



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO. 47 OF 2013

From original conviction and sentence by Principal Magistrate (B.M.Mararo) in Kyuso Principal Magistrate's Court Criminal Case No. 127 of 2011.

FREDERICK MUEMA NGUNGU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

Background

Frederick Muema Ngungu, the appellant, was charged in the lower court at Kyuso with the offence of breaking into a building and committing a felony contrary to section 306 (a) of the Penal Code. It is alleged that on 15th June 2011 at Gai Village in Kyuso District within Kitui County jointly with another before the court broke and entered a building namely school and committed a felony, namely theft of timber, 38 mattresses, iron sheets and a door all valued at Kshs 39,450.

In the alternative, the appellant was charged with handling stolen goods contrary to section 322 (2) of the Penal Code. This is alleged to have been committed on 13th July 2011 at the same place as in the main count when he was found with 3 iron sheets and some pieces of timber having reason to believe them to be stolen or unlawfully obtained.

The case for the prosecution was supported by evidence of five witnesses. The trial magistrate considered this evidence and found that the case had been proved and convicted the appellant in the main charge. He was sentenced to three years imprisonment. The appellant is dissatisfied with the conviction and sentence and has appealed to this court.

Petition of appeal

In his amended petition of appeal, the appellant has raised seven grounds which I have understood and summarized as follows:

- i. The trial was unfair.
- ii. The prosecution failed to prove the case beyond reasonable doubt.
- iii. The prosecution evidence was contradictory and inconsistent.
- iv. The investigating officer was not summoned to testify.
- v. The mode of arrest was poor.
- vi. The exhibits were not identified as belonging to the complainant.

vii. That there was no evidence connecting the appellant with the breaking and stealing and the trial magistrate did not apply the doctrine of recent possession.

The appellant submitted in support of the appeal that the date the offence was allegedly committed is contradictory in that the charge sheet shows the offence was committed on 15th June 2011 when PW1 said it was 13th June 2011; that the alleged stolen items were not ascertained because PW1 said 38 mattresses, iron sheets and timber were stolen while PW2 said it was 18 mattresses and one door; that the doctrine of recent possession was not applied in this case and therefore it is not clear how the trial court convicted him on the main charge; that the table found at his home was given to him by one Muasya as payment for work he had done for Muasya; that there are many contradictions in evidence and that the case was not proved beyond reasonable doubt.

Respondent's Submissions

The appeal was opposed by the state. Learned state counsel, Miss Njagi, submitted that the ground that the appellant was not accorded a fair trial has no merit because the record of the trial court shows that the appellant participated in the trial which was conducted in the language that he understands and he cross-examined all witnesses.

It was further submitted that the prosecution witnesses were credible and that the evidence of PW1 was corroborated by that of PW2 and the evidence of PW3 was corroborated by that of PW5; that the exhibits were identified by the witnesses; that the fact that the investigating officer was transferred did not prejudice the appellant; that the arrest was conducted within the law; that PW1 and PW2 identified the items recovered from the appellant's home as the ones stolen from the complainant; that the doctrine of recent possession is applicable in this case and that the contradictions in evidence are minor and do not destroy the prosecution case. Learned counsel submitted that the case was proved beyond reasonable doubt and asked the court to dismiss the appeal.

Evidence

Jeremiah Nzioka, PW1, told the lower court that in company of others they found the Trinity Bible Institute situated at Gai, broken into and 38 mattresses, iron sheets and timber stolen. He said that one Musya was found in the school compound removing doors but he fled upon being found. The matter was reported to the area Chief and to the police who led an operation to the said Musya's home. A table and a sheet were recovered.

John Mbuvi Michael, PW2, who said teaches at the Trinity Bible Institute testified that he was informed of the theft and that when he went to the scene he found 18 mattresses and a door had been stolen and that a suspect was charged with the theft and convicted. He further testified that the appellant was arrested on 12th July 2011 and that he was found with a mattress cover, timber, wire mesh, cupboard door and curtain holder.

John Kimotho, PW3, said from the appellant's home they recovered timber and mattress cover.

Musili Musyoka, PW4, testified that in June 2011, the appellant sold him a mattress at Kshs 900 but he paid him Kshs 600 first; that the appellant had gone to him with two mattresses and said the mattresses belonged to his children and that he had problems. PW4 said he learnt that the mattresses were stolen.

The role of PW5 Police Constable Kennedy Kimanthi was to produce exhibits. He explained that the investigating officer who had handled the case had been transferred.

Determination

I have carefully examined and evaluated the evidence. Clearly the evidence is contradictory. The date the offence of breaking in and stealing was allegedly committed is 13th June 2011. It is only PW1 who

mentions this date. PW2 said that he was called and informed of the breaking in on 16th June 2011. PW3 mentions June 2011 without stating the day. PW4 said the appellant sold him two mattresses in June 2011 without stating the day. The charge sheet states that the offence was committed on 15th June 2011.

Secondly, PW1 said 38 mattresses, iron sheets and timber were stolen. The iron sheets are not quantified nor were the timber. PW1 also said that a table and a sheet were recovered from appellant's home. PW2 said 18 mattresses and a door were stolen.

The trial magistrate did not comment on these contradictions. In addition, evidence of PW2 is rather confusing on the issue of recovered property. Testifying in respect of the appellant he stated as follows:

“I know accused. He was arrested on 12th July 2011. He was charged for handling stolen property. He was found with mattress covers, stolen timber, wire mesh, cupboard door, curtain holder...”

This contradicts PW1's evidence that a table and sheet were recovered from the appellant. It is not clarified whether it was iron sheet or what type of sheet it was.

The appellant in his defence stated that the table recovered from his house was given to him by one Musya in payment for work he had done for him.

In his judgement, the trial magistrate stated that:

“I have considered all the evidence placed before me and I note that the accused opted to give unsworn statement and called no witness and it was his defence that he received the table recovered from his house from one Musya in consideration for constructing a house for him. I note that he steered clear of the mattress cover and mattress that was also recovered from him.”

My careful reading of the evidence does not show that a mattress was recovered from the appellant. PW1 said a table and a sheet were recovered from the appellant's home. PW2 said the appellant was found with mattress covers, stolen timber, wire mesh, cupboard door and curtain holder. PW3 said they recovered a small table and mattress cover.

I have already considered and made my findings concerning the contradictory evidence. The above evidence is contradictory and more to that it does not show that the mattress was recovered from the appellant's home. PW4 is the only witness to connect the appellant with the alleged mattress. There is no evidence to show how the mattress was recovered and under what circumstances.

The trial magistrate did not believe the defence of the appellant. He told the court that the items recovered from him were given to him by one Musya as consideration for work he had done for Musya. PW1 told the court that the wife to Musya who had been convicted for stealing the items at the Institute told them that the table and sheet found at appellant's home had been sold to him by the said Musya. This is adequate to raise doubts in the court's mind regarding the involvement of the appellant in the commission of this offence.

After my careful analysis of all the evidence, I find that I agree with the appellant that the evidence is contradictory and that the prosecution failed to prove its case beyond all reasonable doubt. I find that there are many doubts in the prosecution evidence. I also find that the trial court failed to consider the appellant's defence. The evidence is not clear on the manner the exhibits were recovered. The trial court convicted the appellant on the main charge without evidence to support that he committed that offence. The court did not invoke the doctrine of recent possession to connect the appellant with this offence and he did not convict him on the alternative charge. Even without considering the other grounds of appeal, the fact that there are serious contradictions in this case regarding the items found in appellant's house and failure of the trial court to consider that the evidence does not prove the case beyond reasonable doubt is persuasive enough for this court to allow this appeal. In the circumstances, I find that the appeal

has merit. I hereby allow the appeal with the result that the conviction is hereby quashed, the sentence set aside and the appellant set at liberty. He shall be released forthwith unless for any other lawful cause he is held in custody.

Dated, signed and delivered this 25th day of June 2014.

S.N.MUTUKU

JDUGE