



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 175 OF 2011

BONIFACE MWANGI KINAE APPELLANT

VERSUS

REPUBLIC

(Being an appeal from the conviction and sentence of Hon. J.W. Gichimu Resident Magistrate delivered on 27/9/2011 in Tawa Senior Resident Magistrate Criminal Case No. 247 of 2011)

(Before Hon. B. Thurania Jaden J)

J U D G M E N T

1. The Appellant, **Boniface Mwangi Kinai** was charged jointly with two others with the offence of school breaking and committing a felony contrary to **section 306 (a)** of the **Penal Code**.

The particulars of the offence were that “on night of 12/2/2011 and 13/2/2011 at **Nthaani Primary School, Kalawani Location, Mbooni West District** within **Makueni County** jointly broke and entered into the staffroom of **Nthaani Primary School** with intent to steal from therein and did stole assorted textbooks namely, **Mathematics** – 12 copies, **Kiswahili** – 21 copies, **English** – 25 copies, **Social Studies** – 6 copies, **Science** – 12 copies, **Encyclopedia** – 2 copies, **CRE** – 2 copies and 8.4 kgs K gas all valued at Kshs.62,220/= the property of **Nthaani Primary School**”.

2. When the Appellant was arraigned before the trial court, he pleaded not guilty. The case proceeded to a full trial.
3. The case for the prosecution was that on the material day, **Nthaani Primary School** was broken into and the properties mentioned in the charge sheet stolen. A report was made to the police and investigations commenced.
4. On 10/07/2010 at about 9.00 p.m., police officers laid an ambush at an ongoing construction site where some utensils had been found hidden. At about midnight, the police officers spotted two people who entered the said construction site. While the two people were leaving the building with the goods, the police officers pounced on them and arrested them. The Appellant who was one of those arrested mentioned a shop where he had taken the gas cylinder. The gas cylinder was recovered. The recovered gas cylinder was identified by the school management as the school’s property. After investigations, the Appellant and two others were charged.
5. When placed on his defence, the Appellant gave unsworn evidence. No witnesses were called. He denied the offence and stated that the prosecution did not carry out proper investigations. The Appellant further stated that it is not normal for the same gas cylinder to be re-filled. That the gas cylinder was recovered from his co-accused then they were charged.

6. The trial magistrate was satisfied that the prosecution case was proved beyond reasonable doubts. The Appellant was convicted and sentenced to seven (7) years imprisonment but his two co-accused were acquitted. The Appellant was aggrieved by both the conviction and sentence. He appealed on the grounds that the case was not proved beyond reasonable doubt and that as a first offender he ought to have been given a non-custodial sentence.
7. During the hearing of the appeal, the Appellant relied on his grounds of appeal and his written submissions. The written submissions essentially expound the grounds of appeal.
8. The appeal was opposed. The learned counsel for the State submitted that the evidence on record was sufficient to sustain a conviction.
9. This being a first appeal, this court is duty bound to re-evaluate the evidence and the record afresh and come to its own conclusions and inferences – See **Okeno –vs- Republic (1972) EA 32**.
10. From the evidence of the head teacher, PW1 **Mutungu Muindi**, there is no doubt that the school was broken into and the properties mentioned in the charge sheet stolen. The evidence of the head teacher (PW1) is corroborated by that of the school Chairman, PW2 **David Muthoka** who upon receiving the report of theft visited the school and confirmed that the theft had indeed occurred.
11. The evidence of PW4 **APC Osman Mohamed Ahamed** and PW5 **APC Albanus Ndeke**, is that the Appellant was one of the two people who they arrested at the ongoing construction site where they recovered several goods. The aforesaid police officers gave a corroborated account of evidence that it was the Appellant who gave them the name of the person and the shop where the missing gas cylinder was recovered from.
12. The recovered gas cylinder was positively identified by the head teacher (PW1) and the school Chairman (PW2) who pointed out the mark ‘**Nthaani Pry School**’ and another mark (‘**XX**’) on the gas cylinder and the burner respectively. The cylinder and the burner were produced in court as exhibits.
13. Although the Appellant denied having been found with the cylinder there is no reason that emerges from the record why the two police officers who recovered the same would frame him up. It is observed that the arresting officers did not know the Appellant before.
14. The theft occurred on the night of 12/2/2011 and 13/2/2011. According to the evidence of the arresting officers (PW4 and PW5), the gas cylinder was recovered on 10/7/2011. There was therefore a period of about five (5) months between the time of the theft and the time of recovery. The gas cylinder could have changed hands in the course of time and it would not be safe to conclude that the Appellant was involved in the theft of same. However, the Appellant who led to the recovery of the gas cylinder had no explanation on how the same had come into his possession. The inference that can be drawn from the circumstances of the recovery and the arrest is that the Appellant handled the gas cylinder while knowing that the same was stolen property. Under **section 188 (a)** of the **Criminal Procedure Code**, the trial magistrate should have considered convicting the Appellant for the offence of handling stolen property though not charged with it.
15. With the foregoing, I substitute the conviction with that of handling stolen property under **section 322** of the **Criminal Procedure Code**. The sentence of seven (7) years imprisonment was harsh and excessive taking into account the value of the property. The gas cylinder was also recovered. The Appellant was treated as a first offender. The trial court ought to have called for a pre-sentence report by the Probation Officer to consider whether the Appellant was suitable for a non-custodial sentence. Taking into account that the Appellant has served for about 2½ years of the sentence, I will reduce the sentence to the period already served. The Appellant is therefore at liberty unless otherwise lawfully held.

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B. THURANIRA JADEN

JUDGE

Dated and delivered at Machakos this 16th day of July 2014.

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JUDGE