



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT GARISSA**  
**CRIMINAL APPEAL NO. 65 OF 2013**

**Appeal from the conviction and sentence by the Acting Senior Resident Magistrate in the Senior Resident Magistrate's Court Criminal Case No. 235 of 2012 (Mr. V.A Otieno, Ag. SRM)**

JOHN MUSYOKA MUTHENGI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

**JUDGEMENT**

**The Appeal**

John Musyoka Muthengi who is referred to as the appellant in this judgement claims that he was not accorded a fair trial; that the prosecution did not prove the case beyond reasonable doubt; that there were no exhibits tendered in evidence; that the evidence was contradictory and inconsistent; that crucial witnesses were left out and that the trial magistrate did not consider his defence. He is asking the court to allow the appeal, quash the conviction, set aside the sentence and set him free. He has submitted briefly in support of the grounds of appeal. He did not submit why he thinks he was not accorded a fair trial.

The appeal has been opposed by the state. The learned state counsel submitted that the appellant did not raise issue with the lower court that he was not accorded a fair trial and that the record of the lower court shows that the court accorded him a fair trial; that the appellant fully participated in the trial and therefore this ground has no merit.

Counsel further submitted that the evidence of the prosecution witnesses is corroborated, consistent, credible and cogent and the appellant did not rebut it; that failure to call the arresting officer is not fatal or adverse to the prosecution case; that the stolen items were not recovered and therefore the issue of recent possession is not relevant to this case. Counsel asked the court to dismiss the appeal for want of merit.

**The charges**

The appellant was charged with breaking into a building and committing a felony contrary to section 306 (a) of the Penal Code. It is alleged that on the night of 10<sup>th</sup> and 11<sup>th</sup> February 2012 at Mwingi Town in Mwingi District within Kitui County jointly with others not in court with intent to steal broke and entered a cereals store and therein stole 42 bags of green grams, 50 empty bags and a weighing scale all valued at Kshs 250,000 the property of Francis Nzilu.

The appellant was charged with a second count of preparation to commit a felony contrary to section 308

(1) of the Penal Code. It is alleged that this offence was committed on 15<sup>th</sup> April 2012 in Mwingi Town when the appellant was found with a metal bar and knife while not at his place of abode and in circumstances that indicated that he was so armed with intent to break into a building and commit a felony.

### **The evidence**

Three witnesses testified for the prosecution. Francis Nzilu Kitoo, PW1, told the court that he received news that his store had been broken into. He went to the shop and confirmed that the roof had been cut open and the back lock broken. He noted that 42 bags of green grams, 50 empty bags and weighing scales had been stolen. He estimated the value of the stolen items to be Kshs 250,000. He reported the matter to the police.

He later received information from one Kitonga Mwanzia (PW2) and Alex Muthui (not a witness) that they had witnessed the theft and that the people involved were the appellant accompanied by other people. PW1 relayed this information to the police leading to the arrest of the appellant.

PW2 testified that on 10<sup>th</sup> February 2012 at around 11.00pm he was loading a vehicle after which he started walking home. He said that he spotted the appellant and one Mbila parking bags of cereals onto Motor Vehicle Registration number KBP 335J. He asked them whether there was work for him to assist but they told him to leave the scene. When he learned of the theft the following morning he informed PW1 what he had witnessed the previous night.

The appellant, the only defence witness, denied involvement with this crime. He told the court that on 10<sup>th</sup> February 2012 he worked until 7.00pm and went home and that he was surprised to be arrested the following day.

### **Determination**

I have carefully read and analyzed all the evidence. It is true that no exhibits were tendered in court. The police did not make any recovery and the investigating officer (PW3) told the court that the vehicle number KBP 335J was not traced. It is obvious that PW3 did not think it fit to check who the registered owner of this vehicle was. This would have been an easier way in tracing this vehicle.

Nothing was recovered from the appellant to connect him with this offence. The evidence shows that he was arrested in April 2012 two months after the alleged break in and stealing. It is alleged that at the time of his arrest he had with him a metal bar and a knife. This evidence has not been confirmed by the arresting officer and therefore there is no proof of this. Secondly, even if it were true that he had these items, there is no evidence that the same are connected with the offence of 10<sup>th</sup> February 2012.

It is again true that the prosecution did not call to testify the arresting officer(s). This omission, though not fatal to prosecution case in the presence of other adequate evidence, is crucial in this case because the appellant is charged with the second count of preparation to commit a felony. This charge is left in limbo because there is not an iota of evidence supporting the charge. The trial magistrate failed to notice this anomaly and found both charges proved which is erroneous. The trial magistrate also made errors in trying to connect the alleged metal bar and knife with the commission of the first offence without evidence to that fact.

The trial magistrate made a passing mention of the defence of the appellant. He said that the appellant merely denied wrong doing and did not materially challenge the prosecution case but failed to analyze it further.

I have confirmed from the evidence that it is not true that there is contradiction in reference to the registration number of the motor vehicle allegedly found at the scene of the crime. This ground of appeal has no merit.

It seems to me that the trial magistrate relied fully on the evidence of PW2 in finding the first count proved. To this, I wish to consider if the evidence of PW2 proves without reasonable doubt that the appellant committed this offence. I have stated above that there is no evidence in support of count two. This leaves this court with the first count.

PW2 is the only witness who claims to have found the appellant and others stealing from the store belonging to PW1. The time is stated to have been 11.00pm. What was the source of light? Was the appellant known to PW2 before this date? How long did PW2 take at the scene?

I am posing these questions to show that the evidence leaves grey areas which touch on the identification of the appellant. I am aware he did not raise this issue in his appeal but he did raise the issue that the case was not proved. This court, while sitting on first appeal, is under a legal obligation to examine all the evidence afresh and come to its own conclusion. It is my finding that identification of the appellant as one of the people who broke into the store belonging to PW1 and stole the listed items is vital to the conviction of the appellant. It is my finding that the evidence of PW2 does not prove beyond reasonable doubt that the appellant took part in this offence particularly due to the issue surrounding the identification. This evidence required corroboration which is lacking.

I therefore agree with the appellant that this case was not proved beyond reasonable doubts. There are reasonable doubts in my mind as a result of which I find the first charge not proved. I have already said there is no evidence supporting count 2. The appeal succeeds with the result that the conviction in both counts is hereby quashed and the sentences set aside. The appellant shall be set free forthwith unless for any other lawful reason he is held in custody. It is so ordered.

**Dated, signed and delivered this 17<sup>th</sup> day of June 2014.**

**S.N.MUTUKU**

**JUDGE**