



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUSIA
CRIMINAL APPEAL NO.92 OF 2013

(An Appeal arising out of the conviction and sentence in Busia CMC.No.1082 of 2011 delivered by I.T. MAISIBA PM on 19.11.2013)

EDWIN ODEMBOAPPELLANT

VERSUS

REPUBLICRESPONDENT

J U D G M E N T

1. This Appeal, which is conceded by the State, arises from the conviction of the Appellant on a charge of Breaking into a Building and Committing a Felony contrary to Section 306 (a) of the Penal Code. Following the conviction the Appellant was sentenced to a prison term of 3 years.

2. It had been alleged that;

“On diverse date between 13th September 2011 and 19th September 2011 and 19th September 2011 at unknown time at Funyula Township in Busia County jointly broke and entered a building namely a store of VINCENT OGUTU OLUMBE and committed therein a felony namely theft and did steal from therein 10 tins of 20 litres paint (assorted), 8 flash doors and 15 panel doors all valued ksh.404,000 the property of the said VINCENT OGUTU OLUMBE.”

3. The concession by the State was rightly made. The role of the Appellant in the episode that led to his arrest, trial and conviction are not involved. In Funyula Township stand some Jua Kali Shades. At the material time to this offence, the shades were still under the custody and possession of Vincent Olumbe (PW3). He was the contractor of the Shades but had not handed them to his employer.

4. PW1 was informed by his watchman Nanyanga Maloba (PW1) that on reporting to night duty at 6.00p.m on 13th September 2011, he found that the lock to the shades had been replaced with a silver padlock. He was therefore unable to access the premises. This information was also passed to Fredrick Khadudu Khaduli (PW2) who was the Chairman of the Jua Kali Shades. PW3 was aware that by then (13th September 2011) no persons had been allocated any of the premises.

5. Acting on the information he had received from PW1, PW3 visited the site on 18th September 2011. Indeed he found the Gate to the Shades locked with a padlock that did not belong to him. On making some enquiry he was told that the Appellant had been seen around the premises. The Appellant is his nephew and well known to him. So PW1 contacted the Appellant. The Appellant informed him that one Henry (The Appellants co-accused at trial) had given him a premise within the Shades. Posing as a customer PW1 asked Henry for a premises Henry directed him to the Appellant. Henry informed him

that the Appellant was his agent for purposes of scouting for tenants. Later on 19th September 2011, PW3 met Henry at the site. Henry opened the premises and showed him around. On reaching the store PW3 noticed that several items were missing. They are those mentioned in the charge sheet. This led to the arrest of the accused persons.

6. From the evidence, Henry posed as the Manager of the premises with authority to let them out. Indeed he let out one shop to the Appellant. It was Henry who removed PW3's locks and replaced them with his own. They had hired one Silas (Accused 3) to cut the padlock. The Act of breaking into the premises was committed by Henry with the assistance of Silas. The Appellant played no role whatsoever. Further, there was no evidence that the Appellant played any role in the disappearance of the stolen items.

7. True the Appellant had a key to the new padlock. But he explained that it was Henry who gave him that key. The version of the Appellant would be believable because when duped by PW3, Henry tried to let out premises to him. Henry was holding himself out as the letting agent to the premises.

8. From the evidence, there seems some likelihood that the Appellant was a victim and there would have been no justification for the trial Court to hold that,

“What emerges is that 3 accused persons conspired to break the gate of the premises and it is apparent they must have known who stole from the store at the site. Accused 1 and accused 2 had keys to the store and accused 3 is the one who broke into the store by cutting the gate and locks to the premises.”

As earlier held, the Appellant had given a plausible and believable explanation to how he held the key to the store. He had been given that key by Henry who held himself out as having authority to let out the building. In the absence of evidence that contradicts this, some doubt is created as to the guilt of the Appellant. He should, as I now hold, benefit from that doubt. Consequently I quash the conviction entered on 19th November 2013 and set aside the sentence imposed on him on even date. He is free to go unless lawfully detained for some other reason.

F. TUIYOTT

J U D G E

DATED, DELIVERED AND SIGNED AT BUSIA THIS 2ND DAY OF JULY 2014.

IN THE PRESENCE OF:

KADENYI.....COURT CLERK

.....FOR APPELLANT

.....FOR RESPONDENT