



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

CRIMINAL APPEAL 61 OF 2011

ANTONY ORIENDE OLOO.....APPELLANT

VERSUS

REPUBLICRESPONDENT

**[Appeal from Original Conviction and Sentence from Bondo SRM’s Court: M. M. NAFULA
D.M11 PROF**

In Criminal Case No.1664 of 2010

J U D G E M E N T

This is an appeal from the Judgment of District Magistrate **M. M. Nafula** in Senior Resident Magistrate’s Criminal Case No.1664 of 2010 where the appellant had been charged with three counts as follows:

Count 1: Breaking into a building and committing a felony contrary to Section 306(a) of the Penal Code. The particulars of this offence being that on the night of the 21st/22nd of November 2010 at Bondo Township in Bondo District jointly with others not before court broke and entered a store belonging to Daniel Odhiambo Oyuga and stole three generators make Honda, Botong and Tiger all valued at Kshs.59,300/= the property of Odhiambo Oyuga.

Count 11: Handling stolen property contrary to Section 322(2) of the Penal Code. The particulars of the offence being that on the 2nd day of November 2010 at Bondo Township aforesaid jointly with another had in their possession one TG 1500 generator blue in colour and one Botong gasoline generator red reasonably suspected to have been stolen or unlawfully obtained.

Count 111: Resisting arrest from a police officer contrary to section 253(b) of the Penal Code. The particulars of this offence are that on the 22nd day of November, 2010 aforesaid the appellant resisted arrest by wrestling **P.C. Boaz Kimetto** a police officer who at the time of the said resistance was acting in due execution of his duty.

The appellant pleaded not guilty to the offence was tried, convicted of the first and second counts and sentenced to 4 years on each count which years were to run consecutively. Being dissatisfied with the judgment the appellant preferred this appeal on the following grounds:

“1. THAT the learned trial magistrate erred in law and facts by convicting me on the evidence of PW4 without corroboration of independent evidence of the A.P. officers who supported my arrest and recovered the alleged exhibits.

2. THAT the learned trial magistrate erred in law and facts in not taking into consideration that dusting evidence from the scene of crime of the exhibits was necessary before convicting me.

3. THAT the learned trial magistrate erred in law and facts by failing to consider that there was no evidence from the scene where the alleged exhibits were loaded or removed by me to PW4’s vehicle before convicting me on the same.

4. THAT the learned trial magistrate gravely erred in law and facts by convicting me on the count of handling stolen property, together with breaking into a building, yet it is illegal to pass two sentences on the same and order to run consecutively. This was harsh and excessive in nature.

5. THAT the learned trial magistrate erred in law and facts in convicting me without an inquiry of the inventory list of the exhibits allegedly recovered in my possession by PW4.

6. THAT the learned trial magistrate erred in law and facts by convicting me whilst failing to consider that I was not accorded a fair hearing by the trial court under Section 50(1) of the constitution., some statements were issued to me after witnesses had testified.

7. THAT the learned trial magistrate convicted and sentenced me to 8 years imprisonment with no jurisdiction to pass the same, causing a breach of law.”

At the hearing of the appeal the learned State Counsel opposed the same. On his part the appellant filed written submissions and made a rejoinder to the learned State Counsel’s submissions.

The submissions by the appellant may be summarized as follows:

- **There was no evidence linking the appellant to the stolen items and breakage of the store;**
- **The prosecution failed to call evidence to corroborate that of PW1;**
- **The appellant’s alibi was ignored without reasons being given;**
- **he also dropped ground 6.**

The learned State Counsel proposed initially that a re-trial be

ordered in view of ground 6 which prompted the appellant to drop the same. The prosecution otherwise supported the conviction and sentence. The learned prosecutor argued that the appellant was found in possession of stolen generators, witnesses provided receipts to prove ownership of the same. Being in possession of stolen goods is sufficient to connect the appellant to the robbery and the evidence on record in its entirety points a finger at the appellant. The learned State Counsel urged that the appeal be dismissed further that the 4 years sentence safe.

I have considered the evidence a fresh, analysed and examined the same. The evidence may be summarized as follows:

PW1 Daniel Odhiambo Oyuga a mechanic who has a workshop lost 3 generators belonging to customers from his store. The lost items were Botong, Honda EM 650 and a Tiger 1500 generators. He reported the matter to Bondo Police Station. He informed the owners also of the lost items. He later learnt that 2 of the generators were recovered. He identified the same at the police station. They were the Botong and Tiger make of generators.

PW2 Masiga Odhiambo Edwin. A businessman. On 13/11/10 he took his generator Botong China to PW1 for repair. He produced a receipt for the same. He had left the generator with PW2 and on 23/11/10 PW1 called and informed him of the loss. He later learnt that it had been recovered. He recorded a statement at the police. He identified the generator in court.

PW3 Nicholas Omondi Oluoch. A laboratory technician. On the 15th of November, 2010 he received a call that his generator had been stolen. It was a Honda.

PW4 P.C. Boaz Kimetto of Bondo Police Station. He testified that on 22nd November 2010 at 12.30 p.m. while he was outside Wanainchi bar where he had parked his car, two people approached him selling two generators. He went with the two people up to Equity Bank and asked a G4S guard to help him arrest them. They were arrested but one escaped. The appellant was arrested and taken to Bondo Police by the witness and **P.C. Noor** and **APC Wachira**

PW5 Otieno Odera stated that: On 15th November, 2010 he took his generator Tiger to PW1. He later learnt that on 22nd November 2010 thieves had broken into the store and stole his generator. He identifies as his a generator in court..

PW6 P.C. Johana Lengandu stated that on 22nd November, 2010 at about 11 p.m. He was on duty at crime branch when PW4 reported theft of two generators. PW6 was taken by PW4 to the cite where the same were recovered. The witness interrogated the appellant who did not give a satisfactory account of the generators. Later two people complained of their generators stolen at PW1's. They produced receipts for them. The third person was not able to produce a receipt but identified the recovered generator. The witness also stated that he was the investigating officer in this case.

On his part the appellant gave a sworn statement. He stated that he is a driver and on the 21st of November, 2010 he was at Wanainchi Bar from 3.30 p.m. to 8 p.m. when one **Peter Onyango** who was drunk abused him and hit him with a bottle. PW4 then came to the appellant and held his waist and told the appellant he was under arrest in the company of 2 APS they took him to Bondo Police. He denied knowing the owners of the generators or seeing them before. In cross-examination he stated further that he was arrested for having fought with another.

The issue before court is whether the appellant herein broke the store and stole the three generators as alleged or in the alternative did he handle stolen items? Thirdly did he resist arrest?

I will start with the third count of resisting arrest. I find like the trial court did that PW4 a police officer did not mention that appellant resisted arrest. There is mention of PW4 seeking for assistance and no more is said save for now the evidence of PW6 the investigating officer. Like the trial court I find that the evidence of PW6 cannot hold in the absence of such evidence from PW4 who with the assistance of others arrested the appellant.

The first and second counts ought to be the main and alternative. To convict the appellant on both would be punishing him twice for the same offence. The appellant therefore succeeds on grounds 4 and 7 of his grounds of appeal.

PW4 a police officer has testified that the appellant and another who escaped attempted to sell the two generators to him at a lower price which brought suspicion. The appellant and the witness did not know each other before, I therefore do not see any reason why PW4 would lie as against him. I find his evidence consistent and truthful. That coupled with the fact that the appellant failed to give a satisfactory account of the two generators brings the doctrine of recent possession into play. The appellant was in possession of lost property the same night after PW1's store was broken into. He gave no proper account and then PW2 and PW5 are able to produce a receipt for PW2 and PW5 identified the generators corroborating the evidence of PW1, irresistibly links the appellant to the offence. Which means therefore that I concur with the findings of the magistrate on this ground. I do also concur with the sentence of 4 years which is lawful.

However although the two counts were not in the alternative as per the charge sheet I find that the first count ought to have been the main and the second the alternative as the first refers to breaking and stealing to subject the appellant to conviction of both would be double jeopardy, unfair and unjustified in which case therefore I will acquit the appellant of the second conviction and sentence.

This therefore means that the appellant will not serve the second 4 years. The sentence of 4 years for each count was to be served consecutively and not concurrently.

The appellant will serve only 4 years for the first count. For avoidance of doubt the term is to run from the date of conviction by the lower court – the 28th of March, 2011.

Dated and delivered this 1st day of March 2011

ALI-ARONI

J U D G E

In the presence of:

.....**counsel for state**

.....**appellant in person**