



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CRIMINAL APPEAL 382 OF 91

Munyoki.....appellant

v

Republic.....respondent

Judgment.

The 2 appellants, namely Joseph Munyoki and Boniface Mwasia were convicted by the Resident Magistrate Voi on the charge of Store-breaking and committing a felony contrary to S. 306(a) of the Penal Code. The 2 appellants were sentenced to 2½ years imprisonment with 4 strokes. They appeal to this court against conviction and sentence.

The facts of the case are as follows: On the Friday the 14th September 1990 at 4.30 p.m P.W.2 – who was a Ministry of Agriculture storeman at Wundanyi routinely locked the door to the Ministry’s store and went away for the weekend. But the Ministry’s watchman, P.W.1 arrived there for his sentry duty on the same evening at 6 p.m. When he inspected the premises he noticed a padlock on the door to the store was and left hanging from the hasp. He did not enter the building and so he could not ascertain whether something had been stolen from it. But he remained at his sentry until the following day when he reported the incident to Wundanyi Police Station. P.W.3 is the Policeman who received the report and then proceeded to the scene where he observed the broken padlock. He used his own personal padlock to secure the door and kept the store out of bound while awaiting the storekeeper. On the 16th November 1990 the storekeeper (P.W.2) availed himself to P.W.3 and they both entered the store. P.W.2 inspected it and established the 2 motorised pumps which had been kept on the rack were not in the store. So these were the items which had been stolen from the store. A team of Policemen which included P.W.3, P.W.8 and P.W.9 was detailed to investigate the crime. Acting on information received P.W.8 arrested the 1st Munyoki. He then went further to question P.W.4 whose evidence is that she accompanied both appellants on a matatu from Mwatate bus stage to house where the appellants kept their 2 pieces of luggage. It is the evidence of P.W.8 and that P.W.4 that on the 20th September 1990 the latter witness led the former to that house and P.W.8, on searching it, found therein a pump in a sack. Later P.W.4 identified the sack as similar to the one in which the 2 appellants had carried their one luggage piece when she was with them on the 14th of September 1990. The owner of that house is Wakise who was arrested and he, in turn, pointed out to the Police the 2nd appellant’s house. He (2nd appellant) was indeed found in that house and was arrested. The second pump was recovered by P.W.8 from the office of the P.W.6 whose evidence was that it was the 1st appellant who had taken it (the 2nd pump) there and had requested P.W.6 to keep it for him. According to P.W.7 is the P.W.6’s employee who had driven the vehicle to Wakise’s house from where he carried the pump in that vehicle) to P.W.6’s office. It is his (P.W.7’s) evidence that he did all this in compliance with the request and direction of the 1st appellant.

The 1st appellant in his defence gave an unsworn statement. His was a total denial. He denied to have stolen the pumps and to have been involved in their movements to the places whence they were subsequently recovered. He also denied knowledge of the people from whose houses or office the pumps were recovered. The second appellant on the other hand gave a sworn testimony in which he confirmed the evidence of P.W.4 regarding the movement of the pieces of luggage from a matatu stage to the Wakise's house. He admitted to have assisted the 1st appellant to carry the items to the first matatu stage (where they met with P.W.4) and to have also carried the same luggage from the stage where they alighted from the vehicle to Wakise's house where they stored them. His evidence is that in all these acts he was only helping the 1st appellant who was his colleague and friend without knowing at all that the items had been stolen from their own place of work.

There was ample evidence showing that the 2 pumps were stolen from the store of the Ministry on the 4th September 1990 between 4.30 p.m. and 6.30 p.m. On this point the credible evidence of the storeman (P.W.2) and that of the watchman (P.W.1) could not be doubted.

With regard to the 1st appellant the evidence of P.W.4, P.W.6 and P.W.7 materially connected him with the stolen pumps. P.W.4 described the manner in which the appellants transported the pumps to Wakise's house. The fact that one of the pumps was later recovered from that house after she had pointed it out to the police categorically bears her out. Also, the fact that P.W.7 moved the second pump from that same house on the 14th September 1990 goes further to corroborate her evidence on the point. The evidence of P.W.6 and P.W.7 serves a double purpose in the sense that apart from linking the 1st appellant with the second pump which was recovered from P.W.6's office, it is a piece of evidence which corroborates that on P.W.4 i.e, that the 1st appellant was one of the two people who carried the pumps to Wakise's house. In those circumstances the 1st appellant's denials were false and a finding that the 1st appellant had possession of the items which had been stolen from his place of work was based on the objective analysis of the acceptable ample evidence on the point. With regard to the 2nd appellant there was evidence of P.W.4 depicting him as the principal (not a subordinate) player in the transportation of the pumps to Wakise's house. He is shown to have not only led the way to that house but to have been the one who kept the pumps on the house. P.W.4 said:-

“Boniface led us to a house behind the shops. Me and Munyoki remained outside while Boniface put the luggage into the house. Boniface did not knock. He just went into the house and we remained outside the main door of the building. It is Boniface (who) told us to wait at the main door of the building. Boniface carried one of the packages into the house and then came back for the other immediately thereafter. He stayed in the house for about 5 minutes after carrying the end bag and then came out. He told us “twende”. We all went to Milkah Bar. It is Boniface who said we go Milkah Bar. Boniface is the 2nd accused.”

The learned trial magistrate accepted and believed that evidence which graphically depicted the active role played by the 2nd appellant in moving the pumps to Wakise's house. Therefore the 2nd appellant's attempt to dissociate himself with the activities he had evidently done in concert with 1st appellant could only be viewed as a fabrication. And the magistrate did so in her judgment. I am unable to find whatsoever that in so doing she misdirected herself.

There was thus evidence undoubtedly proving that the 2 appellants found in joint possession of the items by P.W.4 a few moments after the (items) had been stolen from the store. Their possession clearly raised a presumption which was not rebutted that the 2 men were the thieves. And this is particularly more so in the light of the fact that the 2 appellants had were employees of the department (and station) from where

the items were stolen. The appeals against conviction therefore lacked merit. As to sentence one thing which can be noted is that the 2 men fell from grace when they broke into their employer's store. In those circumstances the rather stiff sentences were quite justified.

I accordingly dismiss their appeals against conviction and sentences.