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**Mudio v Republic (Criminal Appeal E011 of 2021)**
**[2023] KEHC 1072 (KLR) (21 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 1072 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT MALINDI**

**CRIMINAL APPEAL E011 OF 2021**

**SM GITHINJI, J**

**FEBRUARY 21, 2023**

**BETWEEN**

**ELIJAH JABU MUDIO ............................................................................ APPELLANT**

**AND**

**REPUBLIC ...................................................................................... RESPONDENT**

***(Being an appeal for the entire decision judgment of Honourable S.K.Ngii – Principal Magistrate in Chief Magistrate's Criminal Case No.30 of 2019 at Mariakani Law Court)***

**JUDGMENT**

CORAM: Hon. Justice S. M. Githinji

Mwangi for the State

Appellant in person

1. The state charged, Elijah Jabu Mudio with the offence of Burglary Contrary to Section 304(2) and Stealing Contrary to Section 279 (b) of the *Penal Code*. The particulars of the offence being that on the 1st day of October, 2018 at around 19:00 hrs at Mackinnon Road Location, Kinango Sub County within Kwale County, the accused broke and entered the dwelling house of Yunas Sadik Ibrahim with intention to steal and stole 2 Ramton Fans with assorted colors green and grey, three bags full of clothes , jewelry, electronics, 32 inch Samsung Tv set, Hoofer Sea Piano, microwave , camera and other assorted house hold goods, the property of the said Yunas Sadik Ibrahim which property was valued at Kshs. 500,000/-
2. In the Alternative, he was charged with the offence of Handling Stolen Goods Contrary to Section 322 (1) (2) of the *Penal Code*.
3. The particulars of this offence being that on the 12th day of January, 2019 at around 10: 00hrs at Mackinnon Road Location Kinango Sub County within Kwale County, otherwise than in the cause

of stealing, dishonestly retained 2 Ramton Fans, two tables, three T. V stands, 13kgs gas cylinder, one gas cooker, assorted clothes and sheets, assorted household goods and assorted utensils all valued at Kshs. 250,000/- knowing or having reasons to believe them to be stolen goods.

4. Upon trial in the lower court, the appellant was convicted on both limbs of the offence in the main count and sentenced to serve 3 years and 4 years imprisonment respectively. The said sentences to run concurrently.

5. Aggrieved by the sentence and the conviction of the trial court, the Appellant lodged an appeal on the following grounds:

    1. That the learned trial Magistrate erred in law and fact in failing to hold for the appellant.

    2. That the Learned trial Magistrate erred in law and in fact by awarding the appellant to serve seven years in prison for the two counts.

    3. That the Learned trial Magistrate erred in law and in fact in failing to find that the right to a fair trial was not given to the appellant in that there was no investigating officer who testified neither the arresting officer from Taru police station to consider the evidence tabled before him.

    4. That the Learned trial Magistrate erred in law and fact in failing to appreciate the manifest contradicting evidence.

6. He sought to have this Honourable Court set aside the judgement of the trial court dated February 11, 2021.

**Evidence**

7. PW1, Zuleka Mohammed stated that their house was broken into. That she had locked her house and left for Makindu. That the husband later went and found that the house had been broken into and their household items stolen. It was her testimony that on January 13, 2019 she and her husband were led by the police to the house of the accused person who was at the time unknown to her where she found her household items of which that was able to identify. She told the court that she found utensils, curtains, drawers (side tables of the bed), coffee table and TV trolley.

8. She further stated that the items before court in a box which were 3 ceramic cups, 2 ceramic plates, 3 steel bowls, skewers, 3 lids, two cooking sticks, one roller pin, one hot pot without a lid, one plastic container, 3 plastic lids, 3 blankets, one pair of curtains and one bed sheet were recovered from the accused's house. She told the court that she had not sold the items to the accused person.

9. On cross examination, she stated that she discovered that the items had been stolen through her husband. She confirmed that they had locked the house in September, 2018 when they left for Makindu. She further confirmed that all the items had been recovered from the accused person's house. She also told the court that she did not have receipts for the items and neither could she remember the prices.

10. PW2 Yusuf Sadik Ibrahim informed the court that on October 11, 2018 he informed his wife that he had found a house at Makindu and that she should prepare to shift. They packed their items in boxes but there were big items which were not packed and were left. That when he went back after 3 weeks he could not find some of the left items including documents, dispensers, TV, DVD, Hoofers, TV Trolley and other household utensils. That he later reported the matter to the police who later accompanied him to the house of the accused person where some of the stolen items were recovered. That among the items that were recovered from his house included utensils, a computer, furniture and beddings.

11. On cross examination, he stated that he had locked the house and when he returned 2-3 weeks later, he found that the house had been broken into. That the matter was reported to the police the same day. He also stated that he had not sold the items to him.

12. At the close of the prosecution case, the trial court found that a prima facie case had been established and the Appellant was placed on his defence. The Appellant elected to give unsworn testimony where he stated that he bought the household goods with his earnings. He told the court that the complainant had subcontracted him to do some work for him and paid a deposit of Kshs. 20,000/-. That he did not pay him the balance and had been avoiding him not to demand for the balance. That the complainant at one point offered to pledge a fridge as security. He further told the court that he had bought the TV which had been produced from someone in 2015.

13. DW2 Husna Mjeni told the court that the complainant owed the accused person some money and this resulted in personal differences between the two. She also told the court that she had been listed as a prosecution witness but refused to testify allegedly because the complainant wanted her to lie against the accused.

14. On cross examination, she denied that she had recorded a statement with the police but when she was shown the statement, she admitted that she had actually done so. She also stated that at one time she left their house for a while and when she got back she found some items inside the house of which she had not left there. She also stated that the household goods that were found in their house belonged to them and that they had bought them at Voi. She also admitted that she had been bonded to testify for the prosecution but never showed up to testify because she was afraid.

**Analysis and Determination**

15. This being a first appeal, the court is duty bound to re-appraise and re-analyse the evidence afresh, draw its own conclusions and make its own independent findings, bearing in mind that it did not have the advantage of seeing the witnesses testify as was held in *Okeno v. Republic* (1972) EA 32. In executing that mandate, the court must determine whether the learned magistrate erred in failing to hold for the appellant; whether the prosecution proved their case beyond reasonable doubt and if there was material discrepancy in the evidence as to negate the findings leading to a conviction, as the appellant alleges.

16. I have carefully analyzed the offences preferred against the appellant, the testimony of the witnesses as well as the submissions by both parties. Looking at the charge, this court notes that the charge does not specify the exact date and time of the commission of the offence. PW1 in her testimony asserted that she had locked her house and left for Makindu and that when the husband later went back, he found that the house had been broken into and their household items stolen. She told the court that she locked the house in September, 2018 when they left for Makindu but it was not clear from her testimony when her house was broken into. PW 2 on the other hand testified that on 11.10.2018 he informed his wife that he had found a house at Makindu and that she should prepare to shift. They packed their items and moved to Makindu leaving some behind, locked in the house. They returned back to Mackinnon after 3 weeks.

17. This court finds that the evidence adduced does not support the offence carried in the first limb; The offence is burglary. Burglary is committed by breaking into a dwelling-house at night with intent to commit a felony. That felony is identified as stealing which is an offence under Section 279(b) of the *Penal Code* – stealing from a dwelling-house or vessel. The prosecution case does not specify the actual date and time of the commission of the offence. The alleged date of the offence in the charge sheet is the 1st day of October, 2018. Pw-1 in her testimony talked of September, 2018 when she left Mackinnon after locking the house and went to Makindu with her husband. Upon their return they found the

house broken into and the households they had left therein stolen. Her husband (Pw-2) stated they left Mackinnon for Makindu on October 11, 2018 and returned after about 3 weeks.

18. For the offence of Burglary, the time of the offence matters. This is what differentiates it from the offence of house breaking. Burglary is when the offence is committed in the night. Under section 4 of the Penal Code, "night" or "night time" is defined as the interval between half past six o'clock in the evening and half past six o'clock in the morning.

19. Where the evidence is not clear on whether the offence was committed at night or during the day, it then becomes hard for the Court to establish whether the offence committed is of Burglary or housebreaking. This is the position in this case. The first limb of the offence must therefore fail.

20. The second limb is of stealing contrary to section 279 (b) of the *Penal Code*. Under the section, the offence is committed if the thing is stolen in a dwelling house, and it's value exceeds one hundred shillings, or the offender at or immediately before or after the time of stealing uses or threatens to use violence to any person in the dwelling house.

21. The evidence shows the items recovered in possession of the appellant were stolen from the dwelling house of Pw-1 and Pw-2 at Mackinnon and their value in the alternative count is given as 250,000/=. It therefore exceeds 100 kshs. The rest of ingredients for the offence are alternatives as the word "or" is used, and the prosecution was not obliged to establish that there was someone in the house during the commission of the offence, and the appellant threatened to use violence on the person during commission of the offence. Definitely there is no eye witness evidence to the commission of the offence of stealing, contrary to section 279 (b) of the *Penal Code*. The prosecution case is that the appellant was found in possession of some of the stolen items shortly after they were stolen. The appellant and his witness do not deny that they had the possession but alleges they had bought the goods and the appellant was fixed by Pw-2 as he owed him money. That is far from the truth; The evidence of Pw-2 who is a wife to the appellant was completely shaken and eventually destroyed during her cross-examination. She was not truthful in her evidence and simply lied in an effort to exonerate her husband. As such the trial court was right in rejecting the defence case.

22. The doctrine of recent possession applies where a suspect is found handling stolen goods and an inference of guilty knowledge is drawn against an accused in the absence of reasonable explanation from him of how he came by the stolen goods in his possession.

23. In the case of *David Mugo Kimunge-Vs-Republic* [2015]eKLR, the Court of Appeal reiterated the holding in the case of *Isaac Ng'ang'a Kahiga –Vs-Republic* Criminal App. No. 272 of 2005, that;-

> " It is trite that before a Court of Law can rely on the doctrine of recent possession as a basis for conviction in a criminal case, the possession must be positively proved. In other words, there must be positive proof;
>
> i. That the property was found with the suspect
>
> ii. That the property is positively the property of the complainant
>
> iii. That the property was stolen from the complainant;
>
> iv. That the property was recently stolen from the complainant
>
> > "The proof as to time, as has been stated over and over again, will depend on the easiness with which the stolen items can move from one person to the other."

24. Applying the foregoing to the case at hand, all the required ingredients to invoke the doctrine of "recent possession" were well established by the prosecution beyond reasonable doubt. The appellant offered no reasonable explanation as to how he got into possession of the stolen items. It must be deduced that he is the one who stole them.

25. The upshot is that the offence in the second limb was established by the prosecution beyond reasonable doubt. The conviction on the 1st limb fails while that on the second limb succeeds. The sentence meted on the second limb is 4 years imprisonment. I find it fair and reasonable given that the maximum sentence for the offence is 14 years imprisonment. I find no cause to disturb the said sentence.

26. The appellant will therefore continue serving the 4 years imprisonment.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 21st DAY OF FEBRUARY, 2023**

**........................................................**

**S.M.GITHINJI**

**JUDGE**

**In the Presence of;-**

1. The Appellant in Person

2. Miss Ocholla for the State