



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL APPEAL NO. 11 OF 2015

LAWRENCE GITONGA IRERI.....APPELLANT

VERSUS

REPUBLICRESPONDENT

JUDGEMENT

1. The appellant has appealed against his conviction and sentence of imprisonment of five years for a charge of handling stolen goods contrary to section 322 (1) of the Penal Code (Cap 63) Laws of Kenya, imposed upon him by the court of the Ag Senior Resident Magistrate on 4th February 2015.
2. The appellant in his petition of appeal had listed 4 grounds in support of his appeal. He had challenged both the conviction and sentence in his petition of appeal. During the hearing of his appeal, he abandoned his appeal against conviction and clearly stated that he was now only appealing against sentence. According to him, the sentence of five years imprisonment should be reduced so as to enable him to be set free.
3. The Respondent/State through Ms Mbae opposed the reduction of his sentence. According to her, the penalty provided for the charge of handling stolen property in respect of which the appellant was convicted carries a term of imprisonment not exceeding 14 years with hard labour. She submitted that the sentence imposed was lenient and should be upheld.
4. I have perused the judgement appealed against and the evidence in support of the offence of handling stolen property. The appellant was charged with five counts of stealing contrary to section 268 (1) as read with section 275 of the Penal Code. In the alternative, he was charged with the offence of handling stolen goods contrary to section 322 (2) of the Penal Code. The appellant was employed by the complainant as a shamba boy. His duties included milking the cow of the complainant (PW 1).
5. PW 1 employed him as a shamba boy. He was also provided with accommodation in the home of the complainant. On 10th July 2014 the wife of the complainant told the husband that their beans were missing. On 13th July 2013, they both prepared to go to church and left the appellant in the house. Upon their return from the church, they found that the appellant was not at home. They found this to be unusual because it was a Sunday. By late evening the same day, the appellant had not returned. They became suspicious, because he was supposed to be back to milk the cow which was part of his duties. As a result they went to check his room. They discovered that he had taken all his belongings apart from his jacket.
6. The following morning on 14th July, PW 1 woke up and went to milk the cow and once again he went to check the room of the appellant. To his surprise, he found that the jacket of the accused was had also gone missing. Beginning from that day, a series of his goods which are charged in the five counts went missing on a daily basis. On 16th July 2014, the complainant realized that his wheelbarrow and a cock (chicken) were missing. He also realized that his sufuria was missing

- together with a jerry can of oil. On 18th July 2014, PW 1 got a call from a member of the public. The complainant's phone was the I-tel model. They reported the theft to the members of Nyumba Kumi.
7. PW 1 together with his brother went to the home of the appellant at Ena in Embu on 19th July 2014. There they found his grandmother. They then requested the grandmother to allow them talk to the appellant. Apparently, she agreed. PW 1 then asked the appellant whether there were items which he had that belonged to him. It also seems that they went to report to the village elder while in the company of the appellant. They appellant boarded their car. As he was coming out of the car, the cellphone fell down which PW 1 identified as his cellphone.
 8. From there, they proceeded to the Chief's Camp where they were given AP officers and then proceeded to the rented house of the appellant. In his house they found the goods of the complainant which were the following:
 1. Plate
 2. A sufuria (2)
 3. Bucket (white)
 4. Marble stone carving
 5. Blanket
 6. Mattress
 9. At that point in time the appellant told them that he had sold the wheelbarrow of the complainant. They went to the home of the person who had bought the wheelbarrow and they did not find him.
 10. The evidence of PW 1 is corroborated by that of his neighbour Gabriel Munyi Mukenya (PW 2). According to PW 2 they both went to the home of the appellant from where they recovered the goods of the complainant. After that they arrested him and took him to Manyatta. He confirmed the evidence of PW 1 that the items were recovered in the house of the appellant. The appellant was arrested by the police, who then charged him in court with the five offences, which were charged in the main counts and with one alternative charge of handling stolen goods.
 11. Upon being placed on his defence and after being explained his rights to remain silent, to give evidence and call witnesses in his defence the appellant elected to remain silent. He responded thereafter by informing the court that he was only awaiting for the verdict of the court.
 12. I have re-evaluated this evidence as required of a first appeal court in terms of the Court of Appeal in *Pandya v. R (1957) EA 336*. I find that it is the offences of stealing that were proved against the appellant. The circumstantial evidence showed that the appellant was found in possession of some of the complainant's goods within three days from the time the goods were stolen. There is also evidence that the appellant after stealing the goods of the complainant secretly removed his personal belongings including his jacket. Finally, it is also clear that he had the opportunity to steal the goods by virtue of having acquired the whereabouts of those goods in the compound of the complainant.
 13. In the circumstances, it was not open to the trial court to convict the appellant on a charge of stolen property which was an alternative charge to the main counts of stealing the goods. The appellant was not acquitted in respect of counts 1, 2, 3, and 4. I therefore set aside the conviction and sentence imposed on the appellant in respect of the charge of handling stolen goods. In its place I hereby enter convictions of stealing in counts 1, 2, 3 and 4.
 14. In sentencing the appellant I have taken into account that the appellant was a first offender and that some of the stolen goods were recovered. I have also taken into account that this was a well planned scheme in which the complainant lost his goods. After considering all these matters, I hereby sentence the appellant to two (2) years imprisonment from the date of this judgement, which sentences are to run concurrently from the date of this judgement.

JUDGEMENT DATED, SIGNED and DELIVERED in open court at **EMBU** this **9th** day of **FEBRUARY 2016**

In the presence of the appellant Ms Mbae for the State

Court clerk R. Njue

J. M. BWONWONGA

JUDGE

9th February 2016