



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MAKUENI**

**HIGH COURT CRIMINAL APPEAL NO. 48 OF 2017**

**MUSYOKI NOAH NDULA.....1<sup>ST</sup> APPELLANT**

**FREDRICK NDEI MATHIAS.....2<sup>ND</sup> APPELLANT**

**-VERSUS-**

**REPUBLIC.....RESPONDENT**

**JUDGEMENT**

1. The Appellant was charged with **Burglary and Stealing contrary to Section 304 (1) and Section 75 of the penal code.**
2. The particulars of the offence being that on 03/09/2014 at Upete A.P. Camp jointly stole various items listed in the charge sheet.
3. In alternative they were charged with handling stolen property contrary to Section 322 of the penal code. Particulars being that on 02/10/2014 at Upete A.P Camp dishonestly received and disposed of various items listed in the charge sheet.
4. The trial magistrate heard the case and convicted the same and sentenced each one of them to 5 years imprisonment.
5. Being aggrieved by the above verdict, the Appellant filed appeals No. 106 of 2016 and 107 of 2015 which were heard together as Makueni Criminal Appeal No. 48 of 2017.
6. The Appellant set out similar grounds of appeals in their amended supplementary grounds of appeal namely:-
  - ***That the circumstantial evidence relied on by trial court to convict them was insufficient and did not meet the legal threshold.***
  - ***The court relied on allegations of confessions without caution having not been proved to have been administered before same was taken.***
  - ***The evidence on record was unsafe to form a conviction. And finally Section 169(1) Criminal Procedure Code was not complied with in that court faulted to consider defence raised.***
7. The parties agreed to canvass the appeal by way of submission. The state counsel submitted verbally and the Appellant relied on their written submissions.
8. The duty of the first Appellant court is to reevaluate the evidence and reach its own conclusion and then

it can hold whether the trial magistrate went into error or affirm the conviction. **SEE OKENO -VS- REPUBLIC.**

9. The prosecution called two witnesses. PW1 Administration Police Constable Stanley Maina from Upete post testified that on 02/10/2014 he was called and informed that the three suspects had been arrested by members of public on suspicion that they had carried out several thefts in the area and that the members of public wanted to lynch the suspects.

10. The two Appellants herein were among the suspects which were rescued by the police and that they confessed to having broken into his (PW1) house and stole the property. The 2<sup>nd</sup> accused told them the stolen properties were at Kasikeu in a shop Christened Kativoi belonging to someone called Kativoi.

11. They proceeded to the said shop with other people whose shops had been broken into and properties stolen. The PW 1 properties were not recovered but several properties were recovered at the shop. Kativoi's wife told them that the items were taken there by the accused persons.

12. While at Kasikeu, PW1 was informed his wallet containing several documents had been found at Ordoua Hotel in Sultan Hamud and they went there and found PW1's Identity Card, Certificates of Appointment, Cooperative Bank ATM, NHIF Cards, SACCO Link ATM and his Note Book. At the back of the note book, there were three names amongst them those of the two accused persons, the list of stolen items and prices of each item.

13. PW2, Corporal David Wanyonyi from Kilome Police Station corroborated PW1 evidence and that he went with PW1 together with inspector Togon to Upete Chief's Camp to rescue the arrested two suspects and took them to Kilome Police Stations. They interrogated them and they admitted committing the offence. The two suspects offered to take them (officers) to the place where stolen properties were located at Kativoi where they had sold it to Kativoi.

14. At Kativoi's shop, the wife of Kativoi said accused persons sold her clothes. The accused also directed them to Sultan Hamud where they had sold motor vehicle spare parts but they did not receive motor vehicle rims. They received ATM, VISA card of PW 1 which was stolen at PW 1 house.

15. Other recovered items were NHIF; work Identity Card, National Identity Card and PW1 Note Book containing particulars of stolen items, monies received and balance and names of the two accused persons.

16. The prosecution case was closed at this stage. The trial court ruled that the accused persons had a case to answer and put them on their defence. Accused 1 gave unsworn statement and narrated how he was arrested by members of public who took him to the Assistant Chief's office. Then police came and took him to Kilome Police Station where he was booked in the Occurrence Book and put in cells.

17. There were several people at the police station and he was told of motor vehicle parts at Kasikeu which he did not understand. They went to Kasikeu and returned back to the station on 06/10/2014 he was charged in court.

18. Accused 2 narrated in unsworn statement how he was arrested by members of public on 02/10/2014 at Mwangine Market. He was taken to Upete Market and was at Upete with two other suspects.

19. They were taken to Kilome Police Station. While in the cells they were informed of rims of vehicle found and at Kasikeu where they were taken. Then they were taken to Sultan Hamud and then back to Kilome Police Station.

20. On 06/10/2014 they were charged in court. He had no clue of the alleged offences. After the defence the trial court convicted the accused persons and sentenced each five years imprisonment.

21. The accused in their appeal did put written submissions. Mr. Orinda for the State/Respondent in

conceding the appeal submitted that there were irregularities which warrants the appeal to be allowed first. After prosecution case the accused were not allowed to submit on whether there was a case to answer or not. That was prejudicial to their case.

22. The PW1 who was the complainant, was also part of the investigation team which is also a gross irregularity. Thus prejudiced accused's case. Nothing was recovered from any of the accused persons.

23. The wife of PW1 who called over PW1 recovered items including a note book containing content implicating accused persons was not called as a witness.

24. The alleged confessions by the accused persons was never taken down as required by the law. The defence tendered by the accused person was disregarded. There was no prove of breaking into the PW1 house. He submitted that the appeal be allowed.

25. Appellant No 1 submitted that the case was not proved beyond reasonable doubt. He submitted that he was not linked to the alleged breaking into PW1 house.

26. The Appellant was arrested by members of public on suspicion of several thefts in the area. None of the members of public was called to testify.

27. He relied on case of **MARY WANJIKU GICHIRIA –VS- R CR. Appeal 17/98** where court held that “*Suspicion however strong cannot provide a basis for inference of guilt. It must be proven by evidence*” See also **TURN BULL 1976 (3ALL ER 549) P. 552.**

28. Further the trial court relied on alleged confession which was not taken as required by law.

29. The court further failed to comply with Section 169 (1) Criminal Procedure Code in that his defence was ignored. He relied on **HCCRC 26/07 JOSEPH MUSYOKI -VS- R MACHAKOS** on no compliance with Section 169 (1) Criminal procedure Code where it stated that the defence tendered is to be weighed against prosecution case or evidence.

30. Appellant No. 2 submitted on the same limb and replicated Appellant No. 1 submission.

31. After going through the evidence tendered I find the issues arising as follows:-

- ***Whether the prosecution proved its case beyond reasonable doubt?***
- ***Whether Section 169 (1) Criminal Procedure Code was complied with?***

32. The alleged offence was allegedly committed on 03/09/2014 at Upete AP Camp in Administrative Police Constable Maina house and various items stolen therein vide the charge sheet.

33. PW1 reported incident on 03/09/2014. After about one month on 02/10/2014 suspect of theft were arrested by members of public and PW1 and two other officers went to rescue them as they were being threatened with lynching for several thefts in the area.

34. It was at this juncture the two suspects twined accused were interrogated by PW1, PW2 and Investigation Police Tongo and the allegedly confessed stealing PW 1items. The officers did not bother to get some confession to be taken as provided by the provisions of the evidence act.

35. The same piece of evidence remained worthless and inadmissible if at all the two accused verbally confessed. The items were recovered in Sultan Hamud when PW1 wife called the officers to tell them about the recovery from a hotel.

36. The PW1 wife was not called nor anybody from the hotel to confirm the alleged recovery of the items stolen from PW1 house.

37. There is allegation of a note book recovered containing the particulars of items stolen, their prices and the names of the Appellant.

38. The investigation officer did not bother to get handwriting expert analyse same and tender report on the same.

39. Above all the above irregularities, the PW 1 was in the thick in the entire investigation yet he was the complainant.

40. The trial court relied on what called the circumstantial evidence and the alleged confessions. In **SIMON MUSOKE –VS- R (1958) E.A. 715**, the court holds that:- ***“It is also necessary before drawing the inference of accused person guilt of circumstantial evidence to be sure that there were no co-existing circumstance which would weaker or destroy the inference.”***

41. The investigation officer (PW2) did not either visit PW1 house to confirm the veracity of report of 03/09/2014. None of the members of public who arrested the appellants was called as a witness.

42. The wife of Kativoi who alleged to have bought items from accused person was not called as a witness. PW1 wife who was a key person to the recovery of PW1 items at Sultan Hamud was not called as a witness. The above factors totally undermined the circumstantial evidence.

43. The confession were never taken down as required by the law nor was the note book containing information implicating the Appellant was not taken to the handwriting expert to confirm the author.

44. This is a case which should have collapsed at the close of the prosecution case. Even without considering the defence tendered, the prosecution by PW1 and 2 was totally hopeless and hollow and ought to have dismissed on no case to answer.

45. The court thee finds that the appeal has merit and same is allowed, conviction quashed and the Appellant to be released forthwith unless otherwise held.

**SIGNED, DATED, AND DELIVERED AT MAKUENI THIS 8<sup>TH</sup> DAY OF JUNE, 2017.**

**C. KARIUKI**

**JUDGE**

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