



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERUGOYA

CRIMINAL APPEAL NO. 196 OF 2013

GEOFFREY WACHIRA GITHAHAE.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

*(Being appeal from the conviction and sentence of the Principal Magistrate's Court (E. H. Keago P.M.)
at Baricho, Criminal Case No. 264 of 2013 dated 9th December, 2013)*

JUDGMENT

1. **GEOFFREY WACHIRA GITHAHAE**, the appellant herein was charged with the offence of shop breaking contrary to **Section 306 (a)** of the **Penal Code** and stealing contrary to **Section 279 (a)** of the **Penal Code** vide Baricho Principal Magistrate's Court Criminal Case No. 264 of 2013. The particulars as per the charge sheet were that on the 26th day of January, 2013 at Kagio Township in Kirinyaga West District within Kirinyaga County, jointly with others not before court broke and entered into a building namely a shop of CEPHER NG'ANG'A and committed a felony namely stealing and did steal mobile phones make 3 Techno, 4 ITEL, 2 Forme, 3 Nokia, 1 bird, 1 vodafone, 1 Alcatel and 1 champ all valued at Kshs.26,570 the property of **CEPHER NGANGA**. The Appellant denied the charge but after trial where the prosecution called four witnesses, the trial court found him guilty on both counts and convicted him sentencing him to five years imprisonment for each count with both sentences running concurrently.

2. The Appellant was dissatisfied with both the conviction and sentence and preferred this appeal raising the following grounds in his petition:-

(i) That the learned magistrate erred in law and fact by failing to find that he was not found with the stolen phones and that the person found with the same was one Geoffrey Gichera.

(ii) That the learned magistrate erred in law and fact by basing his judgment on uncorroborated evidence.

(iii) That the learned magistrate erred by relying on witnesses who were not credible.

(iv) That the learned magistrate erred in law and fact by failing to find that the evidence adduced were full of contradictions and inconsistencies.

(v) That the conviction was against the weight of the evidence.

(vi) That the trial magistrate erred by handing out a harsh sentence when the appellant was a first offender.

(vii) That the learned magistrate erred by not considering his defence.

3. At the hearing of this appeal the Appellant chose to abandon his appeal on conviction notwithstanding the written submissions he had filed and chose to proceed only against the sentence meted out against him.

4. A brief look at the evidence adduced at the trial reveals that the complainant's shop at Kagio Market was broken into between 26th January 2013 and 28th January, 2013. **KEPHA NGANGA WAMONYO** (P.W.1) testified that he was informed by his shop attendant **Joyce Wangui Wanjohi** (P.W.2) on 28th January, 2013 when she discovered on opening the shop that shop had been broken into and the items listed in the charge sheet stolen. The Appellant herein worked as a watchman in a building next to where the incident occurred and Augustine Murage (P.W.3) who was found with one of the stolen phones implicated the Appellant as the person who sold him the stolen phone. The investigating officer told the trial court that he was able to trace one of the stolen phones to P.W.3 who then led to the appellant where he arrested him and charged him with the aforesaid offences. In his defence the Appellant denied the charge and testified that he saw the stolen phone for the first time when he was arrested and taken to the Police Station. He faulted Augustine Murage (P.W.3) for having a grudge with him and framing him in the case and other cases. He further stated that he had filed a civil claim in a civil court where he was paid and that the same did not please the said Murage who he blamed for the woes facing him in the case.

5. The learned trial magistrate on the basis of the evidence adduced found that the circumstantial evidence linking the Appellant with the offence was sufficient to prove that the Appellant had committed the offence and dismissed his defence as an afterthought.

6. I have considered this appeal and though the Appellant indicated that he was abandoning the appeal on conviction and proceeding only on sentence, my attention has been drawn by the charge sheet and the nature of the evidence tendered. The charge sheet presented to the trial court clearly revealed 2 counts or distinct offences within the same count namely:-

(i) Breaking into a shop and committing a felony therein contrary to **Section 306 (a)** of the **Penal Code**.

(ii) Stealing contrary to **Section 279 (a)** of the **Penal Code**.

The learned trial magistrate did in fact find the Appellant guilty on both counts and convicted him on both. However, the provisions of **Sections 135 (2) Criminal Procedure Code (CPC)** shows that the charge as presented was defective for duplicity. The cited section under **sub section (i)** provides as follows:

“Any offences whether felonies or misdemeanors may be charged together in the same charge or information if the offences charged are founded on the same facts or forms or are part of a series of offences of the same or similar character.”

And under **sub section (2)** the law provides as follows:

“Where more than one offence is charged in a charge or information a description of each offence so charged shall be set out in a separate paragraph of the charge or information called a count” (emphasis added).

The Charge Sheet presented to the trial court was clearly defective as the same revealed two distinct offences as aforesaid and the Appellant was clearly embarrassed in his defence because of the defect. I have also looked at the facts supporting the charge and the dates given when the offences are said to have occurred are also inconsistent with the evidence tendered. The facts given on the charge shows that the offence took place between 26th and 27th January, 2013 but the evidence tendered shows that the shop was closed on 26th January, 2013 and on 28th January, 2013 it was discovered that it had been broken into

and mobile phones stolen. Under **Article 50 (2) (b)** an accused person has a right to a fair trial which entails among other things to be informed of the charge facing him with sufficient detail to answer it or to defend himself. As I have already stated above, the charge presented to court had 2 counts combined into one. An offence under **Section 306 (a)** of the **Penal Code** that is breaking into a building and committing a felony is distinct and different from stealing contrary to **Section 279 (a)** of the **Penal Code**. Under the former, breaking into a building (shop etc) on its own under that Section does not create an offence until or unless the offender commits a felony therein which in this case was stealing some mobile phones. In my view the prosecution erred by adding the offence of stealing contrary to **Section 279 (a)** of the **Penal Code** to the charge thereby creating a duplicity of charges as a result occasioned a failure of justice to the Appellant. The learned trial magistrate erred in law by making a finding that the Appellant was guilty on both counts when it was clear even from the facts presented that only one offence under **Section 306 (a)** of the **Penal Code** had been committed.

7. The Appellant appears to have been motivated to abandon his appeal on conviction in view of the fact that only a few months remains for him to complete his sentence which is understandable but having looked at the entire case and the evidence tendered against him, this Court in the interest of justice could not overlook the above anomaly in the charge sheet. I also wish to touch on the evidence tendered and must say that even if I was to determine this appeal on the merits, I would still not have hesitated to allow it. This is because the evidence pointing at the Appellant was purely circumstantial and the prosecution should have done more to show how the stolen phone was traced to **Augustine Murage** (P.W.3). The evidence adduced by the investigating officer– **P.C. Mohammed Kibwana** (P.W. 4) was not backed by expert evidence or any other evidence from the Criminal Investigation Department (C.I.D.) showing how the phone was traced and for how long the phone was in use before it was found. If it is true that the stolen phone was traced to P.W.3 my considered view is that the defence offered by the Appellant in that respect should have at least created doubts to the mind of the learned trial magistrate on the guilt of the Appellant and where doubt is created, an accused person is normally given its benefit.

In view of the above findings, this Court finds merit in this appeal. The same is allowed under **Section 354 (3) (a)** of the **Criminal Procedure Code**. The conviction and the sentence meted out against the Appellant are reversed. The Appellant shall be set free forthwith unless lawfully held.

Dated and delivered at Kerugoya this 12th day of January, 2017.

R. K. LIMO

JUDGE

12.01.2017

Before Hon. Justice R. K. Limo J.,

State Counsel Mr. Sitati

Court Assistant Naomi Murage

Appellant present

Interpretation English/Kiswahili

Sitati for State present

Appellant in person present

COURT: Judgment signed, dated and delivered in the presence of Sitati for the State and the Appellant appearing in person.

R. K. LIMO

JUDGE

12.01.2017