Lentiyo v Republic (Criminal Appeal E007 of 2024)
[2025] KEHC 3974 (KLR) (25 March 2025) (Judgment)

Neutral citation: [2025] KEHC 3974 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MARALAL

CRIMINAL APPEAL E007 OF 2024

AK NDUNG'U, J

MARCH 25, 2025

BETWEEN

LEMAYIAN LENTIYO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(From original conviction and sentence in Maralal SPM Criminal Case No E115 of 2023– J.L Tamar SPM)

JUDGMENT

1. The Appellant, Lemayian Lentiyo was convicted after trial of burglary contrary to section 304(2) and stealing contrary to section 279(b) of the *Penal Code* (count I), handling stolen goods contrary to section 322(1)(2) of the *Penal Code* (count II) and conveying suspected stolen property contrary to section 323 of the *Penal Code* (count III). He was sentenced to six (6) years imprisonment for both limb in count I, five (5) years imprisonment for count II and six months imprisonment for count III. The sentences were ordered to run concurrently.

2. According to the amended charge sheet, the particulars for count I were that on the night of 25/04/2023 at Maralal town in Samburu central sub-county, Samburu County, with others not before court he broke and entered prosper enterprise business premise with intent to steal therein and did steal from therein one welding machine valued at fifteen thousand shillings (Kshs.15,000) the property of George Gichohi Mwangi and during the same night he broke and entered Oppo enterprise business premise with intent to steal therein and did steal from therein one Huawei Wi-Fi router valued at fourteen thousand shillings (Kshs.14,000/-), fourteen pieces of screen protectors valued at one thousand one hundred and sixty five shillings (Kshs.1165/-) all valued at fifteen thousand one hundred and sixty five shillings the property of Kevin Ngunjiri.

3. The particulars for count II were that on 25/04/2023 at Maralal town in Samburu central sub-county within Samburu County, otherwise than in the course of stealing, dishonestly assisted in the disposal of one welding machine, a laptop bag, a dozen super glue, screen protectors, one monitor, one computer programming unit, one wifi router and one oppo dummy phone knowing or having reason to believe them to be stolen goods.

4. The particulars for Count III were that on the same day and place, he was arrested by CPL Samwel Waithaka, a police officer attached to DCI Samburu central on board a motorcycle with no registration number while having in his possession or conveying suspected stolen property being one welding machine, a laptop bag, a dozen super glue, screen protectors, one monitor, one computer programming unit, one wifi router and one Oppo dummy phone.

5. Being dissatisfied with the convictions and the sentences, he filed a petition of appeal and raised the following grounds of appeal;

    i. The learned magistrate erred for failing to find that the evidence on record did not support the charge.

    ii. The learned magistrate erred for failing to find that there were material contradictions in the prosecution's evidence.

    iii. The learned magistrate erred convicting him on a defective and improper charge sheet which was amended without giving him a chance to challenge the amendment.

    iv. The trial magistrate erred for failing to afford him a chance to defend himself even after indicating he will give sworn evidence and call three witnesses.

    v. The learned magistrate erred by failing to give him a chance to mitigate since the court proceeded with Kiswahili at the time of mitigation which he does not understand.

    vi. The learned magistrate misapprehended the law on admissibility and production of documentary evidence.

    vii. The learned magistrate erred by shifting the burden of proof to him.

6. The appeal was canvassed by way of written submissions.

7. This being the first appellate court, my duty is well spelt out namely; to re-evaluate the evidence tendered before the trial court and subject it to a fresh analysis so as to reach an independent conclusion as to whether or not to uphold the decision of the trial court. See Okeno v Republic [1972] EA 32.

8. In that regard, a good take off point would be a recap of the evidence at the trial court.

9. The evidence before the trial court was as follows. PW1, George Gichohi Mwangi testified that on 25/04/2023 while on his way to work, he was informed that his shop had been broken into. On arrival, he found that there was a hole which had been cut. He opened the shop and found the welding machine missing. Other items were missing viz jix mixing machine, goggles, cap, super glue silicon and other items which he did not notice immediately. He reported to the police and informed business men in town that his shop had been broken into. On 02/05/2023, he was informed by Njunge that someone was selling the machine and he requested him to detain the person selling. He was able to identify the machine at the police station and also found super glue, screen protector. Upon recall, he identified the welding machine, 3 laptop bags, 4 pieces of super glue and one scissors which were his items.

10. PW2, Kelvin Maina Ngunjiri testified that he went to his shop on 01/05/2023 and noticed that the rooftop had been cut and also noticed that some items like phone covers, ear buds, screen protector, cheques vouchers, a client phone and other items were missing. He made a report at the police station and on 03/05/2023, he was called by the police over some items which had been recovered and he found wifi router which serial number matched the box that was left in the shop. He also found batteries and dummy phones, screen protectors, and charger head. That he used to see the Appellant around the shop.

11. PW3 Humphrey Mburu testified that he was a welder and on 02/05/2023 while at his work, a person approached while on a motorcycle carrying something in a sack. He removed the welding machine which he was selling to him at Kshs.11,000/-. He contacted PW1 who had informed him that his welding machine had been stolen. PW1 went there and he contacted the police who arrested the Appellant. That several things were recovered from the sack.

12. PW4, the investigating officer testified that on 01/05/2023, he received information that a person had been arrested conveying suspected stolen goods and, in the morning, PW2 had made a report. He proceeded to the scene and recovered boxes which were stolen. That he took the inventory of the items recovered from the Appellant. That the serial number of the router matched the one that was on the router box. He produced the items recovered as exhibits.

13. The appellant was placed on his defence and he opted to make a sworn statement and call three witnesses. Defence hearing was therefore slated for 17/10/2023. On the said date, he was sworn in and told the court that he did not have anything to say and informed the court to rely on the evidence availed.

14. I have considered the charges herein and the evidence adduced. I have taken cognisance that I neither saw nor heard the witnesses testify and have given due allowance for that fact. I have put into account the submissions made and case law cited.

15. As seen earlier, he was charged with offence of burglary as count I, handling stolen goods as count II and conveying suspected stolen property, count III. In Count I, it was alleged in the particulars that he broke into prosper business premise and stole a welding machine the property of George Githohi Mwangi. In the same count, it was alleged that on the same night, he broke into Oppo enterprise business premise and stole Huawei wifi router and 14 pieces of screen protectors, the property of Kevin Ngunjiri.

16. It is noteworthy from the above that he was charged with the same offence of burglary in respect of two different complainants in one count. My view is that this is bad in law. Further, it was alleged that he committed the offence on 25/04/2023 whereas PW2 testified that his shop was broken into on 01/05/2023 meaning that these were two separate incidents that called for two different charges or at the very least, separate counts. Looking at the charge sheet, it is defective for joinder of offences committed on different dates in one count. I am guided by the Court of Appeal holding in Joseph Lekulaya Lelantile & Jeseph Lomuru Hezron Vs Republic [2000] eKLR where the court held that;

> " We have given careful consideration to what the trial Magistrate said on count two. We are, however, unable to agree with him that there was duplication or duplicity in the manner this count was laid. As we mentioned earlier, the complainants in both counts were father and son. The son was the complainant in the first count while the father was the complainant in the second count. Both were walking together and were attacked together. Each of them was robbed of property that was in his possesion at the time of the attack. Under the circumstances, we are satisfied that the charges were properly laid in two counts although

the robbery occurred on the same date, at the same place and at the same time. But the offence was committed against two individuals each of whom was robbed of his personal property in his possession at the time of the offence. This being so, there were two separate complainants arising from the commission of the offence and each had to be in a separate count. Putting them together in one count as the trial Magistrate said would have, in fact, made the charge bad for duplicity." (emphasis added).

17. The Court of Appeal in Peter Ngure Mwangi v Republic 2014 eKLR addressed the issue of a defective charge sheet when it held that there are two factors to be considered. One, whether or not the charge sheet is indeed defective and two, whether or not even with such defect justice could still be met. In Benard Ombuna v Republic the said court expressed itself as follows;

> " In a nutshell, the test of whether a charge sheet is fatally defective is substantive rather than formalistic. Of relevance is whether a defect on the charge sheet prejudiced the appellant to the extent that he was not aware of or at least he was confused with respect to the nature of the charges preferred against him and as a result, he was not able to put up an appropriate defence."

18. Section 134 of the *Criminal Procedure Code* provides:-

> " Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged."

19. Section 382 of the Criminl Procedure Code provides:

> " Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice. Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings. It follows therefore that the court in determining whether a defect caused injustice has to have regard whether the objection should have been raised at an earlier stage in the proceedings."

20. In our instant case, it is further noted that the Appellant was charged with the offence of handling stolen goods as a separate count, count II. This was also wrong as the count for handling stolen goods is normally charged in the alternative. Our courts have also held that one cannot be convicted of stealing and handling at the same time. The rationale being that one cannot be a thief and at the same time the receiver of the things stolen. This was reiterated by Musyoka J in Johnstone O. Onyango & another v Republic [2019] eKLR where he held that;

> " The appellants have not raised issue with the fact that the court convicted them of stealing and handling stolen property at the same time. Handling stolen property is always charged as an alternative to stealing. One cannot be a thief and at the same time the receiver of goods stolen during the theft, for he cannot receive stolen items from himself. The thief and the

receiver must be two different individuals. The two offences cannot be charged in the same charge sheet as main offences, for the accused cannot be a thief and receiver at the same time, he either has to be the thief or the receiver of the stolen goods. It was with that in mind that the court in Stephen Viljoen & 2 others vs. Republic [2006] eKLR said:

"... to put it simply, there can be no handling under section 322 of the *Penal Code* if there was no theft of the item alleged to be handled. The prosecution in support of a charge of handling stolen goods must first and foremost prove that the goods were stolen, and then only would the prosecution be required to prove that the accused person" received' or 'retained" them, the accused knew or had reasons to believe that they were stolen."

The corollary is that an accused person cannot be convicted of both theft and handling stolen property. Once the trial court convicts the accused person of theft, it ought to dismiss the handling stolen goods charge against the accused found guilty of theft, and where it is persuaded that the accused was not the person who stole the subject goods, but is convinced that he received them while knowing them to be stolen, it ought to convict of handling stolen goods and dismiss the theft charge. It was improper therefore for the trial court to entertain the count on handling stolen goods as a substantial charge rather than an alternative to the theft charge, and to go ahead and convict the appellants of both theft and handling stolen property. The convictions and sentences cannot accordingly stand."

21. See also Antony Kariuki Kareri Vs Republic [2004] eKLR where the court observed that:-

> "When a person is charged with theft and, in the alternative, with receiving and the sole evidence connecting him with the offense is the recent possession of stolen property, ten, if the only reasonable inference is that he must have either stolen the property or received it knowing it to be stolen, he should be convicted either of theft or of receiving according to which is more possible or likely in the circumstances. He is not entitled to be acquitted altogether merely because there may be doubt as to which of the two offences he has committed."

22. I have considered the facts in this case and the principles of the law as seen in statute and in legal precedents. The cardinal consideration when a defect is note as is in the proceedings before the trial court is whether given the defect, the Appellant was still able to understand the charge and mount a proper defence thereto and whether he was prejudiced thus hindering a fair hearing.

23. On the material before court, it is my firm finding that the defects in Counts I and Count II bring to the fore confusion as to what charges the Appellant was to defend himself against. In Count I, he is to defend himself against 2 offences commited on different dates against 2 different complainants and locations while in Count II he is to defend himself against a main charge of handling the same property he is alleged to have stolen.

24. How these glaring defects escaped the notice of the Director of Public Prosecutions and the court is mind boggling but one thing remains clear; that in a case that seemed to carry clear evidence, the framing of the charges heavily prejudiced the Appellant and therefore the CountsI and II ought to have been dismissed on the basis of the defect.

25. In regards to count III, he was charged with conveying suspected stolen property contrary to section 323 of the *Penal Code*. The said section states that;

> "Any person who has been detained as a result of the exercise of the powers conferred by section 26 of the *Criminal Procedure Code* (Cap. 75) and is charged with having in

his possession or conveying in any manner anything which may be reasonably suspected of having been stolen or unlawfully obtained, and who does not give an account to the satisfaction of the court of how he came by the same, is guilty of a misdemeanour."

26. Section 26 of the *Criminal Procedure Code* stipulates as follows:

    1. "A police officer, or other person authorized in writing in that behalf by the Commissioner of Police, may stop, search and detain—

        a. any aircraft, vessel or vehicle in or upon which there is reason to suspect that anything stolen or unlawfully obtained may be found; or

        b. any aircraft, vessel or vehicle which there is reason to suspect has been used or employed in the commission or to facilitate the commission of an offence under the provisions of Chapters XXVI, XXVIII and XXIX of the *Penal Code* (Cap. 63); or

        c. any person who may be reasonably suspected of having in his possession or conveying in any manner anything stolen or unlawfully obtained.

27. The conditions precedent to a finding of guilty under section 323 of the *Penal Code* as read with section 26(1) of the *Criminal Procedure Code* were set out in the case of Kiondo Hamisi Vs Republic(1963) E.A 209 where the court stated that the prosecution must establish:

    1. That the accused was, in fact, detained in the exercise of powers conferred by the relevant section of the *Criminal Procedure Code*;

    2. That at the time when he was detained, the accused was in the course of a journey;

    3. That at the time when he was detained, the accused had in his possession a particular thing;

    4. That the thing was of such a nature, or the circumstances were such that it might reasonably be suspected of having been stolen or unlawfully obtained; and

    5. That the accused refused to give an account to the court of how he came by the thing, or gave an account which was improbable as to be reasonable, or gave an account which was rebutted by the prosecution.

28. In Charo v. R. [1982] KLR 1 where the court summarized the ingredients of the offence under section 323 thus:-

> " The ingredients of a charge under Section 323 of the *Penal Code* are that a person must have been detained pursuant to Section 26 of the *Criminal Procedure Code* (Cap 75); the person must be charged with having in his possession or conveying anything reasonably suspected of having been stolen or unlawfully obtained; and the person must have failed to give an account to the satisfaction of the court of how he came by the thing so suspects."

29. The facts of this case are that PW3 was approached by the Appellant who went to his place of work on board a motor cycle carrying something in a sack. He removed the welding machine which he wanted to sell to him. He alerted PW1 who had informed him that his welding machine had been stolen. PW1 went there and called the police who arrested the Appellant and several other things were removed from the sack he was carrying.

30. The Appellant gave no satisfactory account of how he came into possession of the items recovered from him.

31. Flowing from the above, it is clear that the charge in count I was incurably defective and the conviction on the alternative charge after conviction on main count is not legally sustainable. Consequently, the appeal succeeds to that extent. I quash the said convictions and substitute thereof an order acquitting the Appellant in respect of count I and II.

32. As regards count III, the appeal fails and is dismissed. With the result that the Appellant is to be set at liberty forthwith unless he has not completed the term in respect of Count III or he is lawfully held under another warrant.

DATED SIGNED AND DELIVERED VIRTUALLY THIS 25TH DAY OF MARCH 2025

A.K. NDUNGU

JUDGE