



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERUGOYA

CRIMINAL CASE NO. 140 OF 2012

JAMES MUGENDI Alias KAMUSINJE.....APPELLANT

VERSUS

REPUBLIC.....PROSECUTION

(Being an Appeal from the Conviction and Sentence by J.P. NANDI Resident Magistrate Runyenjes in Criminal Case No. 498 of 2012 on 29th August 2012)

J U D G M E N T

JAMES MUGENDI Alias KAMUSINJE was charged with the following offences of **shop breaking and stealing, contrary to Section 306(a) of the Penal Code**. The particulars as stated in the charge sheet were as follows:-

“On the night of the 12th and 13th June 2012 at Runyenjes Township in Embu County, jointly with others not before Court, broke and entered the shop of FELIX JACKSON MBAABU and stole therein two tins of maize grains, mattress, weighing machine, radio cassette make Panasonic, a mobile phone make ZTE S/No. 356707031265457 and two calculators all valued at Kshs.14,150/= the property of the said FELIX JACKSON MBAABU”.

ALTERNATIVE CHARGE

Handling stolen goods, contrary to Section 322(2) of the Penal Code. The particulars as stated in the charge sheet were as follows:-

“On the 16th June 2012 at Runyenjes Township in Embu County, otherwise than in the course of stealing, dishonestly handled one mobile phone make ZTE S/No. 356707031265457, knowing or having reason to believe it to be stolen or unlawfully obtained”.

After a full hearing the appellant was convicted of the main count and sentenced to 4 years imprisonment. He filed this appeal raising the following grounds:-

1. ***The trial Magistrate erred in both points of law and facts when he failed to consider that the alleged phone which connected the appellant with alleged offence as not found in his possession.***
2. ***The trial Magistrate erred in both points of law and facts when he failed to consider that vital witnesses of whom could have cleared the doubts involved in this case were not summoned to give their evidence, so as to support PW2 allegations.***
3. ***The trial Magistrate erred in both points of law and facts when he failed to consider that vital no evidence was produced before the Court to prove that he had used the alleged phone.***

4. ***The trial Magistrate erred in both points of law and facts when he failed to consider that his fundamental rights were violated when he was held in police custody for nine (9) good days before availed to the court for plea instead of 24 hours as required by the law under section 72 (3) of the Criminal Procedure Code.***
5. ***The trial Magistrate failed to consider that the alleged phone was included in alternative charge after the case was already forwarded in Court.***
6. ***The trial Magistrate rejected his defence on weak reasons leaving Section 169(1) of Criminal Procedure Code having been violated.***

The Prosecution case is that on 13/6/2012 5.30 p.m. PW1 was sleeping when he received a telephone call and was informed that his store had been broken into. He proceeded to the scene and confirmed the report. He found the items mentioned in the charge sheet missing. Among them was a phone ZTE (EXB1). PW2 a police officer stated that on 13/6/2012 6.40 a.m. he received a report concerning the shop-breaking in issue. And on 16/6/2012 11 a.m. he was with PC Langat doing inquiries behind Muthoni bar when they spotted the appellant talking to a certain lady. On seeing them he ran away as he dropped a phone he had. They picked it as they chased him in vain.

At the station he confirmed that the serial numbers of the missing phone were as those of the recovered phone. On 18/6/2012 5 p.m. the appellant was arrested by members of the public and he was charged. In his unsworn defence he said he was talking to a certain lady at Muthoni bar when he saw people running. He too ran away. When he returned at 7 p.m. he was arrested by two workers of PW1 who said he had stolen a phone.

The appellant presented the Court with written submissions and amended grounds of appeal. The issue he raises is that important witnesses were not called. Secondly that he was not arrested with the phone. Mr. Miiri for the State opposed the appeal saying the appellant was found in possession of the stolen phone.

The duty of a first appeal Court as this one are to re-consider and evaluate the evidence on record and come to its own conclusion. I am alive to the fact that I did not see nor hear the witnesses. The Court of Appeal in the case of ***MWANGI VS REPUBLIC [2004] 2 KLR 28*** held thus:-

1. ***An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to have the appellate court's own decision on the evidence.***
2. ***The first appellate court must itself weigh the conflicting evidence and draw its own conclusion.***
3. ***It is not the function of the first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court had the advantage of hearing and seeing the witness.***

In line with the above authority, I have considered the submissions by the appellant and the State plus the grounds of appeal. I have also considered the evidence on record. Ground No. 4 is not supported by the Court record. The appellant was arrested on 18/6/2012 and he was arraigned in Court on 19/6/2012 for plea. There is an error in the charge sheet showing that the appellant was first arraigned in Court on 27/6/2012. Ground 1 therefore fails.

The rest of the grounds relate to the evidence adduced and I will merge them. From the evidence on record it is clear that there was no eye witness to the shop-breaking. One IP Njomo who did not testify went to the scene. The evidence connecting the appellant to the offence is the recovery of the phone ZTE (EXB1). The Court of Appeal in the case of ***ARUM VS REPUBLIC [2006] 1 KLR 233*** laid down what must be proved before a Court relies on the doctrine of recent possession. These are:-

1. ***Before a Court can rely on the doctrine of recent possession as a basis of conviction in a criminal case, there must be positive proof;***

- (a) that the property was found with the suspect;*
 - (b) that the property was positively the property of the complainant;*
 - (c) that the property was stolen from the complainant;*
 - (d) that the property was recently stolen from the complainant.*
2. *The proof as to time will depend on the easiness with which the stolen property can move from one person to another.*
 3. *In order to prove possession there must be acceptable evidence as to search of the suspect and recovery of the allegedly stolen property and any discredited evidence on the same cannot be suffice, no matter from how many witnesses.*

In the present case PW2 alleges that he was with PC Langat when they saw the appellant who was talking to a certain lady run and drop a phone. This was on 16/6/2012. They did not arrest the appellant as he ran way. PC Langat and the alleged lady were not called as witnesses to support what PW2 was saying. The likely inference to be made is that if they had come their evidence would have contradicted that of PW2.

Ref. *JUMA NGODIA VS REPUBLIC [1982-1988] 1 KAR 454.*

It cannot therefore confidently be said that the ZTE phone was found with the appellant. Can it then positively be said that the ZTE phone was PW1's property? This is what PW1 said in his evidence at page 4 lines 11-13

“On 18/6/2012 I was called by police. I went to police station. When I was shown a mobile phone which I identified by a cross near battery, this is the said phone MFI-1. When accused was arrested I was not present”.

So far that is the identification of the phone by PW1. The particulars of the charge mentions a ZTE S/No. 35670703126547 phone. PW1 did not produce any receipt or mention any serial number. All he said was a cross near the battery. The battery is not the phone. How sure can this Court be that the phone produced as EXB1 was the phone indicated as the missing one in the charge sheet? The two first issues in the case of *ARUM (supra)* were not satisfactorily answered in the positive. I therefore find that the doctrine of recent possession cannot apply herein to found a conviction. There was no explanation for the appellant to give as it was not proved that he was found in possession of a stolen phone. Secondly PW1 did not prove that the phone produced in Court as EXB1 was his phone.

I therefore find the appeal to have merit and I allow it. The conviction is quashed and sentence set aside. The appellant to be set free unless otherwise lawfully held under a separate warrant.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 11TH DAY OF MARCH 2014.

H.I. ONG'UDI

J U D G E

In the presence of:-

Ms. Ingahizu for State

Appellant

Njue CC