



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO. 102 OF 2014

NGUI MWANGANGI APPELLANT

VERSUS

REPUBLICRESPONDENT

(From the conviction and sentence in Mwingi SRM Criminal Case No. 569 of 2014 – G. W. Kirugumi RM)

JUDGEMENT

The appellant was charged with bar breaking and committing a felony contrary to section 306 (a) of the Penal Code. The particulars of the offence were that on the night of 5th and 6th September 2014 at Mwingi Township Mwingi Central District within Kitui County jointly with others not before court with intent to steal broke and entered the bar namely Village Park and therein stole one JVC television coloured S/No. 100400120 model 1486Q, assorted types of beers and spirit, 3 plastic chairs and unknown amount of cash all valued at around Kshs. 35,000/= the property of Kamami Musyoka. In the alternative he was charged with handling stolen goods contrary to section 322 (1) (2) of the Penal Code. The particulars of the offence were that on the 6th September 2014 at Mwingi Township, Mwingi Central District within Kitui County otherwise than in the course of stealing dishonestly retained one JVC TV, 3 plastic chairs, 4 bottles of beer guinness and 6 bottles of wine and spirits knowing or having reason to believe them to be stolen goods.

He denied both charges. After a full trial he was convicted on the main count and sentenced to serve 7 years imprisonment. Dissatisfied with the decision of the trial court, the appellant has come to this court on appeal. His grounds of appeal are as follows:-

1. That the learned trial magistrate erred in law and fact in admitting prosecution evidence which was totally contradicting thus violating the provisions of section 163 of the Evidence Act Cap 80.
2. The learned trial magistrate erred in law and fact when convicting and sentencing him without considering that after he was arrested after thorough search was done in his three roomed house and nothing was recovered connected to the offence.
3. The learned trial magistrate erred in law and fact when he convicted and sentenced him without considering that he had to be arrested even if the said offence was not committed.
4. The learned trial magistrate erred in law and fact by not considering that the prosecution side failed to present before the court the person or persons who fed the OCS with the information that led him to breaking the house where the exhibits were found for example the land lord.
5. The learned trial magistrate erred in law and fact by failing to note that after the complainant and his workers recovered stolen properties they could not identify and recognize the suspect as required by law.
6. The learned trial magistrate erred both in law and fact when convicting and sentencing him very

- severely without considering that his arrest was due to an existing grudge between him and police officers because of a peace bond which he had.
7. The learned trial magistrate erred in law and fact when he convicted and sentenced him without considering that the probation officer never visited his home area to collect necessary information before concluding the matter.
 8. The learned trial magistrate further erred in points of law and fact by failing to note that the judges rule No. 4 was broken which stated that it was wrong in law for a police officer to appear before the court as an investigating officer as well as the arrester when adducing testimony.
 9. The learned magistrate erred in law and fact when convicting and sentencing him without considering that his rights were violated by changing the prosecutor who started the case with another to complete the case.
 10. The learned trial magistrate erred in law and fact by failing to consider his defence and also ignoring his mitigation.

At the hearing of the appeal, the appellant made oral submissions. He stated that he was initially arrested and the police asked him for a bribe. Later the police arrested him and bonded him to keep the peace. It was his submission that the police did not know the person from whom he had stolen. He submitted also that PW2 and PW3 were asleep on the day in question and PW4 the watchman did not see the person who stole. He submitted that though the OCS stated that the theft occurred at 3a.m, the same OCS wanted to arrest him at 11p.m even before the incident was alleged to have occurred. He submitted further that though the OCS said in evidence that he called him on the phone and informed him that a theft was going to be committed, the OCS did not give the telephone number which the appellant used to call him. He maintained that he was not arrested because of the theft. He stated that it was a police officer by the name Irungu who led him to his house and though they searched his residence, they recovered nothing. He complained though the police said that his wife informed them that they had another house the said wife was not called to testify. He said that in actual sense no investigations had been conducted and that he was arrested merely because he had been bonded to keep the peace.

With regard to sentence he submitted that the probation officer was told at his house that he had a clean record.

Mr. Orwa the Learned Prosecuting Counsel, opposed the appeal. Counsel submitted that there were no contradictions in the prosecution witnesses evidence. The evidence of the prosecution witnesses corroborated one another. On non recovery of the items from the house of the appellant, counsel submitted that the stolen items were recovered from a house of the appellant and that the wife was not a compellable witness and was therefore not called to testify. Counsel submitted that because the stolen items were recovered from the appellants house and he did not give an explanation on the same, he was proved to be the culprit. With regard to information given to the OCS, counsel submitted that it was not clear which people the appellant was talking about. With regard to the existence of a grudge with prosecution witnesses, counsel argued that such issue was not brought at the trial and should not be raised on appeal. Counsel emphasized that the probation report contained an opinion on the conduct and character of the appellant and as such it was a proper report. With regard to alleged violation of the appellants right due to change of prosecutors, counsel submitted that change of prosecutors was not a violation of the law. Counsel submitted that the sentence was lawful and that the judgment was sound. As such counsel urged the court to dismiss the appeal.

In response to the prosecuting counsel's submissions, the appellant stated that he was not bringing issues on appeal; and that he had relied on the typed proceedings.

At the trial, the prosecution called 6 witnesses. PW1 was Kamami Musyoka a business man who operated Village Park Bar at Mwingi and another bar at Kitui. He testified that on 6th September 2014 at 9a.m he was called by Victory Mwikya his manger of village park bar at 6am and informed of a breaking at the bar. He proceeded from Kitui to Mwingi arriving at 3pm. He went to the bar and found a number of items missing. These were a JVC 14 inches television, beers and other drinks. In addition, 3 seats were missing and the days sales income was also taken. Padlocks were broken. He was later shown items which he identified in court as coming from his bar. He stated that he did not have a receipt for the

television or other items but could identify the T.V using some marks of paint. He could also identify the 3 chairs using paint marks.

In cross examination he stated that the police only told him to come to court and testify but did not tell him that they had arrested someone. He reiterated that he do not have a receipt for the TV but could identify it using yellow paint marks. He also did not have receipts for the other items.

In re-examination he stated that the items had been marked. The seats had numbers on them.

PW2 was Victor Mwikya Mulavi the manager of village park bar situated near Musila Gardens in Mwingi town. He stated that on 5th September 2014 they closed work at 10.45pm and went away leaving a watchman. They closed the counter using a padlock. The gate was also closed with a padlock. The watchman was given the key.

The next day at around 5.10am, the watchman came to his home and informed him that the bar was broken into while he had gone to the bus stage. He thus contacted his employer PW1 and also called Peter Kilonzo his company manager as well Mary Kiteme an employee at the bar. They all proceeded to the scene and found the exit door padlock opened and the padlock on the ground. They found that the sacks they used to put rubbish were missing. The bar door was also open. The nearby butchery was open. At the counter they found the counter open and the T.V. missing. The counter girl Mary Kiteme also said that the money was missing. All the spirits at the counter were missing. Three plastic chairs were also missing.

At 10am they were called to identify the items. They found 3 chairs, the T.V which was in a sack, beers, trigger spirits and other spirits and brandy. They also found the padlocks. One of the padlocks was however not theirs. The police told them to leave the items at the police station. The police did not disclose to them the person who was arrested.

In cross examination he stated that there were two bars nearby but it was their bar which was broken. He stated that the watchman woke him up and the said watchman was not injured or tied. The watchman said that he did not see any thieves and could not know if the watchman stole. Though the police told him that they had arrested someone they did not disclose the identity of the arrested person.

PW3 was Mary Kalunda Kiteme an employee at the bar. It was her evidence that they closed the bar on 5th September 2014 at 10.30pm and went home. At around 5am she was called by the manger who informed her that the watchman had said that the club was broken into. They went there at 6am and found the door open. The counter was open and the padlock was cut and lying on the ground. Beer crates were outside and money which she didn't count the previous night had been stolen. The T.V was also missing and the counter did not have spirits and beer because the same were also missing. In addition 3 seats were missing. She identified items that were recovered that is the TV set, beers and spirits as well as the seats.

In cross examination she stated that she did not count the money that night as they took stock in the morning. She stated that she saw the watchman in the morning. She said she did not know the thief and also that the watchman was not beaten.

PW4 was Chief Inspector Kinyua Mugambi OCS Mwingi. It was his evidence that on 5th September 2014 while at station he was called by Kimangao the appellant who informed him that there was going to be robbery that night. It was his evidence that he had bonded Kimangao previously to keep the peace. He waited for Kimangao to call him back as promised until midnight but he did not do so. At 1am he decided to join other officers for night patrol and informed them that Kimangao did not call. They were on duty until 4.30am at Musila Gardens and he went home. At 8am when he went to the police station and perused the occurrence book, he found a report of a break in at a bar and thought it was related to Kimangao. He asked if anyone knew Kimangao's home and PC Irungu offered to take him there. When they arrived they met the appellant, his wife and children at the entrance. They then searched the house and found nothing. The wife however said that they had another house and she opened that house where the items were recovered. At that point Kimangao said that the items had been taken to him by other

people. The appellant was thus arrested.

In cross examination, he maintained that the appellant called him on phone and said that he would inform him about the theft that was going to occur. He stated that he found the appellant at his house gate with his wife. He stated that the house of the appellant was a two roomed house but his wife said that they had another room. He did not however know the landlord. He stated that later other thieves were arrested.

In re-examination he stated that Kimangaos wife directed them to the two houses, gave them the key and also opened the other house.

PW5 was Kyalo Mutemi the watchman at the bar. He stated that he was the watchman at Village bar that night and in the morning at around 5am he suffered a stomach ache and went to look for medicine after locking the gate. He went to Garissa stage which was about 300metres away. On coming back he found the bar had been broken into and he woke up his manager. The manager came with one Peter and they noted the things that were missing. He stated that he did not know the accused.

In cross examination he stated that he should not have left the bar but as he was unwell he could not accept to die there of the illness. He did not know where the police recovered the items. He also did not know the items in question.

PW6 was PC Irungu Wanjenga of Mwingi Police Station. It was his evidence that on 6th September 2014 at 7.30am he went to the report office and met Chief Inspector Mugambi and Corporal Kiritu and was informed that there was a report of a break in at village park bar. The OCS said he was suspecting a certain person called Kimangao. Since he knew Kimangao's home they proceeded there in a station vehicle and met Kimangao at the gate. They searched his house in the presence of his wife. His wife said they owned the plot and that they had a key for unrented room. When they opened it the stolen items were found there. The wife said that the husband had brought them at 5am and Mwangangi Kimangao claimed that Ngumbao gave him the items accompanied by Oscar and Musyoka. He also claimed that they wanted him to sell those items. The items were TV JVC, assorted bottles of beer, spirits and seats. They proceeded to village park bar and confirmed that it was broken. A nearby butchery had also been broken. They recovered four cut padlocks. They called the owner of the bar who went to the station and identified the items. They thus charged the appellant. He produced the recovered items as exhibits.

In cross examination he stated that the OCS said he was looking for a suspect whom he knew but did not know the home of the appellant. He stated that the wife of the appellant said that the plot belonged to the appellant. They searched his house but did not find anything but the wife pointed at a room in which they found the items. He stated that the OCS never took any money. He said that the items did not have a receipt.

In re-examination he stated that Kimangao led them to his house and another room. He stated that his first visit to that plot was because of a report by the wife of the appellant of a tenant who had refused to pay rent. He denied asking the appellant for a bribe.

When put on his defence, the appellant stated on oath that he was a chicken vendor and that on 5th September 2014 he left the market and met the OCS who asked him where he was coming from. On 6th September 2014 in the morning, he woke at 9am and went to Mwingi Town. Later he met police officers including the OCS who asked him to show them his house. They went to the house which was three bed roomed. They searched and didn't find anything. Later the OCS arrested him and took money from his phone and from his pocket. Though he told the police that he did not know the person who lives in the other rooms, they asked for a metal to break the door as he watched and on breaking they saw the items and they called for a vehicle. He was later charged with the present offence. He emphasized that the items were found from another house.

In cross examination he stated that he never called the OCS to say that there was going to be theft. He admitted being found by the police at his gate. He stated that his wife was not at home and denied saying that Oscar gave him the items.

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 of the trial court. I have considered the submissions on either side.

The conviction of the appellant is predicated on the prosecution's contention that he was found in possession of stolen items shortly after the incident. The appellant maintains that the offence was a fabrication. He also maintains that the items were found in a house which did not belong to him.

Though the appellant has complained about change of prosecutors, there is no law requiring that only one prosecutor prosecutes a case.

I have considered the prosecution evidence, and in my view the watchman at the bar was an accomplice to the offence. Otherwise how did it occur that at 5am he goes to Garissa stage to buy antacids tablets and that is exactly the time when the break in swiftly occurs. The breakage of several padlocks and taking scattered items in the bar, putting them in sacks and carrying them away, without him being there for that short period is so scientific, that it is unbelievable. In my view he was an accomplice.

Having said so, in my view the appellant was one of the culprits. There is no doubt that he is also known as Kimangao. Though he denies possession of the items, he was present when they were recovered from the nearby room to his residence. They were the same items that were stolen from the bar a few hours before. He denied the presence of his wife and stated that the police should have called his wife to testify. The wife was not a comparable witness for the prosecution. If indeed the wife was absent when the recovery of items incident occurred, I am sure that the appellant would have readily called his wife to come and testify on his behalf. He did not do so, which is his right. However in the process he was not able to shake the prosecution evidence that the stolen items were found shortly after the theft in a house or a room in which he had control. As such he was a principle offender to the offence under the doctrine of recent possession which applies in this case.

I find no basis for his contention that the police wanted a bribe from him or that they charged him with the offence because of an existing grudge. The evidence of the prosecution is believable with regard to the circumstances under which the stolen items were recovered and also that the appellant was in control of the premises where items were found and that he did not give a satisfactory explanation as to how he came to be in possession of those items. As such, the doctrine of recent possession applies.

Consequently I find that the appeal against conviction has no merits. With regard to the sentence the appellant had a number of previous convictions. The learned trial magistrate considered his mitigation before sentencing, and sentenced him to seven (7) years imprisonment. That sentence is the maximum sentence under section 306 (a) of the penal code. In my view, though the appellant had previous convictions the sentence was harsh and excessive as the stolen items were recovered and there were no other aggravating circumstances to the offence. I will thus interfere with the sentence though I am aware that sentencing is an exercise of discretion by a trial court. I will reduce the sentence to three (3) years imprisonment.

In the result I dismiss the appeal against conviction. With regard to sentence I set aside the sentence imposed and order that the appellant will serve three (3) years imprisonment from the date on which he was sentenced by the trial court.

Dated and delivered at Garissa this 8th day of October, 2015

GEORGE DULU

JUDGE