



REPUBLIC OF KENYA

IN THE HIGH COURT

AT MIGORI

CRIMINAL APPEAL NO. 13 OF 2015

BETWEEN

IKENGO HASSAN CHACHA.....1ST APPELLANT

WAISANA MASAMBE.....2ND APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in Criminal Case No. 251 of 2014 at

Principal Magistrate's Court at Kehancha, Hon. R. Aganyo, RM dated on 11th December 2014)

JUDGMENT

1. The appellants were charged with shop breaking and stealing contrary to **section 306(a)** of the *Penal Code (Chapter 63 of the Laws of Kenya)*. The particulars were that on 20th April 2014 at about midnight at Matare Trading Centre in Kuria East District, Migori County, they jointly with others not before the court, broke and entered the shop of Joshua Wambura Matiko with intent to steal therein and did steal one solar panel, one black solar battery N100, 40kgs of sugar, 2 bales of wheat flour, one old speaker make Panasonic, one amplifier 1000 watts, one simi (panga) and assorted shop goods all valued at Kshs. 70,000/-, the property of Joshua Wambura Matiko.
2. The appellants also faced an alternative charge handling stolen goods contrary to **section 322(2)** of the *Penal Code* which alleged that on 22nd April 2014 at Nyansinja village in Tanzania otherwise than in course of stealing they jointly received or retained one black battery solar N100, one old speaker make Panasonic, one simi and a solar panel 100 watts knowing or having reasons to believe them to be stolen.
3. After hearing the case, the learned magistrate acquitted the appellants on the principal charge but convicted them of the alternative charge of handling stolen goods and sentenced them each to 4 years imprisonment. They now appeal against the conviction and sentence.
4. The 1st appellant, in his grounds of appeal filed on 17th February 2015, attacks his conviction on the grounds that there was no eye witness who saw him break into and steal from the complainant's shop and that not items were found on him. The 2nd appellant, in his petition of appeal filed on 17th February 2014, contends that he was not found with any of the items that were stolen as he was in custody in Kenya at the material time. Ms Owenga, counsel for the respondent, supported the conviction on the ground that it

was supported by the evidence.

5. In considering the grounds of appeal, this court is enjoined to follow the principle established in ***Okeno v Republic* [1972] EA 32** where the Court of Appeal held that the first appellate court is required to conduct an independent evaluation of all the evidence and reach an independent conclusion as to whether to uphold the conviction taking into account that it neither heard nor saw the witnesses testify.

6. It is not in dispute that the complainant's (PW 1) shop was broken into on 20th April 2014 and items stolen. PW 2, his watchman, testified how he was attacked and tied and how the thieves made away with assorted goods. He did not identify the people who stole from the shop. PW 1 recalled that after reporting the matter to Ntimaru Police Station, he was later informed that some of his items were being sold in Tanzania and that indeed the items had been recovered in Tanzania. He went to Nyansinja in Tanzania and identified some of his items that had been stolen. He later reported to Ntimaru Police Station. The Commanding Officer assigned two officers to collect the stolen goods from Tanzania. The 1st appellant and another accused were handed over to the Kenyan Police by the Tanzania Police while the 2nd appellant was arrested later.

7. The principal witness was Corporal Bernard Ekada (PW 3) from Ntimaru Police Station. He confirmed that on 20th April 2014 he received a report from PW 1 that his shop had been broken into and assorted goods stolen and his watchman, PW 2, had been attacked. He recorded the items that had been stolen. He further testified as follows;

We got information that there were items found at Nyansinja and taken to Nyamwaga Tanzania which were confirmed to be PW 1's. We did a letter to assist him view the goods. We then took the items he identified as his and went with the items and [2nd appellant and Pauline Gichogo]. The [1st appellant] was arrested later. In Tanzania we found [2nd appellant and Pauline Gichogo] already arrested in the Tanzania Police Cells. [2nd appellant] told us how they got items in Kenya and led us to [1st appellant] and his home. We arrested him later. [2nd appellant] was arrested in Nyamwaga.

8. When the appellants were put on their defence, the each gave unsworn statements in which they denied being involved in breaking into the complainant's shop and stealing. They also denied being found with the stolen items.

9. In convicting the appellants, the learned magistrate concluded as follows;

In relation to the alternative charge, I find the case against the 3 accused persons unshaken by the defence. The accused persons [2nd appellant and Pauline Gachogo] were each found in possession of the items stolen from the shop of PW 1. [2nd appellant] linked the [1st appellant] as an accomplice, even leading the police to the correct home of the [1st appellant]. I am satisfied that the commission of alternative charge has been proved.

10. The offence of handling stolen property under **section 322(1)** of the **Penal Code** provides;

A person handles stolen goods if (otherwise than in the cause of stealing) knowing or having reason to believe them to be stolen goods he dishonestly receives, or retains the goods, or dishonestly undertakes or assists in, their retention, removal, disposal or realization by or for the benefit of another person, or if he arranges to do so.

11. The prosecution must prove beyond reasonable doubt that the accused received, retained or undertook or assisted in the retention, removal, disposal or realization of the goods he knew or had reason to believe had been stolen. The thread running through the definition of the offence is possession of the stolen goods and if possession is not proved then the accused must be acquitted.

12. Having analysed the evidence which I have outlined above, the learned magistrate's finding cannot be supported as the prosecution did not prove that the appellants were found in possession of the stolen goods. It is true that the goods stolen from PW 1 were recovered and identified as his and the 2nd appellant handed over by the Police in Tanzania as being the suspect. There is however no evidence to connect him to the stolen goods. No witness from Tanzania called to testify as the circumstances of the 2nd appellant's arrest or to the fact that he was found with the stolen goods. The testimony of PW 3 in that regard is therefore hearsay as he is not the one who found the 2nd appellant in possession of the stolen items. Likewise, nothing was recovered from the 1st appellant when he was arrested. The evidence connecting the 1st appellant to the goods was accomplice evidence which was not corroborated by any other material evidence and in light of the evidence against the 2nd appellant, his conviction cannot be sustained.

13. In essence, the prosecution only proved that the complainant's goods were stolen. It failed to prove the essential link between the stolen goods and the appellants.

14. The appeal is allowed and the appellants are set free unless otherwise lawfully held on a separate warrant.

DATED and DELIVERED at MIGORI this 2nd day of June 2015.

D.S. MAJANJA

JUDGE

Appellants in person.

Ms Owenga, Senior Prosecuting Counsel, instructed by the Director of Public Prosecutions for the respondent.