REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO. 35 OF 2016

ALEXANDER SYENGO MBUVI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being appeal against conviction and sentence in Garissa Chief Magistrate Criminal Case No. 1192 of 2014 by V.K. ASIYO (SRM)

JUDGEMENT

1. The appellant **Alexander Syengo Mbuvi** was charged in the Magistrate's Court at Garissa Criminal Case No. 1192 of 2014 with three others with breaking into a building and committing a felony contrary to section 304 (a) of the Penal Code. The particulars of the offence were that on 5th July 2014 at Grey Line Tech Shop within Garissa township jointly broke and entered a building namely a shop of Mohamed Bare Ismail with intent to steal and did steal therein mobile phones Nokia 205 X2, Tecno 3741, Nokia 205 C8, Viniko V929EE 15, City Call AI, Tecno T36, SQN 800, SQG 9K 18, OK 60QN 6000, Nokia 100, Safaricom scratch cards valued at Kshs.10,000/= all valued at Kshs.241,900/= the property of the said Mohamed Bare Ismail.

2. In the alternative, he was charged with handling stolen goods contrary to section 322 (1) of the Penal Code. The particulars of the offence being that on the 5th July 2014 at Garissa township within Garissa County otherwise than in the course of stealing dishonestly undertook the retention of one mobile phone make G9 while knowingly or having reasons to believe it to be stolen goods.

3. Under Count 2 he was charged with three others with breaking into a building and committing a felony contrary to section 304 (a) of the Penal Code. The particulars of the offence were that on the same 5th July 2014 at Daryeal shop within Garissa township they jointly broke and entered a building namely a shop of Quresh Adan Muhumed with intent to steal therein mobile phones Asha 200, Nokia 202, Nokia IUIA 520, Itel 5150, Y210 and cash Kshs.500,000/= all valued at Kshs.734,400/= the property of Quresh Adan Muhumed.

4. His co-accused David Peter Makau was charged with an alternative count of handling stolen goods in which the appellant was not charged.

5. The 1st accused was separately charged with Count 3 for neglect to prevent a felony contrary to section 392 of the Penal Code.

6. The appellant and his co-accused pleaded not guilty and were tried. The learned magistrate in a judgement delivered on 8th July 2016 concluded as follows-

"The upshot of this is that in Count 1 both accused persons are acquitted under section 215 of the Penal Code for the offence of breaking into a building and committing a felony contrary to section 304 (a) of the Penal Code. I invoke section 382 of the Criminal Penal Code (sic) in rectifying an error in the alternative count to Count 1. It should have read handling stolen goods contrary to section 322 (1) and (2) of the Penal Code.

I thus convict the 2nd accused under section 215 of the Criminal Penal Code (sic) for the offence of handling stolen goods contrary to section 322 (1) and (2) of the Penal Code.

I also invoke section 382 of the Criminal Penal Code in rectifying Count 2. It should have read breaking into a building and committing a felony contrary to section 304 (1) (a) of the Penal Code. The 1st, 3rd and 4th accused persons are hereby acquitted under section 215 of the Criminal Procedure Code for the offence of breaking into a building and committing a felony contrary to section 304 (a) of the Penal Code. However, the 2nd accused is convicted under section 215 of the Criminal Penal Code for the offence of breaking into a building and committing a felony contrary to section 304 (1) (a) of the Penal Code.

I further invoke section 382 of the Criminal Penal Code in rectifying the error in the alternative count to Count 2. It should have read handling stolen goods contrary to section 322 (1) and (2) of the Penal Code. I thus convict the 3rd accused under section 215 of the Criminal Procedure Code for the offence of handling stolen goods contrary to section 322 (1) and (2) of the Penal Code.

The 1st accused is acquitted under on Count 3 under section 215 of the Criminal Penal Code for the offence of neglect to prevent a felony contrary to section 392 of the Penal Code."

7. It should be noted that the 2nd accused referred to by the trial court above, is the appellant herein **Alexander Syengo Mbuvi**.

8. Consequent upon the above convictions, the trial court sentenced the appellant to serve five (5) years imprisonment for the alternative count to Count 1. He also sentenced him to serve three (3) years imprisonment on Count 2, the sentences to run concurrently, which sentence was pronounced after a Probation Officer's report was brought to court. It is not clear whether the other convicted person, the 3rd accused was placed in a Borstal Institution as intended. From the record however, the magistrate noted that the Probation Officer's report was favourable to both the appellant and his co-accused who had been convicted but the magistrate felt that a custodial sentence was necessary for the appellant.

9. Aggrieved by the decision of the trial court, the appellant has come to this court on appeal. He filed his petition of appeal in 2016. Before his appeal was heard, and with the permission of this court, the appellant filed an amended petition of appeal which he relied upon as well as written submissions. His grounds of appeal are as follows-

(1) The trial magistrate erred in law and fact to convict him without considering that the charge sheet relied upon was fatally defective.

(2)The trial magistrate erred in convicting him without considering that his fundamental rights were infringed when he opted to amend the charges during judgement yet he was not called upon to take plea for new charges.

(3)The trial magistrate erred in law and fact to allow the prosecution to recall a witness at the defence hearing after closure of the prosecution case.

(4)The trial magistrate erred in noting that the probation report was favourable to both accused persons and yet failing to comply with the same claiming that the case attracts custodial sentence without cogent explanation.

(5)The magistrate erred in convicting him without considering that the first report and the defence evidence of the 1st accused were a clear indication of the appellant's innocence.

(6)The magistrate erred in law and fact in convicting him without considering that there was no identification at the scene of crime nor was there a parade conducted to confirm the prosecution witnesses' allegations.

(7)The trial magistrate erred in law and fact in convicting him without considering that upon arrest and search conducted he was not found with any incriminating item and the phone alleged to be in his possession was recovered from PW2.

(8)The magistrate erred in convicting him without considering that prosecution evidence was contradictory and full of inconsistences.

(9)Trial magistrate erred in convicting him without considering that the prosecution failed to prove their case beyond reasonable doubts as required.

(10) That his cogent defence was enough to rebut the prosecution witnesses' evidence adduced in court.

10.At the hearing of the appellant's appeal, he relied on written submissions which I have perused and considered. He added verbally that he had applied for release of his items which were still in the custody of the police including his motorcycle.

11. In response, Mr. Okemwa the Principal Prosecuting Counsel stated that the appellant was charged jointly with others who totaled four (4) people and some were acquitted but he was found guilty. Counsel submitted that the magistrate narrowed down the charges to two offences of house breaking and handling. Counsel said that there was evidence that the shop of Mohamed Bare, and another shop of Adan Mohamed were broken into and also that a phone stolen from the shop was found in the possession of the appellant.

12. Counsel emphasized that the appellant had sold the phone to another person which was the reason he was convicted of handling. Counsel urged this court to uphold the conviction. Counsel noted however that there was an anomaly on the charge sheet but stated that the magistrate properly used the court's power under section 382 of the Criminal Procedure Code and rectified the mistake.

13. Counsel went on to add that in **Garissa High Court Criminal Appeal No. 96 of 2012, Alexander Syengo Mbuvi & Another vs Republic,** the appellant was acquitted merely on a technicality. He stated that the alleged items of the appellant that were taken by the police were not related to the present case. Counsel however stated that he would inform this court about those items before judgement day.

14. In response to the Prosecuting Counsel's submissions, the appellant stated that the items which were taken by the police from him were mentioned in the present proceedings and were part of the list of exhibits herein. He stated also that he raised the issue on the first and second day of the proceedings in the trial court.

15. I have considered the appeal and the submissions on both sides.

16. During the trial, the prosecution called four (4) witnesses. The appellant and his co-accused also gave their defence testimonies. The appellant tendered a long sworn defence and was cross-examined at length.

17. This being a first appeal, I am required to re-evaluate all the evidence on record and come to my own conclusions and inferences. I am required to bear in mind that I did not have the opportunity to see witnesses testify and give due allowance to that fact. See the case of **Okeno vs Republic [1972] EA 32**.

18. I have re-evaluated the evidence on record. I have perused the judgement. I have considered the

grounds of appeal as well as the submissions both written and oral on both sides.

19. Indeed, no one witnessed the breaking in to the shop of the complainants. The incident occurred at night. The 1st accused in the trial court was a watchman at Greyline Technology Shop belonging to Mohamed Bare Ismail. He was acquitted. The appellant on the other hand, who was the 2nd accused, was convicted of handling stolen goods in relation to a mobile phone that was from this shop.

20. The 3rd accused was convicted of one offence of handling stolen goods, but the sentence of the trial court is not clear.

21. From the evidence on record, after the breaking incident there was information in Garissa town that somebody was selling mobile phones, and what transpired thereafter was what led to the appellant's arrest, his being charged in court, convicted and sentenced.

22. The evidence against the appellant with regard to his conviction for handling stolen goods on Count 1 relates to his having been identified as a seller of a phone to another person, which phone was said to come from the shop described in Count 1. The evidence on record, in my view was not adequate to establish that indeed the phone was sold by the appellant. The prosecution did not establish that he sold the phone.

23. With regard to his conviction on the main Count 2 for the breaking into a building and committing a felony, the evidence on record is also far from establishing to the standards required in the criminal case that indeed he committed the offence. No witness saw him break the shop, nor gave evidence that he could be the only breaker of that shop to satisfy the legal requirements for conviction on circumstantial evidence.

24. In my view, the prosecution failed to prove beyond reasonable doubt both the offences under which the appellant was convicted. The magistrate should have acquitted him of those counts, especially in view of the contents of his long sworn defence statement on which he was extensively cross-examined.

25. I now turn to the amendment of the charges by the trial magistrate after closure of evidence at the end of the judgment. Indeed, the magistrate was entitled to amend the charges at any stage before judgement. The law however also required that the magistrate should have asked the accused person to plead to the amended charge. In my view, the reason for such requirement of the accused pleading to the amended charge is that the accused may have something to say in relation to the new development or to give an additional defence, which should be considered because ultimately, the accused person has a constitutional right to know the complaint against him and respond. It is not his business or her business to correct the errors of the charge or procedure adopted by the court, if it is advantageous to him or her,

but he has a right to know the complaint against him and to respond. In failing to inform the accused of the amendment of the charge, and going on to amend the charges at the tail end of the judgement, in my view, the trial court occasioned a serious prejudice against the appellant. The conviction that followed after that unilateral and secretive amendment to the charges means that the convictions arising therefrom are not supported by the law and Constitution and cannot be sustained.

26. For the above reasons, I find merits in the appeal. I quash the conviction and set aside the sentence herein. I order that the appellant be set at liberty forthwith unless otherwise lawfully held.

27. There has been a request by the appellant for release of items confiscated by the police. I have not been given a report about the items taken by the police as promised by Mr. Okemwa, the Principal Prosecuting Counsel.

28. This court can only deal with items that were produced in evidence as exhibits. In this regard also, if the appellant requires any item that was produced in this court as an exhibit to be released to him, he is at liberty to make a request for same to the Deputy Registrar for the appropriate orders to be issued.

29. Otherwise the appeal is allowed and the conviction quashed and sentence set aside. The appellant will be set at liberty unless otherwise lawfully held.

Dated and delivered at Garissa this 6th day of November, 2018.

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George Dulu

JUDGE