REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CRIMINAL APPEAL CASE NO. 94 OF 2018

SILAS MUTIMO SIKHALO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An Appeal from the Judgment of the Resident Magistrate Honourable E. Kigen

in

Eldoret Chief Magistrate's court Criminal Case No. 4661 of 2017

dated 16th October, 2018)

JUDGMENT

SILAS MUTIMO SIKHALO was charged in the lower court with three main counts and one alternative count as follows:-

Count one with the offence of Burglary, contrary to *Section 304 (2)* and stealing contrary to *Section 279(b)* of the *Penal Code.*

The particulars of this offence are that on the night of 27th and 28th day of November 2017 at Mwamba village, Mwamba Sub Location in Lugari Sub County within Kakamega County, the appellant jointly with others not before court, broke and entered the dwelling house of Francis Simiyu with intent to steal therein and did steal from therein thirteen assorted window curtains, one thermos flask, two tins of half used 4 litres paints, and one roll of leveling hose pipe all valued at Kshs. 12,800/= (twelve thousand eight hundred shillings) the properties of the said Francis Simiyu.

In count two the offence is of stealing, contrary to *Section 275* of the *Penal Code*. The particulars hereof being that on the night of 1st and 2nd of December 2017 at Mwamba village, Mwamba sub-location in Lugari Sub County within Kakamega County, the appellant jointly with others not before the court, stole 270kg of shelled maize in six Manila sacks, all valued at Kshs. 9,925/- the property of Francis Simiyu.

Count three is of theft of farm produce, contrary to *Section 8(1)* of the *Stock and Produce Act Cap 55 Laws of Kenya*.

The particulars of this offence being that on the night of 1st and 2nd day of December 2017 at Mwamba village, Mwamba Sub location in Lugari Sub County within Kakamega County, the appellant jointly with others not before court, stole one bunch of green

bananas valued at Kshs. 200/- from the farm of Francis Simiyu.

In the alternative, the appellant faced an offence of handling stolen goods, contrary to *Section 322 (1) (2)* of the *Penal Code*.

The particulars of this offence are that on the 2nd day of December 2017 at Mwamba village, Mwamba Sub location in Lugari Sub County within Kakamega County, the appellant otherwise than in the course of stealing, dishonestly retained one thermos flask, 270kgs of shelled maize, thirteen assorted window curtains, six manilla sacks, two tins of 4 litre half used paints, one bunch of green banana and one levelling hose pipe, knowing or having reasons to believe them to be stolen properties.

The prosecution case is that PW-3 in this case owns a parcel of land at Mwamba village, Lumakanda. PW-1 was working for him as the farm manager and PW-2 as a farmhand. On the night of 27th and 28th of November, 2017 PW-2 went to bed. When he woke up in the morning he found the door open. When he checked in the house he found a hose pipe, clothings and a Thermos flask missing. He called PW-1 and reported about it.

On 28/11/2017, 30/11/2017 and 1/12/2017 they shelled maize. On 2/12/2017 in the morning PW-2 discovered that the maize had been stolen. They called PW-3 and informed him about it at around 6.00 a.m. They followed a trail of maize drops upto the appellant's house. They found children sweeping the compound. They reported the matter at Turbo police station. PW-4 together with Inspector Mosonik visited the scene. They followed maize drop trail upto the appellant's house. Appellants was not therein but his mother and Aunt were. The appellant's phone was also not going through. They broke into his house. From therein they recovered three bags of shelled maize, a thermos flask, roll of hose pipe, 13 assorted curtains and 4 litres of paint in 2 tins. The appellant arrived and made noise. He alleged PW-3 workers sold him the items. He tried to escape but was arrested. He was taken to Turbo Police station and charged with the offences preferred in the charge sheet. The allegedly recovered items were produced in court as exhibits.

The appellant in his defence denied the offences and alleged he had a land boundary dispute with PW-3.

The trial court evaluated the evidence and found the appellant guilty of the alternative charge of handling stolen goods, contrary to *Section 322(1)* of the *Penal Code.* He was sentenced to serve 5 years imprisonment.

The appellant dissatisfied with the said convictions and sentence, appealed to this court on the grounds that:-

(1) It was an error to convict him and sentence him to 5 years imprisonment for an offence of Burglary contrary to Section 304 (2) and stealing contrary to Section 279 (b) of the Penal Code.

(2) The trial court misdirected itself as to the ingredients for the offence of Burglary contrary to Section 304 (2) and stealing contrary to Section 279 (b) of the Penal Code.

(3) The defence was not properly evaluated.

(4) The prosecution did not prove their case beyond reasonable doubt.

(5) The evidence adduced did not place him at the scene.

(6) The trial procedure was flawed.

(7) The sentence imposed is harsh, improper and excessive.

The appellant offered written submissions while the prosecution submitted orally.

I have looked at the charges preferred, the evidence adduced by the prosecution witnesses in the lower court, appellant's brief defence, the judgment passed, meted sentence, grounds of appeal and submissions by both sides.

Section 4 of the *Penal Code* defines *"Night"* or *"night-time"* as the interval between half-past six O'clock in the evening and half past six O'clock in the morning. *Section 304(1), (a), (b),* and *(2)* defines the offences of housebreaking and burglary. For housebreaking, it is committed when a person breaks and enters any building, tent or vessel used as a human dwelling, with intent to commit a felony therein or having entered with the said intent or having already committed a felony therein, breaks out thereof. For this offence it must be during day time. If at night, the offence is termed as burglary. In this case PW-2 did not establish the said offence was committed at night. He simply said he went to bed on the night of 27th and 28th and gave no specific time when he went to bed. Likewise, in the morning of 28th he did not state the time he woke up and found the door open. In short he did not establish the house was broken into at night. Likewise, it is not clear that what was broken into was a dwelling house. PW-2 did not disclose that the house broken into is where he was living or PW-3 living. If at all PW-2 was living therein, it was not explained how it was broken into without him noticing. PW-2 in respect to the second limb of the offence of stealing, contrary to *Section 279(b)* of the *Penal Code*, disclosed what he noticed stolen were, a hose pipe, clothings and Thermos flask. However the charge disclose of thirteen assorted window curtains, one thermos flask, two tins of half used 4 litres paints and one levelling hose pipe. The discrepancy on the additional items in the charge sheet was not explained.

Also the charge alleges the appellant committed the offence jointly with others not before the court. However the evidence does not show that he was with others or there is no way he would have committed the offence alone.

In relation to the offence in count 3, there is no evidence that was adduced to the effect that there was a stolen bunch of green bananas.

The appellant was connected to the offence out of an alleged trail of maize drops which led to his house. From the evidence the alleged house was in a homestead where other people were also living. The appellant's mother and Aunt were disclosed by PW-1 on cross examination to have been present. PW-1 even disclosed that the mother had been arrested as a suspect. The prosecution evidence does not establish beyond reasonable doubt that the items allegedly recovered, were recovered from the appellant's house. The relatives who were present, his mother, Aunt and children were not called to establish so. There is also no evidence that the appellant was living alone in the alleged house and nobody else had an opportunity to take the alleged items therein.

PW-3 also disclosed that some of the recovered items were stolen way back in the year 2001 when he had taken his wife to India. He did not disclose which items and it's therefore questionable whether the alleged offences were committed on the dates alleged in the charge sheet.

The trial magistrate erred in her judgment when she found that the items were recovered from the appellant's house, whereas there is no reliable evidence to that effect. She also confused her finding when she relied on the doctrine of recent possession and found that the appellant is the one who had stolen the items, and yet instead of convicting him on the main counts, did so on one alternative count of handling stolen property, of which infers that she found no evidence to the effect that he was the thief.

The bottom line is that the adduced evidence does not support the offences in the charge sheet and the prosecution failed to establish the offences to the required standard in law; that is, beyond reasonable doubt. The existing doubts are resolved in his favour. The conviction and sentence are hereby quashed, and the appellant is set free unless otherwise lawfully held.

S. M GITHINJI

JUDGE

DATED, SIGNED AND DELIVERED AT ELDORET THIS 10TH DAY OF AUGUST, 2021.

In the presence of:-

Mr. Okara for the appellant

Ms Limo for state

Ms Gladys - Court assistant