



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAROK
CRIMINAL APPEAL NO 14 OF 2015

ERICK BETTAPPELLANT

VERSUS

REPUBLICRESPONDENT

(Being an appeal from the original conviction and sentence dated 12/6/2014 in the criminal case No. 1215 of 2011 in the Principal Magistrate's court at Narok, R. v. Erick Bett)

JUDGEMENT

1. The appellant has appealed against his conviction and sentence of seven years imprisonment in respect of the offence of stealing from a person contrary to section 279(a) of the Penal Code (Cap. 63) Laws of Kenya.
2. The state has supported the conviction and sentence of the appellant.
3. The appellant was convicted on the direct evidence of the complainant (PW 1), Richard Kiprono Rotich (PW 2) and Simon Kipngetich (PW 3).
4. The defence of the appellant was that of an alibi.
5. The appellant has raised 7 grounds in his petition of appeal to this court. I will deal with grounds 3 and 6 together. In those 2 grounds, the appellant's counsel has faulted the trial court for failing to consider that there was in existence a land dispute between the appellant and the complainant. The evidence of the complainant in this regard is that there was not in existence any land dispute between him and the appellant.
6. The evidence of PW 3 contradicts the evidence of the complainant in respect of the land dispute between the appellant and the complainant. PW 3 testified that there was a land dispute between PW 1 and the appellant.
7. The existence of a land dispute between PW 1 and the appellant is also confirmed by the investigating officer, No. 77858 PC Charles Chamwada (PW 4). PW 4 confirmed that there existed an ongoing land dispute between PW 1 and the appellant. The evidence of PW 4 is neutral and independent.
8. The trial court did not consider this contradictory evidence between PW 1 on the one hand and PW 3 and PW 4, on the other hand.
9. I find that the foregoing is a material contradiction.

10. Furthermore, I also find that the trial court erred in law by failing to consider the whole evidence tendered at trial. That court appeared to have treated the defence evidence in isolation of the prosecution evidence, which is contrary to the well laid procedure of wholly considering the entire evidence as required of trial courts according to the *Court of Appeal Oketch OKale & another v. R (1965) EA 555*. In other words the defence and the prosecution evidence should have been considered as a whole and not in isolation of each other.

11. The above authority also stands for the proposition that a trial court is in law required to base its decision on the evidence tendered at trial. In this regard, the trial court further fell in error in law in finding that: *"It is common knowledge that when you purchase a phone, the receipt must always indicate the purchaser's name, ID number and even a phone number. Failure to have these vital details was not explained."* This finding is not supported by the evidence of the prosecution. The prosecution through PW 1 testified in this regard that: *"I do not have the receipt in court."* The receipt referred to was that of the stolen Nokia phone.

12. Interestingly the trial court rejected the defence evidence, which led evidence of the receipts as defence exhibits D exh. 1a, b and c in respect of the purchase of a coil spring for Peugeot 504 and head lamp and phone nokia in support of the appellant's alibi defence, that he was in Kitale, when the offence was committed.

13. It is for this reason what I agree with Mr. Mongeri for the appellant that the trial applied a different stand in considering the defence evidence, which the court cast in a negative light. And at the same time the court applied a different standard in considering the prosecution evidence, which the court cast in a positive light. All the evidence must be treated equally and be accepted or rejected for reasons to be recorded by the court.

14. Ground 5, is in the following terms: *"That the learned trial magistrate erred in law and fact by convicting the applicant (sic) with the different section apart from which was appearing in the charge sheet"*. It has caused me concern. In this regard, the trial court made a finding that the appellant was convicted of the offence of stealing from a person contrary to section 279(a) and not under section 279(g) both of the Penal Code. The finding was based on the evidence; following the refusal of the trial court to allow the prosecution to amend the charge to read stealing from a person contrary to section 279 (a) of the Penal Code.

15. In the light of this finding, I find that the futile attempt to amend the charge by an unknown person or officer was an exercise in futility. And for this reason, I further find this ground is wholly lacking in merit and is hereby dismissed; for it did not amount to a pleading or charge sheet that is recognized in law. It amounted to an attempt to obstruct the course of justice.

16. The trial court ought to have ordered for an investigation into this alteration of the court record to read section 279(g) of the Penal Code. The warning of the trial court that: *"I take a tough stand and hereby warn all officers, litigants or any member of the public who have access to the court. Record to refrain from interfering with the same,"* is helpful. The issue is as to who among the officers, litigants or any member of the public who interfered with the court record. In the circumstances, I hereby direct that an investigation be carried out by the office of DCIO Narok and submit a report within two months.

17. In view of the foregoing considerations, I find that it is not necessary to consider grounds 1, 2, 4,6 and 7 of the petition of appeal.

18. The upshot of the foregoing is that the appellant's appeal is hereby allowed. The conviction and sentence are hereby quashed. As a result, the appellant is hereby released from the terms of his release on bail pending appeal.

Judgement delivered in open court at Narok this 13th day of June, 2017 in the presence of the appellant, Mr. Abobo holding brief for Mr. Mongeri for the appellant, Mr. Mukofu for the state and the court assistant Mr. Kimriny.

J. M. Bwonwonga

Judge

13/6/2017