



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT GARISSA**

**CRIMINAL APPEAL NO. 108 OF 2012**

**APPEAL FROM THE CONVICTION AND SENTENCE BY THE RESIDENT MAGISTRATE  
AT MWINGI IN CRIMINAL CASE NO. 421 OF 2012 (I.W GICHOBİ, RM)**

NDUTE MUSYOKA.....1<sup>ST</sup> APPELLANT

MWENDWA MAKAU.....2<sup>ND</sup> APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

**JUDGEMENT**

**Background**

Originally there were two appeals filed: Criminal Appeal No. 108 of 2012 and Criminal Appeal No. 113 of 2012 filed by Ndute Musyoka, the 1<sup>st</sup> Appellant, and Mwendwa Makau, the 2<sup>nd</sup> Appellant respectively. The two appeals were consolidated by this court on 25<sup>th</sup> March 2014 into one with the court file becoming Criminal Appeal No. 108 of 2012. The appellants appear in the manner they appeared before the lower court.

Both appellants had been charged before the Mwingi court with breaking into a building and committing a felony contrary to section 306(a) of the Penal Code. It was alleged that the two appellants broke and entered into Feso Pharmacy and Agrovvet belonging to Boniface Soo situated in Mwingi Town, within Mwingi District Kitui County and stole assorted items as listed in the charge.

The two were tried and convicted by the lower court. Each was sentenced to seven years imprisonment. They are dissatisfied with the conviction and sentence and have come to this court on appeal.

**Petitions of Appeal**

The grounds of appeal are similar save for a few differences. The 1<sup>st</sup> Appellant in his amended petition of appeal filed on 31<sup>st</sup> October 2013 lists six grounds which I have understood and summarized as follows:

- i. That there is no proof that the alleged stolen items belonged to the complainant.
- ii. That some crucial witnesses were not summoned to testify.
- iii. That the alleged recovered catapult was not found in his possession.
- iv. That the evidence by the prosecution was contradictory and inconsistent.
- v. That the mode of arrest has not been established.
- vi. That the value of the alleged stolen items differs in the initial report and the evidence on record.

The 2<sup>nd</sup> appellant has advanced similar grounds save to add that:

- i. That the description of the recovered dust coat and the one allegedly stolen was different.
- ii. That the sentence of seven years is harsh and excessive.

Both appellants made similar submissions in support of their respective appeals. Generally they are contesting the evidence claiming it was inadequate to prove breaking into the pharmacy and stealing. They also claim that the drugs produced in evidence were taken to court by PW3. They also claim that if the thugs were found before stealing where did the exhibits come from. They state that crucial witnesses mentioned in evidence were not summoned in court.

Both appellants did not argue their appeal. They preferred to leave the court to read and consider their written submissions and give a judgement.

### **Submissions by Respondent**

The appeal was opposed by the respondent. The learned state counsel submitted that there is evidence to show that the arrest carried out by PW2 and PW3 was according to the law; that the two appellants were caught in the act and therefore this ground of appeal should not arise. It was submitted that there are no discrepancies that in regard to the items recovered and those stolen as the complainant identified some of the recovered items; that the evidence of the complainant and the police officers was adequate to connect the appellants with the offence and there was no need for the prosecutor to call other witnesses. Counsel further submitted that the defence of alibi advanced by the appellants was misplaced.

### **Facts of the case**

While PC Daniel Mbole, PW2, and PC Tony Akungu, PW3, in company of CPL Wairimu (not a witness) were in patrol within Mwingi town on 28<sup>th</sup> July 2012 at around 2.30am they received a telephone call alerting them that there was theft in progress. They went to the scene which is described as being at the Mwingi Market. They approached the place with many shops. They could hear some commotion inside one of the shop described as a chemist. At the front of that chemist the door was intact and PW3 was left guarding the place. PW2 went through a corridor to the back where he found one door open. Using his torch as the source of light he entered the shop and saw two people identified as the appellants inside. PW2 also noticed some broken padlocks near the door. He challenged the appellants who failed to explain themselves. He ordered them to lie down and shot in the air twice to scare them. While the 2<sup>nd</sup> appellant lay down the 1<sup>st</sup> appellant went into a room within the chemist and closed himself inside. The 2<sup>nd</sup> appellant was found wearing a dust coat and a catapult was found inside the room where the 1<sup>st</sup> appellant had closed himself in. The police managed to handcuff the appellants and later escort them to the police station where they were charged with this offence.

In the meantime the complainant, Boniface Muoki Soo, PW1, was informed of the breakage. He went to the scene around 3.00am and found the appellants having been arrested. He confirmed finding the chemist broken into after breaking the padlocks. He confirmed credit cards for both Safaricom and Airtel had been stolen including some drugs and cash. From the 1<sup>st</sup> appellant was found Ksh 500 as well as the credit cards.

In his defence the 1<sup>st</sup> appellant stated under oath that he was arrested on 27<sup>th</sup> July 2012 at 12.30am after the instigation of one PC Karumba with whom he had fought over a woman; that he was taken to the police station where he stayed on 28<sup>th</sup> and 29<sup>th</sup> July 2012. He denied having been at the Feso Pharmacy.

The 2<sup>nd</sup> appellant, who testified without taking oath, told the court that on 27<sup>th</sup> July 2012 he spent the night in Mwingi on his way back to Garissa after picking building stones at Matuu; that the driver of the lorry went to bed leaving him guarding the lorry; that at around 3.00am he decided to walk and call the driver since his phone did not have charge; that he met three police officers who beat him and handcuffed

him with another person and took both to Mwingi Police Station where he stayed until 30<sup>th</sup> July 2012 when he was taken to court.

### **Determination**

I have examined all the evidence adduced in the lower court and evaluated the same afresh. I have also considered the defence of each of the appellants. The key witnesses as to what transpired are PW2 and PW3. They responded to a call that there was theft taking place and went to the scene. They found several shops all securely locked at the front. They could hear some commotion in one of the shops. While PW3 was left at the front, PW2 went behind. Through a corridor he was able to find his way to an open door. Inside that door he could see two people with help of his torch light. He ordered these people to explain themselves but they did not. In fact PW2 testified that he had to shoot in the air twice to scare the two to surrender but while the 2<sup>nd</sup> appellant lay down, the 1<sup>st</sup> appellant closed himself inside a room within the shop/chemist. PW2 also claimed that the 1<sup>st</sup> appellant aimed a stone at him but missed hitting the wall behind PW2. The 2<sup>nd</sup> appellant was wearing a dust coat which PW1 identified as the coat normally worn by the staff. It was said to have been heavily stained in blood and this was explained as having been caused by injuries sustained by the 2<sup>nd</sup> appellant after he was beaten by members of public. A catapult is said to have been recovered from a table in the room where the 1<sup>st</sup> appellant had hidden.

I find this evidence well corroborated by PW3 who confirmed rushing to the back of the shop after hearing gun shots. PW3 confirmed finding the 2<sup>nd</sup> appellant wearing a dust coat and lying down and the 1<sup>st</sup> appellant inside a room from where he was arrested and a catapult recovered. PW3 also testified that at the Police Station he searched the appellants. From 1<sup>st</sup> appellants he recovered credit cards and Kshs 500 from his underwear.

The evidence is also corroborated by the PW1 who found the two appellants having been arrested. PW1 said after he and his employee made an inventory in the morning, they found an assortment of items including credit cards, drugs and cash all worth Kshs 3,800 missing.

I have noted that other than the crowbar, four padlocks, dust coat and assorted drugs, the credit cards and the money was not identified by PW1. However, the credit cards and cash Kshs 500 were produced by PW3 as exhibits. The judgement of the lower court also confirms these items were produced.

The appellants claim that they were not at the scene and that they were arrested on 27<sup>th</sup> July 2012. This in my view cannot be true. All the evidence of the three prosecution witnesses places them at the scene on 28<sup>th</sup> July 2012 around 3.00am. The charge sheet also shows the Occurrence Book Number as 06/28/07/2012 and the same date is indicated as the date of arrest of the two appellants.

The trial court did not believe the defence of each of the appellants and neither does this court. The trial court directed its mind properly in finding that even where a defence of alibi is advanced, an accused person does not assume the burden of proof and that such defence is considered against the prosecution evidence.

It is my finding therefore that the defence of each of the appellants cannot be true. I find the evidence on record proves without a doubt that both were arrested inside the shop/chemist belonging to the complainant in the process of stealing. They had not been invited into that shop; they broke it open to gain entry.

It is my finding that even without calling any other witnesses, the prosecution proved its case; that the complainant was able to identify the items stolen from shop; that there are no contradictions in evidence and even if all the evidence may not agree word for word, there is ample evidence to prove this case beyond reasonable doubt; that there is nothing wrong with the mode of arrest; that I found no merit in the claim that the value of the stolen items is inconsistent and that I find the appeal by each appellant without merit.

Lastly I wish to address the issue of harshness or severity of the sentence. Section 306(a) of the Penal Code under which the appellants were charged provides for a maximum sentence of seven years. Courts sitting on appeal have been reluctant to interfere with the discretion of the trial court on sentencing. In **Wanjema v. Republic [1971] EA at 494** the Court stated as follows:

**“An appellate court should not interfere with the discretion which a trial court has exercised as to sentence unless it is evident that it overlooked some material factor, took into account some immaterial factor, acted on a wrong principle or the sentence is manifestly excessive in the circumstances of the case.”**

In my view the circumstances of this case are that the appellants were caught before they took anything away from the chemist. Even what had been hidden under the underwear was recovered. The record also shows that the appellants were first offenders upon conviction. Under those circumstances, it is the considered view of this court that the maximum sentence meted out to the appellants is excessive. For this reason, this court finds it necessary to interfere with the discretion of the trial court in sentencing and reduce the sentence of each appellant to three years each to run from the time they started serving sentence.

In conclusion, the appeal of each of the appellants fails in all other respects except in respect to sentence as indicated in this judgement. It is so ordered.

**Dated, signed and delivered this 19<sup>th</sup> day of June 2014.**

**S.N.MUTUKU**

**JUDGE**