



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
CRIMINAL APPEAL NO.139 OF 2012

JAMES MUGENDIAPPELLANT

VERSUS

REPUBLIC.....RESPONDENT

From original conviction and sentence in Cr. Case No. 504 of 2012 at the Chief Magistrate's Court at Embu by HON. J.P. NANDI – RM on 29TH AUGUST 2012

J U D G M E N T

JAMES MUGENDI was charged with the following offences;

Church breaking and stealing contrary to section 306(a) of the Penal Code

The particulars of the charge were that;

JAMES MUGENDI NJERU: On the night of the 14th and 15th June 2012 at Kiaragana village Mufu sub-location in Embu County jointly with others not before Court, stole nine plastic chairs, box speaker, mattress, blanket, loose cover, table cloths, radio, thermos flask, two plates, 3 sufurias, wall clock and curtain and food stuffs all valued at kshs.150,000/= the property of East African Pentecostal Church.

Alternative Count

Handling stolen goods, contrary to section 322 (2) of the Penal Code

The particulars of the charge were that;

JAMES MUGENDI NJERU: On the night of the 18th June 2012 at Runyenjes Township of Runyenjes East Location in Embu County otherwise than in the course of stealing, dishonestly handled seven plastic chairs, box speaker, one mattress, blanket, one set loose cover, 2 table cloths, radio, thermos flask, two plates, 3 sufurias, wall clock and one curtain the property of East African Pentecostal Church.

The Appellant denied the charges and the matter proceeded to full hearing as a result of which the Appellant was convicted of the main count and sentenced to four (4) years imprisonment. He was aggrieved by the Judgment and has appealed against both conviction and sentence, raising the following grounds;

1. *That the learned trial Magistrate erred in law and facts by not considering that the Appellant pleaded not guilty.*
2. *That the learned trial Magistrate erred in law and facts when he failed to consider that no fact was raised before the Court to prove that the alleged house of which the exhibits were recovered belonged to the Appellant.*
3. *That the trial Magistrate still failed to consider that during the time of arrest the Appellant was not booked or arrested with any stolen items.*
4. *That the trial Magistrate still erred in both points of law and facts when he failed to consider that the alleged landlord of the said plot was not summoned so as to state of whom he had rented the alleged house where the alleged exhibits were recovered.*
5. *That the trial Magistrate still erred in both points of law and facts when he failed to consider that no written documents was produced in Court so as to prove whether the alleged house (rented) belonged to the Appellant.*
6. *That the trial Magistrate still erred in both points of law and facts when he failed to consider that the informer who informed the police about the said planted house to the Appellant where the alleged exhibits were recovered was not called to give his/her evidence.*
7. *That the trial Magistrate still failed to consider the fact that the alleged confession mentioned by the police was not sworn before the court by the Appellant.*
8. *That the trial Magistrate misdirected himself when he conducted a defective trial of which does not indicate the language and interpretation which was going on in Court during the trial leaving section 23(8) of the Criminal Procedure Code having been violated.*
9. *That the trial Magistrate erred in both points of law and facts when he conducted three (3) different files at one period in respect of the Appellant.*
10. *That the trial Magistrate rejected the Appellant's defence on weak reasons leaving section 169(1) being violated.*

The Prosecution called four (4) witnesses. Its case was that the East African Pentecostal Church Kiaragana headed by PW1 was locked up on 17/6/2012 at 2pm after service. On 18/6/2012 PW1 was informed by PW2 that the church and PW1's house had been broken into and the items in the charge sheet stolen. PW3 a Police Officer received a report of the breaking and visited the scene on 18/6/2012. He confirmed that the offence had occurred. That evening the Appellant was brought by members of the Public and he inquired from him where he stayed but the Appellant denied having a house in Runyenjes. Through his own investigation he found out where the Appellant stayed. He took the Appellant to that house and a number of items were recovered from there. They included EXB1-12. The items were recovered after the house was broken into. PW4 was the investigating officer. His evidence was that the Appellant took them to his house from where the recoveries were made. The Appellant in his unsworn defence denied the charge. He explained that on 18/6/2012 he was at Muthoni bar talking to a business partner when he saw people running. He did the same. When he returned in the evening he met four (4) people who told him he had stolen a phone and he was arrested and booked at the police station. Later he was taken to a house in town where items were recovered after the door was broken.

When the appeal came for hearing the Appellant presented the Court with written submissions. He disputes being the owner of the house where stolen items were recovered from. The State through Mr. Miiri opposed the appeal saying the Appellant was found in possession and did not explain it.

This is a first appeal and this Court is enjoined to reconsider and reevaluate the evidence on record and arrive at its own conclusion. I am also alive to the fact that I did not see nor hear the witnesses and have to give an allowance for that. I am guided by the case of *OKENO –V- REPUBLIC [1972] E.A. 32 at page 36* where the Court of Appeal stated;

“An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (pandya –v- Republic [1957]E.A. 336) and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its conclusions. (Shantital M. Ruwala –v- Republic [1957] E.A. 570). It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions, 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 has had the advantage of hearing and seeing the witnesses, see Peters –v- Sunday Post [1958] E.A. 424

I have considered the submissions by both the Appellant and the State together with the grounds of appeal. I have equally considered the evidence on record and the findings by the learned trial Magistrate. The Appellant has filed several grounds which are a pure repetition but I will address them address them in the best way.

Ground 7. It fails because his mentioning of his co-accused was not the basis of his conviction.

Ground 8. It talks of failure to indicate the language of use and the interpretation thereof. It is true that interpretation is a constitutional right which an accused person freely enjoys. The record does not show the language used in the proceedings. However the Appellant fully participated in the proceedings as is borne by the record. When the appeal came for hearing and on the prompting of the Court the Appellant said he understood everything that proceeded on in the lower Court. He was therefore not prejudiced by the failure by the learned trial Magistrate to indicate the language that was in use. This ground therefore fails.

Ground 9. This one also fails because there is no law barring a Judicial Officer from dealing with more than one file in respect of a suspect. I am also aware that at the time of hearing of the Appellant's cases Mr. J.P. Nandi – Senior Resident Magistrate was the only Magistrate in that station.

Grounds 1-6 will be merged as they touch on the evidence that was before the Court. Infact the main issue emerging is whether the house from which these items were recovered belonged to the Appellant.

In the case of ***ARUM –V- REPUBLIC [2006]1 KLR 233*** the Court of Appeal outlined what the Court should consider in a case of ***“recent possession”*** before founding a convicting on it. These are among others the following;

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. ***In case the evidence as to search and discovery is conflicting, then the Court can rely on the adduced evidence analyzing it and accepting that it considers it to be correct and honest version.***
3. ***In case the evidence as to search and discovery is conflicting, then the Court can rely on the adduced evidence after analyzing it and accepting that it considers it to be correct and an honest version.***

Was the property found with the suspect? EXB 1-12 are normal household goods which PW1 identified as some of his stolen items. The Appellant lay no claim on the goods. The evidence of PW3 and PW4 is the evidence of the recovery of the items. Their evidence must therefore tally on all material aspects. PW3 Ag I.P. Francis Njomo said the Appellant denied having a house in Runyenjes. He therefore sought this information from other sources. After getting this information this is what he says at page 6 lines 10-11;

“I did my investigation and got information where he stays. I took him to the plot where he stays and he directed us to the house where he stays where we recovered several goods”.

At the same page lines 18-21;

“You denied owing a house in town but I had information that you have a rental house in town. You pointed out your house to us. You did not produce any identity card. You were the one who was telling us where the items were”.

On the other hand the investigating officer (PW4) stated the following over the same issue at page 7 lines 2-3;

“We were informed about the house of accused. The first accused took us to his house where we recovered some items which I wish to produce as exhibits”.

At page 7 line 9 – 11;

“You were brought on different allegations. An informer told PW3 about your house and you took us to your house where we recovered the items. The Landlord confirmed that you had rented the house recently. I do not know if you had any written agreement with your Landlord”.

From the above narrative it is clear that the Appellant denied owning any house in Runyenjes. It's also clear that PW3 and PW4 got information on the said house from persons besides the Appellant. It therefore follows that the Appellant could not have led them to the house. According to PW4 the Landlord confirmed to them that this house belonged to the Appellant. Unfortunately PW4 did not deem it fit to call this very important witness to testify. The inference is that he would have given evidence which is contrary to the Prosecution case Ref: **JUMA NGONDI [1982 – 1988] KAR**. PW 3 at page 6 lines 22-23 in cross-examination stated;

“I was with Peserem when we searched your house. We broke into your house as you refused to open the same”.

And PW4 at page 7 lines 12 stated in cross-examination;

“you opened the door”

The question this Court asks is whether the Appellant opened the door for PW3 and PW4 or whether the door was broken?.

From the evidence it is clear that the Appellant was not arrested with anything connected with this church breaking and stealing. It is the recovery of these items that tends to connect him. It was therefore imperative for the Prosecution to first of all prove that this house from which the items were recovered from belonged to the Appellant. There is no evidence that lends to establish that. In his defence the Appellant said he was taken by the Police Officers to a certain plot in town. The Police broke the door and recovered several items and he was charged over that recovery. And the Landlord of the house was not called to testify against him. This was a strong defence which the trial Court ought to have considered alongside the gaping holes in the Prosecution case.

After doing the above analysis, I do find that the appeal has merit. The result is that the appeal is allowed. The conviction is quashed and the sentence set aside. The Appellant to be released unless otherwise lawfully held under a separate warrant.

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

H.I. ONG'UDI

J U D G E

In the presence of;

M/s Ingahizu for Prosecution

Appellant

Njue – C/c