



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT EMBU
CRIMINAL APPEAL NO. 9 OF 2014

(CONSOLIDATED WITH CRIMINAL APPEAL NO.10 OF 2014)

SIMON NJUGUNA NJERI.....1ST APPELLANT

PETER MUGENDI NJERU.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

From original conviction and sentence in Cr. Case No. 607 of 2013 at the Principal

Magistrate's Court Runyenjes by HON. J.P. NANDI – Ag SRM on 21/2/2014

J U D G M E N T

1. SIMON NJUGUNA NJERI & PETER MUGENDI NJERU *alias* **MAN “P”** hereinafter referred to as the 1st and 2nd Appellants respectively were charged and convicted of the offence of Breaking into a building and committing a felony contrary to section 306(a) of the Penal Code.

The particulars as stated in the charge sheet were to the effect that the 1st and 2nd Appellants on the night of 22nd and 23rd days of November 2013 at Runyenjes Township in Embu County, jointly broke and entered BLUEMOON WINES AND SPIRITS SHOP belonging to PURITY GADSON with intent to steal from therein and did steal therein sixty bottles of viceroy spirit of 250ml, 12 bottles of GILBEYS GIN spirit of 750ml, 12 viceroy spirit bottles of 750ml, 30 bottles of Kenya cane spirit 250ml, 40 Kane extra spirit of 250ml, 24 bottles of GILBEY'S GIN spirit 250ml, 5 bottles of Richot spirit of 750ml, 24 bottles of Smirnoff spirit of 250ml, 4 bottles cellar cask spirit of 750ml, 8 bottles of Smirnoff spirit 750ml, 4 packets of sportsman and cash ksh.18,600/= all valued at kshs.110,000/= the property of PURITY GADSON.

2. The 1st Appellant was also charged and convicted of another offence of breaking into a building and committing a felony contrary to section 306(a) of the Penal Code.

The particulars as stated in the charge sheet being that the 1st Appellant on the night of 22nd and 23rd day of November 2013 at Runyenjes township in Embu County jointly with others not before Court broke and entered into a shop belonging to John Mugendi Njiru and did steal from therein 50 kgs of Pakistan rice, 50 kgs of sugar, 30 packets of sportsman cigarettes, 30 packets of super

match kings cigarettes, 20 packets of sweet menthol cigarettes, 20 packets of super match menthol cigarettes, 14 Safaricom credit cards of kshs.100/= each, 13 Airtel credit cards of kshs.100/= each, 9 yu credit cards of kshs.100/= each and cash kshs.3,000/= all valued at kshs.30,000/= the property of JOHN MUGENDI NJIRU.

3. There was an alternative count of handling stolen goods to each main count.

After a full hearing both Appellants were convicted and sentenced to five years (5 years) imprisonment on the 1st count. The 1st Appellant was convicted and sentenced to five years (5 years) imprisonment on the 2nd count. They then filed their appeals which were consolidated on 19th June 2014 with HCRA NO. 9/14 as the lead file.

4. They filed similar grounds of appeals which broadly are as follows;

- i. The learned trial Magistrate relied on inconsistent and wrongly obtained evidence.
- ii. There was no evidence to confirm that the beer bottles belonged to the complainant.
- iii. Their constitutional rights were violated.
- iv. Their defences were rejected on weak reasons.

5. When the appeal came for hearing both Appellants presented the court with written submissions. They have expounded on their grounds.

M/s Ing'ahizu conceded to the appeal in respect of the 2nd Appellant as there was no evidence to support it. She however opposed the one by the 1st Appellant on grounds that there was proof of breaking into the shops and there was theft. Finally there were recoveries by PW3 and PW4 and the recovered items were identified by PW1, PW2, PW5 and PW6 as some of their stolen items. And the 1st Appellant did not explain his possession of the stolen items.

6. The record shows that the Prosecution called a total of six (6) witnesses. PW1 is the complainant in count 1 while PW2 is his employee. Their evidence is that they closed their business at Blue Moon Wines and Spirits shop on 22nd November 2013 at 8pm. The next morning at 6am PW1 was informed of the breakage at her shop. The evidence of PW1 and PW2 is that they found the padlock to have been broken together with the door to the shop and all the items listed in the particulars of the charge missing. The matter was reported.

7. PW5 is the complainant in the 2nd count. He passed by his shop on 23rd November 2013 morning and found a chair outside. On further checking he found the padlock missing and the door was just shut. Inside the shop the sugar and rice were missing. Also broken into was PW1's shop. PW5 and PW6 then reported the matter to the police.

8. PW3 – IP George Wangombe and PW4 – CPL Jackson Tanzi laid an ambush after receiving a tip. They met the 1st Appellant who was carrying a white polythene paper bag which they searched and found it to contain several bottles of spirits (EXB2-6). They proceeded to his house and recovered other empty bottles of spirits plus a sack of Pakistan rice weighing 26kg (EXB8). He was arrested and later charged.

And on 19th December 2013 the 2nd Appellant who was in custody for another offence was taken to his house from where an empty bottle of Gilbeys gin was recovered (EXB 7). The bottles found with the 1st Appellant in the white polythene bag had alcohol in them.

9. The 1st Appellant in his sworn defence stated that his auntie had bought several household goods as they had a ceremony. Rice was one of these items. They were placed in a box and yellow polythene paper bag. They were kept in his house. On 26th November 2013 he carried for one Lucy some items in a black paper bag to her house. On the way he met two police officers who stopped him and wanted to know the owner of the items. He told them and they all went to Lucy's house. Reaching there the paper

bag was opened and found therein were three bottles of alcohol. On searching Lucy's house they recovered two (2) empty bottles of alcohol. The officers proceeded to his house and recovered some items which were in the paper bag. He was escorted to the Police Station. While alighting from the Police motor vehicle with all the items the paper bag got torn and the rice started pouring down. He was later charged.

10. The 2nd Appellant in his sworn defence denied the charges. He said he went to his house on Saturday and noticed that he had no paraffin. He went to the dustbin and found an empty bottle which he washed and used the same to carry paraffin. On 18th December 2013 after work he went to a bar and left at about 9pm after enjoying himself. He met officers who arrested him. On 19th December he took the officers to his house which they searched and recovered nothing but the empty bottle which was produced in Court. The paraffin it had was put in another bottle.

11. This being a first appeal this Court has a duty to re-examine and reconsider the evidence adduced before the trial court and arrive at its own conclusion. I am alive to the fact that I did not hear nor see the witnesses who testified. See **OKENO –V- REPUBLIC [1972] EA 32, SOKI –V- REPUBLIC [2004]2 KLR 21, MWANGI –V- REPUBLIC [2004] KLR 28.**

12. I have carefully considered the submissions by the Appellants and the State plus the grounds of appeal. I have equally considered the evidence on record and the findings by the trial Court. There is no dispute that there was no eye witness to the breaking in. The only evidence touching on both Appellants is the recovery of some of the items that were stolen from the two shops.

13. As was held in the case of **ARUM –V- REPUBLIC [2006]2 KLR 233**, before the Court can rely on the doctrine of recent possession as a basis of conviction in a criminal case as was the case here, 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.***

14. The issue for determination is whether the conditions set out in the **ARUM case (supra)** have been proved.

15. The bottles found with the 1st Appellant and which had alcohol were identified by PW1 and PW2 by the impression of a signature of PW1 which had been placed on them. PW5 and PW6 also identified the sack containing the twenty six 1kg packets of rice (EXB8) which were recovered from the 1st Appellant's house. PW5 said the sack had been torn and he had repaired it. The trial Court was satisfied with this identification by PW1, PW2, PW5 and PW6 as it saw the bottles of alcohol and the sack of rice.

16. The evidence of PW3 and PW4 on the ambush and recoveries from the 1st Appellant has not been shaken. Infact the 1st Appellant in his defence admits having been found in possession of these items. He only adds that the rice was for his aunt who had bought it for a ceremony and that three (3) bottles of alcohol were for one Lucy whose luggage he had carried.

17. There is no evidence at all showing that the 1st Appellant's aunt and Lucy were involved in any of this. Since the 1st Appellant was by law expected to give an explanation for his possession, he should have called his aunt and Lucy to support his allegations. The truth is that he was found in possession of stolen items and had no reasonable explanation to offer.

18. The 2nd Appellant also admits having been found in possession of the empty bottle of Gilbeys gin (EXB7). He explained that he picked it from a dustbin for purposes of using it to store paraffin. PW3 has confirmed that the bottle was indeed empty. The explanation given by the 2nd Appellant is plausible, as

there is no law prohibiting persons from picking up empty bottles. And in any event he was only found with one bottle. In the absence of any other evidence linking him to this offence the learned trial Magistrate should have given him the benefit of doubt. I agree with the learned State Counsel that there was no sufficient evidence to sustain a conviction against the 2nd Appellant.

19. The recovery of these items on the 1st Appellant was on 26th November 2013. The felony complained of had been committed on the night of 22nd and 23rd November 2013. The recovery was within four(4) days of the commission of the offence, which was recent.

20. After re-evaluating the evidence I have come to the conclusion that the conviction against the 1st Appellant is sound and the sentence too. Considering the items stolen and their value I don't find the sentence to be harsh or excessive.

21. The upshot is that the appeal by the 1st Appellant (Simon Njuguna Njeri) is dismissed in its entirety, while the appeal by the 2nd Appellant (Peter Mugendi Njeru) is allowed. The 2nd Appellant shall be released forthwith unless otherwise held under a separate warrant.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 9TH DAY OF SEPTEMBER 2014.

H.I. ONG'UDI

JUDGE

In the presence of:-

M/s Ing'ahizu for State

Both Appellants

Mutero/Kirong – C/c