REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO. 53 OF 2016

DEEQ MOHAMED ADEN.....APPLICANT

V E R S U S

REPUBLIC.....RESPONDENT

(From the conviction and sentence in Garissa C.M Criminal Case No. 1277 of 2015 – M. Wachira – CM).

JUDGMENT

The appellant Deeq Mohamed Aden was charged in the Chief Magistrate's court at Garissa with two others for stealing contrary to Section 268 as read with section 275 of the Penal Code. The particulars of the offence were that on the 7th December 2015 at Ifo market in Dadaab District within Garissa County jointly stole two mobile phones make Nokia Lumia and Huweii, two passports of British nationality all valued at Kshs 27,000/= and cash Kshs 50,000/= amounting to Kshs 77,000/= the property of Maano Haji Amin. The appellant together with co accused denied the charge. After a full trial, all three were convicted of the offence. Each was sentenced to serve 2 years imprisonment.

Dissatisfied with the decision of the trial court, the appellant who was the 3rd accused in the trial court has come to this court on appeal. It is not clear whether the other two accused filed any appeals.

The appellant filed initial grounds of appeal in March 2016. He however later filed an amended petition of appeal which he relied upon. The grounds of appeal are as follows:-

1. The learned magistrate erred in that she did not consider that he was a first offender.

2. The learned magistrate erred in admitting prosecution evidence which was not corroborative thus violating provisions of Section 163 of the Evidence Act.

3. The trial magistrate erred in convicting him without considering that on the day he was arrested he was detained in custody for 3 days without being produced in court within 20 hours thus violating his constitutional rights.

4. The trial magistrate erred in convicting him without considering that he was arrested without any incriminate object as an exhibit.

5. The trial magistrate erred in convicting him and sentencing him to a harsh and excessive

sentence.

6. The magistrate erred in convicting him without considering that there was nothing to prove that he was at the alleged scene of crime.

The appellant also filed written submissions, which I have perused and considered. At the hearing of the appeal the appellant adopted his written submissions and elected not to make oral submissions.

The learned prosecuting counsel Mr. Okemwa opposed the appeal. Counsel stated that the appellant was charged with two others and the prosecution called 4 witnesses, 3 of whom were victims of the theft. According to counsel, the evidence from prosecution witnesses was consistent and trust worthy. In addition, the complainants or victims identified the appellant as one of the thieves.

Counsel added that the defence of the appellant did not discredit the prosecution evidence and was a mere denial as found by the trial court. Counsel emphasized that the offence was planned by the three accomplices, and that the appellant was lucky to have been imprisoned for only two years.

In response to the prosecuting counsel's submissions, the appellant stated that the real thieves implicated him while he was not involved. He said that he was arrested in his house due to suspicion and that the phones were planted on him by the father of Abdi Aziz the 1st accused in the trial. He stated that the magistrate sentenced him only to two years imprisonment because he had not committed the offence.

This being a first appeal, I am required to re-evaluate all the evidence on record and come to my own conclusions and inferences – see the case of ***Okeno -vs- Republic (1972) EA 32.***

I have re-evaluated the evidence on record. I have perused the judgment. I have considered the submissions on both sides, both written and oral.

The appellant has come on appeal on several grounds. The main grounds are that the prosecution did not prove its case against him beyond reasonable doubt, that he was kept in custody for long before being charged in court, thus violating his Constitutional right, and that the sentence was harsh and excessive.

With regard to the appellant's complaint that he was kept in custody longer than is allowed by the Constitution, the appellant did not raise such a complaint during the trial. It would have been more appropriate for him to raise such a complaint during the trial as the trial court was better placed to interrogate that complaint through evidence. The appellate court is somewhat restricted in admitting evidence. However, even assuming that it was true that the appellant was kept in custody longer than allowed by the Constitution, courts have held which I agree with that the remedy for such violation is a claim in a civil court for award of damages. Such violation of rights does not vitiate a conviction in a criminal case.

The appellant has complained that the prosecution did not prove its case against him beyond reasonable doubt as he was not found in possession of any of the stolen items and was merely implicated by the father of Abdi Aziz. There is no evidence on record that the father of Abdi Aziz implicated the appellant. The father of Abdi Aziz merely arrested his son Abdi Aziz (1st accused) and handed him over to the police.

The appellant was however identified by the eye witnesses who were complainants that night who said that they saw him in a nearby shop and later he came to the vehicle and was seen in the lights of that vehicle as one of the thieves. He was in the company of the other two people and ran away with them after the theft.

All the evidence on record is that it is Abdi Aziz who actually snatched the handbag of PWI containing the alleged stolen items. The appellant and the other accused were principal offenders because they acted in concert with the said Abdi Aziz, otherwise why did they ran away together with Abdi Aziz if they were not together and part of committing the offence together.

Indeed, the appellant was not found with any of the stolen items, but he was arrested because of information from the complainants that he acted together with two others at the scene, to snatch the items. There is no evidence that the appellant was sentenced to 2 years imprisonment specifically because he did not commit the offence. Each of the three was actually sentenced to the serve same sentence of 2 years imprisonment.

I find and hold that on the totality of the evidence, the appellant was properly convicted by the trial court as a principal offender as he acted in concert with the other two to mislead the complainants by pretending to show them the way and then snatch items from them. The appellant and the other two were thus principal offenders. He cannot thus escape merely because he did not snatch any particular item or because he was not found in possession of any item. I will uphold the conviction.

The sentence imposed is also a lawful sentence. The sentence was determined after each of the three asked for leniency. They were all treated as first offenders. The sentence is neither harsh nor excessive. I will uphold the sentence.

Consequently, I dismiss the appeal and uphold both the conviction and the sentence of the trial court. Right of appeal explained.

Dated and delivered at Garissa this 9th November 2016.

GEORGE DULU

JUDGE