



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO. 10 OF 2018

ABDI NOOR YUSSUF.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the conviction and sentence in Wajir Senior Resident Magistrate Criminal Case No. 341 of 2017 by Hon. A. K. Mokeross (SRM))

JUDGMENT

1. The appellant was charged in the Magistrate's Court at Wajir with house breaking contrary to section 204 (1) (b) and stealing contrary to section 279 (b) of the Penal Code. The particulars of the offence were that on dates between 31st July to 3rd August 2017 at Barwaqo Location in Wajir East Sub-County within Wajir County broke and entered the building used as a dwelling house by Eunice Kithumbi John and stole 1 Sony TV valued at Ksh.11,500/=, 1 Sony recorder valued at Ksh.3,800/= 1 GEK hair drier machine valued at Kshs.5,000/=, 1 Ampex Woofer valued at Kshs.4,000/=, 19 Avvs Short Hair pieces valued at Kshs.1,900/=, and a complete gas cooker valued at Kshs.7,000/= all valued at Kshs.33,200/= property of Eunice Kithumbi John.

2. In the alternative, he was charged with handling stolen goods contrary to section 322 (1) (2) of the Penal Code. The particulars of the offence were that on 3rd August 2017 at Wajir township in Wajir East Sub-County within Wajir County otherwise than in the course of stealing dishonestly retained 1 GEK hair drier and 19 Avvs hair pieces knowing or having reason to believe them to be stolen.

3. He denied both charges. After a full trial, he was convicted on the main count of house breaking and stealing and sentenced to four (4) years imprisonment on the first limb of house breaking and two (2) years imprisonment for stealing and sentences ordered to run concurrently which meant a total prison sentence of four (4) years.

4. The appellant has now come to this court on appeal. He filed his appeal in February this year. Before the appeal was heard however, he filed an amended petition of appeal as well as written submissions which he relied upon. His grounds of appeal are as follows-

- (1) The trial magistrate did not consider that the offence was committed three (3) days prior to the arrest and recovery of the properties hence the doctrine of recent possession could not be applied.**
- (2) The trial magistrate erred in convicting and sentencing him while the evidence tendered was of possession.**
- (3) Mode of arrest was poorly conducted.**
- (4) The magistrate failed to consider that the prosecution failed to discharge the burden of proof to the required standard.**
- (5) The trial magistrate failed to consider the many contradictions in the prosecution evidence.**
- (6) The trial magistrate failed to put into account his defence and the existing grudge between him and the complainant.**
- (7) The trial magistrate did not consider that investigations did not go to the roots of the case.**

5. At the hearing of the appeal, the appellant elected to rely on his written submissions and did not highlight the same. I have perused and considered the written submissions of the appellant.

6. The learned Principal Prosecuting Counsel Mr. Okemwa supported the conviction and sentence and opposed the appeal. He stated that the complainant pretended to be a purchaser of the goods and the appellant was thus found in recent possession of the goods and did not give an

explanation on how he came to possess the same. According to counsel, the appellant in his long defence did not shake the prosecution evidence on record. Counsel submitted that the appellant was lucky because the magistrate elected not to go by the alternative charge of handling stolen goods which had a more severe sentence, and added that offences of house breaking and theft and those of assault on parents were common in Wajir and the magistrate was thus correct in handing down deterrent sentences.

7. This is a first appeal and as a first appellate court, I am required to re-evaluate the evidence on record and come to my own conclusions and inferences. In doing so, I am required to consider that I was not able to see prosecution witnesses testify in order to determine their demeanor. See the case of **Okeno vs Republic [1972] EA 32**.

8. I have considered the evidence on record. I have perused the judgement. I have considered the submissions both of the appellant as well as those of the Prosecuting Counsel. The appellant has raised several grounds on appeal.

9. The appellant has complained about his mode of arrest. He was arrested when the police were called by other witnesses who stated that they saw him attempting to sell some stolen items. I do not see anything that was illegal or irregular about the arrest of the appellant.

10. From the evidence on record, the shop of the complainant was broken into and some items stolen. The next day, the complainant PW1 Eunice Kithumbi John called a friend PW2 Juliana James and told her to be on the lookout for anybody selling suspicious items. Juliana James was a saloonist at Soko Dike in Wajir and at around 9 am on 3rd August 2017 the appellant approached her to buy some items which she suspected to be those allegedly stolen from her friend. The appellant offered for sale a blow drier and hair pieces. He said that the blow drier was going for Kshs.1,500/= and the hair piece was going for Ksh.10/=. PW2 then called the complainant PW1 who came with her husband and PW1 pretended to be a purchaser

while the husband moved away and called the police by pretending to be going to collect the money. The police came and arrested the appellant.

11. In my view, the appellant was either the thief or the handler of those recently stolen items. The doctrine of recent possession applied squarely in this case, and it was for the appellant to explain how he came into possession of those items three days after the theft, which he did not do in his long unsworn defence. In my view therefore, the learned magistrate was justified in convicting the appellant for the main count of house breaking and theft as the incident had occurred less than four (4) days earlier.

12. When the appellant says that there were contradictions in the prosecution evidence, my perusal of the record of the evidence shows that there were no such contradictions. I thus find that, that ground of appeal has no basis.

13. From the totality of the evidence on record, I find that the prosecution proved the main count against the appellant beyond any reasonable doubt. The sentence is also a lawful sentence.

14. I thus dismiss the appeal and uphold both the conviction and the sentence of the trial court. Right of appeal within fourteen (14) days.

Dated and delivered at Garissa this 7th day of November, 2018.

George Dulu

JUDGE