



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 55 OF 2015 AND 74 OF 2015 (CONSOLIDATED)**

**1. PETER KITILI KILONZI.....1<sup>ST</sup> APPELLANT**

**2. PETER MUTEMI MWENDE.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

The two appeals No. 55 of 2015 and 74 of 2015 of Peter Kitili Kilonzi and Peter Mutemi Mwende respectively, were consolidated and heard together as they arose from the same criminal proceedings in the trial court.

The two appellants were charged in the magistrate's court at Kyuso with several counts. Count 1 was for burglary contrary to section 304 (2) and stealing contrary to section 279 (b) of the Penal Code. The particulars of the offence were that on the night of 1st and 2nd of November 2014 at unknown time at Kyuso Township Kyuso Location within Kitui County with others not before court broke and entered a boutique of Betty Musyoki with intent to steal therein and did steal cash Kshs. 5,800/=, 3 pairs of open shoes, 2 pairs of safari boot shoes, a pair of ladies open shoes, 5 bags, a jacket and 3 shirts all valued at Kshs. 28,850/= the property of the said Betty Musyoki. In the alternative they were charged with handling stolen goods contrary to section 322 (1) (2) of the Penal Code. The particulars of the offence were that on 2nd November 2014 at Kyuso Township, Kyuso Location otherwise than in the course of stealing dishonestly received or retained 3 pairs of open shoes, 2 pairs of safari boot shoes, 1 pair of ladies open shoes, 5 bags, a jacket and 3 shirts knowing or having reason to believe them to be stolen or unlawfully obtained.

Count 2 was for burglary contrary to section 304 (2) and stealing contrary to section 279 (b) of the Penal Code. The particulars of offence were that on the night of 1st and 2nd November 2014 at unknown time at Kyuso Township in Kyuso Location within Kitui County with others not before court broke and entered the salon of one Elizabeth Kamwaki Mutiwa with intent to steal therein and stole Kshs. 2,400/=, 4 caro light body creams, 4 maxclair body creams, winnie weave, sunny girl weave, 2 finger cut weave, blow drier, 9 abuja braids, 5 pony tail braids, 1 maya weave, 1 boy cut weave, 2 bayonet weaves, 3 short bob weaves, 1 saxi bun, 2 afroking braids, 1 crop lazer and I short cascada all valued at Kshs. 22,060/= the property of the said Elizabeth Kamwaki Mutiwa.

Count 3 was for burglary contrary to section 304 (2) and stealing contrary to section 279 (b) of the Penal Code. The particulars of the offence were that on the night of 1st and 2nd November 2014 at unknown time at Kyuso Township in Kyuso Location with others not before court broke and entered a book shop of one Onesmus Kimanzi with intent to steal therein and stole cash Kshs. 600/- the property of the said

Onesmus Kimanzi.

Count 4 was also for burglary contrary to section 304 (2) and stealing contrary to section 279 (b) of the Penal Code. The particulars of the offence were that on the night of 1st and 2nd November 2014 at unknown time at Kyuso Township Kitui County with others not before court broke and entered a salon of one Patrick Mutuku with intent to steal therein and stole 3 maxclair cream, 6 carolight creams, soft carrot cream, 2 finger cut weaves, 5 ponytail weaves and half packet of Hi-five weaves all valued at Kshs. 4,500/= property of the said Patrick Mutuku.

At the trial Peter Mutemi Mwende the 2nd appellant herein was the 1st accused, while Peter Kitili Kilonzi the 1<sup>st</sup> appellant was the 2nd accused.

Initially they all pleaded not guilty to the charges. However from the record the 2nd appellant Peter Mutemi Mwende later pleaded guilty and was convicted and sentenced.

The trial proceeded with respect to the 1st appellant Peter Kitili Kilonzi. At the end of the trial, he was acquitted of count 2, 3 and 4. He was however convicted on count 1 and sentenced to 6 years imprisonment on the first limb and 3 years imprisonment on the 2nd limb of the charge, and the sentences ordered to run concurrently.

Both have now come to this court on appeal. Initially the 2nd appellant Peter Mutemi Mwende was reluctant to proceed with his appeal but later decided to argue his appeal. Though the appeal of Peter Mutemi Mwende is mainly on sentence, I treat the appeals to be both against conviction and sentence.

At the hearing of the appeal the 1st appellant Peter Kitili Kilonzi stated that he was relying on his written submissions. His complainant that he was implicated in the case because when the 2nd appellant pleaded guilty to count 1, he stated that he had hired him to carry luggage from the boutique of Betty Musyoka. He stated that it was unfair to convict him on the allegation of the 2nd appellant that he had hired him. He stated that the 2nd appellant was coached at the prison because he was already a convict serving prison sentence in another matter.

The 2nd appellant Peter Mutemi Mwende relied on his written submissions which I have perused.

Mr. Okemwa learned Prosecuting Counsel submitted that the evidence was clear that both appellants committed the offences for which they were convicted. The 2nd appellant pleaded guilty and exhibits were produced. The 1st appellant Peter Kitili Kilonzi pleaded not guilty and four prosecution witnesses testified about what was stolen from their shops. Counsel submitted that the appellants were found by the police at the scene of theft, and though the 1<sup>st</sup> appellant gave sworn defence he did not explain why he was found at that trading centre at 3am in the company of the 2<sup>nd</sup> appellant who pleaded guilty. The 1st appellant also did not produce a bus ticket to exonerate himself.

In response, the 1<sup>st</sup> appellant said that Police Constable Kimathi who was in the same vehicle did not come to court to testify.

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

I have perused the record and re-evaluated the evidence both the prosecution and for the defence.

Starting with the 2nd appellant Peter Mutemi Mwende, the record shows that he pleaded guilty to the charges and was convicted. In my view the requirements set out in the case of ***Adan Vs. Republic [1973] EA 445*** were complied with in recording his plea of guilty. The sentence imposed on him for each of the offences was also within the law. In my view his appeal has no merits and I dismiss the same.

With regard to the 1st appellant Peter Kitili Kilonzi, he was convicted of count 1 in respect of burglary and stealing in the boutique of Betty Musyoki. The evidence on record is that he was arrested at the scene by the police, in the absence of the owner of the boutique. Pw4 Pc John Njoroge of Kyuso police station clearly explained the circumstances under which both appellants were arrested. Indeed PC Kimathi came to the scene with a vehicle with driver PC Kikaria. However these two were not the police officers who arrested the appellant.

In any event the prosecution is not required to call a multiplicity of witnesses to establish a single fact. Regarding the arrest, PC John Njoroge Pw4 who was one of the three arresting officers clearly stated as follows

**“We proceeded to the scene carefully. As we approached there was a person standing outside boutique on seeing us he fled. We saw some light at the boutique. We went to the boutique and I heard people talking in low tones. I saw door broken from outside but locked from inside. I tried to push and one of the people opened suspecting it was their colleague. He was holding a metal bar (exhibit 7). It could be used to injure. I fired two rounds of 7.62mm from my G3 rifle. Person approaching jumped over the counter and tried to crawl to back door. We tried to prevent their escape. We managed to arrest them and detain them. We saw they had stolen from the shop and put them in a tool bag”.**

The above is how the 1st appellant and 2<sup>nd</sup> appellant were arrested. The 1<sup>st</sup> appellant did not say that when he was arrested he told the arresting officers that he was travelling from another destination and was merely mistaken at Kyuso and arrested for an offence he did not commit. In his cross examination of prosecution witnesses, he did not ask the police officer about his alleged travel. It only emerged in his defence where he stated that he was traveling from one point to another.

In the above circumstances, I am of the view that the magistrate was justified in disbelieving his defence as an afterthought. I agree with the finding of the trial magistrate that the appellant was one of the people who was involved in the burglary and the theft. As a member of that group, he was a principal offender and was correctly convicted.

The sentence is within the law.

To conclude, I find no merits in both appeals. I dismiss the appeals and uphold the conviction and sentences imposed by the trial court.

**Dated and delivered at Garissa this 2nd day of September 2016**

**GEROGE DULU**

**JUDGE**