REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT VOI

CRIMINAL APPEAL NO.11 OF 2020

RASHID WACHILU KASHEKA.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against the conviction and sentence of the Hon. C. L. Adisa

(Resident Magistrate) dated 21st February 2020 in Criminal Case No.459 of 2019

at Taveta RM'S Court).

JUDGEMENT

1. The appellant was with another jointly charged with the offence of Burglary contrary to Section 304(2) and Stealing contrary to section 279(b) of the Penal Code. Particulars of the offence were that on the 7th day of August 2019 at about 0500hrs at Bura Ndogo "A" Village in Taita Taveta Sub County, broke and entered into the dwelling house of Duncan Msalame Mpere with intent to steal therein and did steal a TV make Hitachi, two glass stools, two mobile phones make infinix and techno, mobile charger and extension charger. In the alternative, the appellant was charged with Handling Stolen Goods being the two stolen stools contrary to section 322 (1) as read with section 322(2) of the Penal Code.

2. The appellant pleaded not guilty and trial commenced. He was acquitted of the main count and convicted on the alternative charge to which he was sentenced to serve 7years imprisonment on 21st February 2020.

3. Aggrieved by both the conviction and sentence, the appellant lodged this appeal citing the following grounds:

> **a) That the learned magistrate erred in law and fact when he convicted and sentenced him for an offence which was never proved to the required standard of proof that of beyond reasonable doubt.**
>
> **b) That the learned magistrate erred in law and fact for convicting him based on evidence full of glaring inconsistencies, contradictions and which was insufficient.**
>
> **c) That the learned magistrate erred in law and fact when the trial court amended the charge sheet without informing the appellant of his right to recall and examine witnesses contrary Section 214 of the Criminal Procedure Code thus violating the appellant's right to fair trial.**
>
> **d) That the trial court erred in law and fact for failing to consider the plausible defence of the appellant contrary to the provisions of the Constitution, Section 211 and 212 of the Criminal Procedure Code.**
>
> **e) That the sentence imposed was excessive, harsh and not proportionate to the alleged offence.**

4. When the matter came for hearing, parties agreed to dispose of the appeal by way of written submissions. This being a first appeal, this court is duty bound to independently re-analyse, re-evaluate, and re-asses the evidence presented before the trial court and arrive at an independent conclusion and or finding with the obvious caution that it did not have the advantage of seeing or listening to the witnesses to be able to assess their general demeanor. See the case of **Okeno vs Republic(1972) E.A.32 and Kiilu & another vs Republic (2005)KLR174** where the court of appeal stated that an appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court's own decision on the evidence.

5. Brief facts before the trial court were that, on the 7th day of August 2019 at about 5. 00Am, pw1(hereafter the complainant) left for a call of nature at a toilet outside his house. While at the toilet, he heard screams. On getting out, he found his neighbours among them one Josephine (pw2) screaming. It was then that Josephine informed her that his (pw1) house hold items had been stolen. Upon entering his house, he discovered that his two stools made of glass, T.V, two mobile phones and extension cable were missing.

6. He stated that he was informed by Josephine (pw2) that she had seen thieves pass through her home. That they went looking for the said thieves but in vain. After one hour, the village elder arrived and asked him to go and see the suspect. When he saw the alleged thieves among them the appellant seated outside the appellant's house, they attempted to run away but in vain. Upon searching them, the two stolen phones by the make of infinix and techno were recovered from the pocket of Abuga the appellant's co. accused. His sim cards were still intact.

7. It was his testimony that his T. v that had been stolen and abandoned on the road side about 10 metres away his house was recovered. He further stated that When members of the public did search in the house of the appellant they recovered the two stolen stools which marched with the table left in his house.

8. Pw2 one Josephine told the court that, on the material day, she was in her house when one Maria called and informed her that she had seen some items outside her (Pw2) house. That suddenly, one Abuga appellant's co. accused appeared and picked two stools. As she asked Abuga why he was not scared being caught, Abuga told her to use her torch and see. It was then she noticed that Abuga was with one Rashid the appellant herein.

9. After noticing that there was a TV outside her neighbour's house, she woke up her neighbours. On checking Pw1's house, she noticed the house was open with lights on. After calling out Pw1, he emerged from an outside toilet. That when Abuga saw a neighbour by the name Mwangi, he ran away. After Abuga ran away, they informed the village elder who was passing by. That later, the village elder called them to go and see the suspects who had been arrested. Upon proceeding to where the suspects were, they recovered the stolen phones from Abuga's pocket. She further stated that the two stolen stools were recovered from the appellant's house.

10. Pw3 John Charles Otieno a village elder, stated that on the material day and time, he was in his house when he heard people talking over a theft case. He woke up and proceeded to the neighbour's house where he found pw1 and one Sophia talking. It was then that pw1 informed him of his stolen items. That one Sophia informed him that she had seen one Abuga carrying two stools. He also saw the stolen T.V placed on the road outside pw1's house.

11. He mobilized villagers into two groups to search for the suspects whom they found at the home of the appellant about 100metres away. That upon the complainant searching Abuga's pockets, two of the stolen phones were recovered. Equally, upon searching the appellant's house, two stools were recovered. He told the court that he called the police after villagers attempted to lynch them.

12. Pw4 Cpl Julius Tiana the investigating officer received accused persons over theft allegations. He visited the scene and received the recovered exhibits from members of the public. Upon completion of investigations, he charged the accused with the charges before court.

13. On his defence vide unsworn testimony, the appellant denied the offence terming it as a frame up. He said that on the material day at 5.00Am, he was sleeping in his house with his wife (Dw4) when Abuga his co- accused arrived requesting to be sold chang'aa. That while Abuga was drinking chang'aa, a crowd of people arrived. That he and Abuga were arrested on the allegation of having stolen some goods a fact he denied.

14. Dw3 a son to the appellant with whom they were sleeping in the same house corroborated his father's evidence. He denied the allegation that there were any stolen stools recovered from their house nor was any phone recovered from the said Abuga. Dw4 appellant's wife further corroborated the evidence of the appellant and Dw3.

15. When the matter came for hearing of this appeal, parties agreed to dispose the same by way of written submissions.

Appellant's submissions

16. The appellant in person filed his written submissions on 11 May,20 21 thus submitting that there was no evidence of recovery of two stools from his premises. That proper recovery procedure was not followed by the police not preparing and producing before the court exhibit recovery/inventory form and scene of crime photographs. In that regard, reliance was placed in the holding in the case of **Feisal Mohamed Ali V Republic[2018]eKLR** where the court held that, failure to produce an inventory of recovered goods or the photographs confirming the items in question were recovered from the appellant was prejudicial to the prosecution's case.

17. He further submitted that the court did not consider his defence in which he denied recovery of any stolen items from his premises. That the testimony of PW2 to the effect that the alleged stolen items were kept near Mama Maria's house and that it was the said Mama Maria who called her to see the items was not corroborated by the said mama Maria who was not called as a witness. He further contended that similar version of evidence by PW3 that it was Sophia who saw one Abuga co-accused to the appellant carry the stolen stools was not corroborated by calling the said Sophia.

18. The appellant further submitted that the trial court did not give reasons as to why it believed the evidence of PW1, PW2, PW3 and disregarded the defence evidence of DW2, DW3 and DW4 in regard to recovery of alleged stolen stools.

The appellant asserted that there was insufficient proof of possession of stolen items as required by law as the main ingredient of the offence of handling stolen property (knowledge) that the items were stolen property was not proved. Reliance in this regard was placed on the case of **Alfred Muriki Kibui v Republic [2017]e KLR**.

19. It was further argued that the court shifted the burden of proof to him contrary to the holding in the case of **Malingi v Republic [1989] KLR** and **David Mugo Kimunge v Republic [2015]eKLR**. He submitted that there was strong rebutting evidence which he discharged by calling two defence witnesses whose testimony was never shaken by the prosecution.

20. Further, the appellant submitted that ownership of the alleged stolen property by the complainant was not established by producing documentary proof. That there was evidence that there was competition in selling chang'aa between the appellant and PW2 hence the genesis of a frame up to fix the appellant.

21. The appellant contended that the prosecution did not prove that the appellant handled stolen property with requisite knowledge that they were stolen. In that regard the court was referred to the case of **Tembere v Republic [1990]KLR** and the provisions of Section 322(3) (b) of the Penal Code.

22. The appellant opined that the proceedings contained inconsistencies, contradictions and insufficient evidence to convict the appellant. That PW1 told the court that he was called by PW3 to see if he could identify the suspect who purportedly stole from him and later went into the appellant's house and recovered the said stools contrary to the evidence of PW2 and PW3 that they went together to the house of the appellant.

23. That the alleged recovery is surrounded by inconsistencies and is insufficient to sustain a conviction. He relied on the cases of **Ramkrishan Pandya (1967)EACA 339** and **Alfred Muriki Kibui v Republic [supra**]where both courts held that where there is glaring inconsistence in evidence, the court should acquit. That failure to call members of the public and the police officers who took the appellant to the police station among them Mama Maria, Sophie and others was prejudicial to the prosecution's case.

24. On non - compliance with Section 214 of the CPC, the appellant submitted that upon the amendment of the charge sheet, he was neither given a chance to recall witnesses nor informed of that right. He placed reliance on the case of **Cord and 2 Others v Republic and 10 Others in Petition No.628 of 2014 (Consolidated with Petition No.630 of 2014 and 12 of 2015** where the court emphasized that fair trial under article 50 of the Constitution requires such rights to be explained. To further emphasize on that proposition, he relied on the case of **Jason Akumu Yongo v Rpublic Court of Appeal Nairobi Criminal Appeal No.1 of 1983** where the court of appeal held that upon amendment of a charge after witnesses have testified, the court ought to explain to the accused his rights to recall or further cross examine witnesses who would have already testified.

25. Regarding his unsworn evidence, he contended that Dw3 and Dw4's sworn evidence that the alleged stools were not recovered from the appellant's house where they were sleeping on the material night was not shaken by the prosecution on cross examination.

26. On sentencing, the appellant urged that it is an art which must be guided by the law and the sentencing policy guidelines among other instruments. He opined that courts must observe the principles of proportionality, equality, impartiality, accountability, inclusiveness, respect for human rights and fundamental freedoms. That sentence must fit the offence, offender and the circumstances under which it was committed. In support of that position the court was referred to the case of **Alfred Muriki Kibui v Republic [supra**].

27. In conclusion, the appellant urged the court to allow the appeal and set him at liberty forthwith.

Respondent's Submissions

28. The ODPP through its prosecution counsel filed its written submissions dated 5th July, 2021submitting on five grounds of appeal. On whether the prosecution proved its case beyond reasonable doubt, counsel submitted on 4 subheadings. On the question that there was no inventory done in respect of the recovered stools, counsel opined that the appellant was arrested by citizens who allegedly recovered the said stools hence private citizens who are not obliged to record a recovery inventory. Regarding recovery of the stolen stools from the appellant's house, counsel submitted that there was consistent and well corroborated evidence by those present among them PW1, PW2, PW3 and PW4 who recounted the events of the night leading to recovery.

29. Learned counsel contended that an inventory in this case was not necessary due to the circumstances of the case. That in any event, failure to prepare an inventory is not sufficient enough to dismiss the rest of the evidence that the exhibits were indeed recovered. To buttress this submission, reliance was placed on the holding in the case of **Stephen Kimani Robe and Others v Republic[2013]eKLR** where the court stated that;

> **"the purpose of an inventory is to keep a record of exhibits recovered during the investigation. Failure to prepare an inventory cannot override the physical existence of the exhibits especially where other witnesses apart from the officer who made the recovery confirm their existence."**

30. On the issue of insufficient proof of stolen items as required by law, counsel submitted that the duty of the prosecution was to prove possession and knowledge that the goods were stolen which it did hence application of the doctrine of recent possession to convict

31. As regards the issue of lack of proof of ownership documents of the alleged stolen property as property of the complainant, counsel submitted that the two stools found at the appellant's house matched the glass table at PW1's house. Thus, the circumstances in this case strongly infer ownership of the stools by the complainant.

32. As to the argument that there was no proof that the appellant had handled stolen property, learned counsel contended that there was sufficient evidence from PW2 who testified that she saw the appellant's co-accused one Abuga whom she questioned about taking the stolen items without fear. That the appellant had knowledge that the items had been stolen, received and retained the stools with that knowledge. That the appellant's interpretation of Section 322(3) (b) is flawed as it refers to goods and not the act of handling them.

33. On the second ground regarding knowledge that the appellant had knowledge that they were stolen, counsel submitted that the prosecution's role was to prove the offence of handling suspected stolen property by the appellant and the ingredients to prove were that the appellant knowingly handled stolen property a fact that was established through the testimony of PW1 and PW3.

34. That the number of witnesses called was sufficient and that their evidence was clear, concise and did not have any contradictions nor was it shaken even in cross examination. To support the proposition that the prosecution is not duty bound to called a specific number of witnesses, reliance was placed in the case of **Keter v Republic [2017] EA 135**where the court held that;

> **"the prosecution is not obliged to call a superfluity of witnesses but only such witnesses that are sufficient to establish the charge beyond reasonable doubt."**

35. Concerning the contention that Section of the 214 of the CPC was not complied with, counsel asserted that the same was complied with by the court after reading afresh the charges to the appellant who denied the same and that it was his duty to request for recalling or further cross examination of the witnesses.

36. On the issue that the court failed to consider the appellant's defence, counsel contended that the court fully considered both the prosecution and defence case.

37. Regarding excessive, harsh and not proportionate sentence, counsel submitted that the sentence is legal and well within the discretion of the trial magistrate. To support that fact, Counsel relied on the case of **Mokela v The State(135/11)[2011]ZASCA 166** by the Supreme Court of South Africa where the court held that sentencing is a discretionary issue exercised by the sentencing court. In conclusion, counsel urged the court to dismiss this appeal.

38. Having considered the record of appeal and submissions by both parties, issues that emerge are;

a) Whether the prosecution proved its case beyond reasonable doubt

b) Whether there were inconsistencies and contradictions in the prosecution case

c) Whether the appellant was denied a chance to recall witnesses after amendment of the charge sheet

d) Whether the court considered appellant's defence.

Whether the prosecution proved its case beyond reasonable

39. It is trite that the duty to prove a case beyond reasonable doubt purely lies on the prosecution at all times and that it does not shift. See **Okethi Okale v Republic (1965)EA 555.** However, it is worth noting that proof beyond reasonable doubt does not connote 100% error free case. Offences are committed, investigated, prosecuted and decided by human beings who are prone by human nature to make mistakes here and there for one reason or the other or due to lapse of memory by witnesses when testifying owing to a long period of delay before testifying.

40. Therefore, in some cases, a minimal margin of error or mistake in evidence or charges which does not affect substantially the overall evidence or interest of justice cannot be construed to mean that a case has not been proved beyond reasonable doubt. See **Miller vs Minister of pensions(1947)2All EA 372** where the court held that;

> **"The degree is well settled. It need not reach degree of certainty, but it must carry a high degree of probability. Proof beyond reasonable does not mean proof beyond shadow of doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice"**

41. The appellant was jointly charged with one Abuga for the offence of burglary and stealing as a main count. It was the prosecution's evidence that on the material day at 5.00Am, he locked the door to his house and went to answer a call of nature. Shortly, he heard screams from his neighbors who told him that his household goods had been stolen. On checking, he realized that a T. v, two mobile phones, extension cable and two stools were missing.

42. These evidence was corroborated by Pw2 who saw one Abuga carrying two stools while in company of the appellant her neighbor. After analyzing what constitutes the offence of burglary and stealing and correctly so, the court found that the house was broken into but there was no clear evidence as to who broke into the house. However, the court found the accused persons guilty of recent possession of stolen goods from the complainant's house and therefore relying on the doctrine of recent possession convicted on the alternative charge of handling.

43. According to pw1, he had locked his house when he went for a call of nature. It is not clear from the record what he meant by locking so as to be able to know whether there was physical breakage or it was by merely pushing open the door. However, in the offence of burglary, proof of physical breakage is not material. What is material is gaining access into a dwelling house without permission from the owner. In this case, nobody saw the appellant enter the complainant's house. In other words, there was no direct evidence to connect the appellant with the offence.

44. The appellant was therefore linked to the offence by pw2 who saw him at around the time the break in and theft occurred while in company of one Abuga who was carrying the stolen stools and thereafter recovered the said stools in the house of the appellant. If the court found the appellant guilty of recent possession of stolen property with the alleged recovery having been made two hours after the theft, then

circumstantially under the doctrine of recent possession he should have been found guilty of the main charge. In this case, the court failed to convict on the main count on account of recent possession despite finding him guilty of being in possession of recently stolen goods with the knowledge that they were stolen.

45. In the absence of any direct evidence connecting the accused with the offence, it is my duty to assess and evaluate witnesses' testimonies expressing recovery of recently stolen stools from the appellant's house. In the case of **Arum vs Republic (2006)1KLR** the court of appeal expressed itself that, for a court to convict under the doctrine of recent possession, prosecution must prove certain salient conditions inter alia; that the property in question was found with the suspect; the property was positively identified as that of the complainant; the property was stolen from the complainant and that the property was recently stolen from the complainant.

46. Once the said conditions have been satisfied, the evidential burden fall on the accused to show how he or she came into possession of the stolen goods. This is one of the rare cases that the burden is pushed towards the accused. See **Mary Mwango Okeno and two others vs Republic (2018)e KLR and Malingi v Republic(1989)KLR225.**

47. The only evidence connecting the appellant with the offence , was athe alleged recovery of the stolen stools. Pw2 stated that she saw Abuga carrying stools from outside the complainant's compound while in company of the appellant. She stated that she clearly saw and recognized the two from the neighbourhood using security light from the house as well as her torch. Pw2 instantly alerted neighbours and pw1 who informed pw3 their village elder who mobilized villagers in mounting search for the suspects whom they found drinking chang'aa in the appellant's house at 5.45am. Pw1, pw2 and the village elder pw3 claimed that the stolen stools were recovered from inside the appellant's house.

48. Indeed, recognition has always been held to be more reliable than visual identification. In this regard, I am duly guided by the holding in the case of **Anjononi&another vs Republic(1980)KLR** where the court held that;

> **"…this was however, a case of recognition, not identification, of the assailants; recognition of an assailant is more satisfactory, more re-assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or the other"**

49. In this case, both Abuga and the appellant his neighbor were well known to pw2 before. She spoke with the them by questioning Abuga why he was not scared carrying the stools that were on the road.

50. The evidence regarding recognition of the appellant being in company of Abuga who was carrying stools is further corroborated by the recovery of some stolen items from the two suspects. The recovery of two phones with pw1's sim cards intact from Abuga and at the same time stools resembling a table left in the complainant's house exerts more weight on the credibility of witnesses hence I have no reason to disbelieve them.

51. Although the appellant denied the offence and his wife and son supported him, it is natural that his wife and son could not implicate him. The evidence of Dw3 and Dw4 when compared against the evidence of pw2 and pw3 who are independent witnesses cannot carry much weight for the obvious reason of favoring their kin.

52. I have no doubt in my mind that the house of the complainant was broken into on the material night, items among them stools stolen and that they were found in possession of the appellant. That the recovery having been effected about an hour after the theft, the doctrine of recent possession applies. From the events preceding recovery and actual recovery, it is obvious that the appellant knew that what Abuga was carrying while in his company in the wee hours in the morning and then proceeding together to his house were stolen items.

53. As regards failure to call members of the public who arrested and took him to the police station, the answer lies with the holding in the case of **Keter vs Republic (2017)e KLR** where the court held that, prosecution is not bound to call a specific number of witnesses or several witnesses but those that are necessary to prove its case.

54. Touching on the question that there were contradictions in evidence, the appellant argued that it was not clear as to when he saw the suspects. Secondly, the appellant submitted that it was not clear how pw3 came to know the two suspects. From his evidence at page 14 of the proceedings line 20, pw3 stated that it was Sophie who informed him that she had seen Abuga carrying stools. At page 13 of the proceedings line 20, pw2 stated that when pw3 the village elder arrived the suspects had fled from the scene and that they informed him what had happened hence started looking for them.It is therefore clear that pw3 knew of the offence and the perpetrators from pw3 and other neighbours.

55. Regarding the question of contradictory evidence as to when pw1 saw the suspects, I do not find any substantial contradiction as he saw them at the appellant's home. In any event, there is no dispute that when the appellant was arrested, pw1 was called and upon conducting search his stools were recovered. This is just but a minor infraction which I can attribute to communication shortfalls which sometimes occur when leading in court evidence thus leaving gaps which are not fatal. This is expected in ordinary prosecution.

56. Concerning non-compliance with Section 214 CPC, the court duly read afresh the charges and the appellant denied the same. He did not exercise his right to request for recalling of witnesses who had testified for further cross examination. The appellant stated that it was an omission not to be informed of his right. Whereas it is the duty of the court to explain to an accused his right under Section 214, that omission will be fatal if the nature of the amendment fundamentally affects the evidence already tendered. In this case I do not see any prejudice suffered by that omission because the amendment only let to introduction of an alternative charge of handling in conformity with evidence tendered against which the appellant had cross examined on.

57. As to failure to prove ownership of the stolen items through documentary evidence, that question would have been more relevant if somebody else was claiming the same items. Further, the marching of the stolen stools with the table in pw1's house did confirm that indeed

he was the owner. In any event, it is not possible to keep receipts for every house hold good/s purchased. I find this not relevant in this case.

58. Having held as above, it is my finding that the hon. magistrate properly addressed her mind on the question regarding the doctrine of recent possession hence the offence of handling stolen property.

59. Regarding sentence, the Judiciary policy guidelines have identified factors governing imposition of appropriate sentence without losing sight of the fact that sentencing is at the discretion of the court to which an appellate court should not ordinarily interfere with unless proved that the sentencing court acted in error by taking into consideration factors that it ought not to or, generally applied wrong legal principles or the same is harsh or excessive. See the case of **Shedrack Kipkorir Kogo vs Republic Eldoret Cr.C. No 253 /2003** Court of Appeal.

60. In this case, the court took into consideration the appellant's mitigation and probation officers' report which was favourable. Considering the seriousness of the offence convicted of and the value of the stolen items worth Kshs 8,000, and further considering that the items were recovered and the appellant was remorseful having a young family depending on him, a sentence of 7yrs was not only harsh but excessive in the circumstances.

61. For those reasons, I do substitute the sentence of 7yrs with that of 2yrs to be calculated from the period he started serving sentence. The DR to cause submission of afresh committal warrant reflecting the said substitution to the prisons department

ROA 14 days.

Dated delivered and signed at Voi this day 26th day of January 2022

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J.N. ONYIEGO

JUDGE