko Principal Magistrate's Court

Criminal Case number 946 of 2013 *delivered on 24th May, 2016)*

JUDGEMENT

1. This appeal arises from the conviction and sentence of Hon T. Odera Principal Magistrate delivered on the 24/05/2016 in **Mavoko Criminal Case Number 946 of 2013** wherein the Appellants were each sentenced to five (5) years imprisonment for the offence of Godown breaking and stealing contrary to Section 306 (a) as read with Section 306(b) of the Penal Code.

2. The Appellants were aggrieved by the sentence and conviction and raised the following grounds of appeal namely:-

> *(i)* ***That the learned Trial Magistrate erred both in law and fact by convicting the Appellants on contradictory, inconsistent and patently doubtful evidence.***
>
> *(ii)* ***That the learned Trial Magistrate erred both in law and fact by convicting the Appellants on circumstantial evidence of the weakest kind.***
>
> *(iii)* ***That the learned Trial Magistrate misdirected herself both in law and fact by convicting the Appellants despite the fact that the prosecution had not proved their case beyond reasonable doubt.***
>
> *(iv)* ***That the learned trial magistrate erred in law and fact by relying on identification evidence that was not free from possibility or error.***
>
> *(v)* ***That the learned Trial Magistrate misdirected herself both in law and fact by convicting the Appellants by relying on faulty, contradictory and discredited prosecution evidence to connect the Appellants to the offences.***

3. This being a first appeal, this court's duty is to re-evaluate the evidence and subject it to a fresh analysis and to come to its own independent conclusion bearing in mind that it neither saw nor heard the witnesses testifying and to make an allowance for that (see **OKENO =VS= REPUBLIC [1972] EA 32).**

4. The brief circumstances of the case as presented before the trial court is that the Appellants were alleged to have broken and entered a building namely a Godown belonging to Netsol Limited and did steal from therein ***5 drums of 500 metres of 50 mm blue/black/yellow green power cables***, ***600 metres of 16mm blue/black power cables***, ***320 metres of 16mm blue/black power cables, 4 numbers of 4bs delta***

batteries, ***3.3. mm 2 core power cables***, ***4 pairs of safety boots*** and ***10 pairs of alarm cables*** all valued at Khss.7,250,000/= the property of Netsol Limited.

5. **Faith Consolata Maina (PW.1)** was the Warehouse Manager Semco Industrial Park and who testified that she reported for duty and was shocked to find the key to the go-down had been tampered with and on entering the premises discovered several items as listed on the particulars of the charge sheet missing. She was able to account for the said items having received them as per the goods issue and delivery notes which were produced as exhibits. She prepared an inventory of the stolen items as well as that concerning some of the stolen goods recovered which she positively identified in court.

6. **Julius Nyakundi (PW.2)** was a Security guard employed by Fidelity Security Company. He testified that he was on duty on the date of the incident namely 24/08/2013 at about 6 p.m. when two persons arrived who introduced themselves as employees of the complainant and had been sent to the Complainant's premises by their boss to collect some items. A colleague of the witness confirmed to him that indeed the two gentlemen indeed worked for the complainant. A lorry registration number KAR 040 E was used to ferry items from the complainant's go - down.

7. **Jacob Odhiambo Owour (PW.3**) was also a Security guard employed by Fidelity Security Company and he testified that he was on duty on the 25/08/2013 when the 2nd Appellant herein altered the details of the motor vehicle that had ferried goods the previous date that had been indicated on the vehicle movement book as KAR 040 E to read KAB 049E and on enquiring from him as to why he did that the 2 nd Appellant declined to Respondent and he reported the 2nd Appellants action to the operations manager.

8. **Festus Kamache Kiilu (PW.4)** stated that he was a Security guard employed by Fidelity Security Company and was on the material date on guard duties with PW.2 when Motor vehicle KAR 040 E which the 3rd Appellant confirmed to them that they had been waiting for the same and which later ferried goods form the Complainants stores. He confirmed that the details of the vehicle's number were changed the following day on the vehicle movement record book to read KAB 049 E.

9. **Benard Kingori Njoroge (PW.5)** was the complainant's store keeper. He confirmed picking some goods from Andy Company limited and delivering them to the complainant on the 15/08/2013. He identified the recovered goods as comprising those he had delivered earlier.

10. **Kangangi Ngala (PW.6)** was the manager at the complainant's go-down Number 7. He confirmed identifying the recovered stolen goods.

11. **Inspector Richard Yego (PW.7)** conducted a police identify-cation parade in respect of the 1st Appellant herein and prepared the identification parade form.

12. **Benjamin Obonyo Opita (PW.8)** was a staff of Safaricom Co. limited as a Senior Materials Inspector and confirmed that the complainant was one of their contractors and he confirmed having checked the cables and batteries that had been delivered to the complainant.

13. **Jacinta Wanjiku Munene (PW.9)** was the sales administrator at Matsec Cables Company that supplied cables to the complainant. She identified the delivery notes.

14. **James Kinyua Wanjiku (PW.10)** was a store keeper at the Complainant's premises. He reported for duty on the 26/08/2013, only to find that the go-down had been broken into and several rolls of cables and batteries stolen.

15. **Corporal Allan Adalo (PW.11)** was the investigating officer in the matter. Upon receipt of the incident, he visited the scene and confirmed that the complainants go-down number 5 had been broken into and several rolls of cables and batteries stolen. He dusted the scene and recorded statements of witnesses. He organized for a police identification parade and later managed to obtain some leads and which resulted in the recovery of some of the stolen properties which were positively identified in court.

16. All three Appellants were found to have a case to answer and were subsequently put on their defence. The 1st Appellant denied being at go-down number 5 on the date of the incident. The 2nd Appellant who was a security guard admitted having visited the premises to request a colleague to relieve him on 31/8/2013. He denied altering the details on the vehicle movement record. The 3rd Appellant opted to remain silent in defence.

17. Learned counsels for the parties herein agreed to canvass the appeal by way of written submissions. I have considered the said submissions and the authorities in support of thereof. It is not in dispute that the complainant's go-down number 5 was broken into and several rolls of cable as well as batteries stolen. It is also not in dispute that some of the stolen goods were recovered and positively identified by the complainant's staff as well as its contracted suppliers. I find the following issues necessary for determination namely:-

(i) Whether the charge preferred against the Appellants was duplex and whether the same prejudiced the Appellants.

(ii) Whether the case is one suitable for a retrial.

18. As regards the first issue, it is noted that the Appellants had been charged with the offence of Go-down breaking and committing a felony contrary to Section 306 (a) as read with Section 306 (b) of the Penal Code. The two provisions appear to create two scenarios of offences by stating as follows:-

“**Any person who –**

(a) Breaks and enters a school house, shop, warehouse, store, office, counting house, garage, pavilion, club, factory or workshop, or any building belonging to a public body, 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.

From the above definition of the offence it is clear that the offence has two limbs namely breaking into and breaking out with the key denominator being the commission of a felony. Each of these scenarios if proved will attract the sentence of seven years. The duplicity has been brought about by the use of the work “*or*” which clearly shows that each limb in itself creates an offence and one can be convicted on all or either of the two limbs. The trial court did not bring out the difference in the two limbs so as to enable the Appellants properly plead to the charges. Again even in the final analysis upon conviction the trial court ought to state exactly the limb or limbs that have been established. The trial court therefore erred when it treated the main charge as a single offence both at the stage of taking the plea all the way through the hearing upto the judgment and sentencing. In the circumstances, I find that the Appellants were greatly prejudiced due to the duplicity of the charge. This state of affairs clearly went against the clear provisions of Section 134 of the Criminal Procedure Code which demands that offences should be specified in the charge of information with necessary particulars as follows:-

“***Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged.”***

It is noted that the trial proceeded upto the end and that the Appellants and their learned counsels did cross – examine the witness. The duplicity of the charge still remained as a sore thumb throughout the proceedings and there was therefore serious prejudice occasioned to the Appellants. I find the said prejudice could not be cured under Section 382 of the Criminal procedure code due to the miscarriage of justice. The several attempts made at amending the charges did not eventually cure this apparent defect.

19. Turning to the second issue, it is noted that the Respondent’s counsels has submitted that a retrial should be ordered. On the other hand the counsel for the Appellants submits that an acquittal should be the case. An order for retrial ordinarily arises in circumstances where the original trial was illegal or defective. In the case of **HORACE KITTI MAKUPE =VS= REPUBLIC CR A NO.93 OF 1983** the court of appeal held as follows:-

“***In general, a retrial will be ordered when the original trial was illegal or defective. It will not be ordered where the conviction is set aside because of the insufficiency of the evidence or for prosecution to fill up gaps in the evidence at the trial. Even where a conviction is vitiate by a mistake of the trial court for which the prosecution is to blame, it does not necessarily follow that a retrial should be ordered; each case must depend on its particular facts and circumstances and an order for retrial should only be made where the interest of justice require it and should not be ordered where it is likely to cause an injustice to the Appellant or accused.***

A similar position was held by the East African Court of Appeal in the case of **FATEHALI MANJI =VS= REPUBLIC [1966] EA 343.**

The case for the Respondent herein did proceed with eleven (11) witnesses being called. There was evidence that the complainant’s go-down had been broken into and goods stolen some of which were later recovered and positively identified and produced as exhibits. There is therefore sufficient evidence to support the charge against the Appellants to warrant a retrial since there is a high likelihood of a conviction eventually. I note that the Appellants have hardly served a fraction of the sentence imposed by the trial court and as such I find there is no prejudice occasioned if a retrial is ordered in this matter.

20. In the result the Appellants appeal succeeds to the extent that the conviction by the trial court is hereby quashed and the sentence set aside and is substituted with an order for a retrial. The Appellants are ordered to be remanded in police custody at Athi River police station and to be produced before the Senior Principal Magistrate’s Court Mavoko on the 8th October, 2018 for the purposes of retrial.

Orders accordingly.

Dated and delivered at MACHAKOS this 4th day of October, 2018.

D. K. KEMEI

JUDGE

In the presence of:-

All the three Appellants - present

Munyasya for the 3rd Appellant – Absent

Machogu for Respondent- present

Josephine - Court Assistant