REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUNGOMA

CRIMINAL APPEAL NO. 92 OF 2019

ALBERT JUMA MUKHWANA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against the original conviction and sentence in Criminal Case No. 313 of 2018

in the Principal Magistrate's Court – Webuye Law Courts by Hon. M. Munyekenye (PM)

on 27/06/2019)

JUDGMENT

1. Albert Juma Mukhwana the Appellant herein and his co-accused were charged with the offence of burglary contrary to **section 304(2)** and stealing contrary to **section 279(b)** of the **Penal Code**. The particulars were that on the night of 14th and 15th May, 2018 at Nangeni Sub-location, Maraka location in Webuye East sub-county within Bungoma County, they broke and entered the house of Samuel Ichungu with intent to steal from therein and did steal from therein six chicken and two tins of beans all valued at Kshs. 3000/= the property of the said Samuel Ichungu.

2. He faced an alternative charge of handling stolen property contrary to **section 322(1)(2)** of the **Penal Code**. The particulars were that on the 15th day of May, 2018 at Nangeni sub-location in Webuye East sub-county, within Bungoma county, otherwise that in the course of stealing, he was found handling two hens knowing them to be stolen property.

3. The gist of the prosecution case was that on the material date at midnight, the Complainant realized that his kitchen was open and six (6) chicken and maize and beans, which his wife cooks for school children, were missing. He called on his neighbor who lives about 20 meters from his home and together they searched around but did not find anything. His neighbor returned to his home while the Complainant kept vigil for the rest of the night. He reported the matter to Webuye Police Station the next morning. Following a tip off from one of the Complainant's neighbors, the Complainant in the company of Nyumba kumi and the Police, went to investigate information that someone had been seen buying chicken suspected to have been stolen.

4. They went to the home of the Appellant and found two (2) chicken in his house, and three (3) chicken in the house of his co-accused. The Complainant identified the chicken as those that were missing from his kitchen. The Appellant and his co-accused were arrested and taken to Webuye Police Station where they were charged. The chicken were photographed and handed over to the Complainant.

5. In his defence, the Appellant gave sworn testimony in which he denied the offence and narrated his movements on the day he was arrested. He stated that on the material day, he went to work as a cobbler and later escorted his wife who had come to visit him to town. He returned home in the evening but stopped by a place where alcohol is sold and had a drink. He arrived home at about 7.00 p.m. and listened to the radio then he went to bed. Later that night, he heard a knock on his door, and Police officers and other people entered his house and ransacked it. He was taken to the police station and placed in the cells where charges were preferred against him.

6. Following a full trial, the Appellant was found guility and convicted on the main count for the offence of burglary contrary to **section 304(2)** and stealing contrary to **section 279(b)** of the **Penal Code**. He was consequently sentenced to four (4) years' imprisonment on the offence of burglary and three (3) years on the offence of stealing, which sentences were to run concurrently.

7. Being dissatisfied, the Appellant filed the instant appeal against conviction and sentence in which he advances five (5) grounds, the gist of which is that the prosecution's case was not watertight. Further that the evidence presented by the Prosecution was contradictory and there were no exhibits to solidify the evidence. In mitigation, he stated that he is a pauper and a layman in matters law and was a first offender.

8. The Appellant filed undated written submissions in support of his case and argued that the proceedings before the trial court were unconstitutional, for reasons first, that he was not afforded sufficient time to avail his defence witness, and second that he was convicted on a charge to which he never pleaded. He submitted that the charges read to him during plea taking were in respect of the offence of burglary and an alternative of handling stolen property.

9. The Appellant also submitted that there was nothing to connect him with the offence of burglary with which he was charged and that the trial Magistrate had occasioned a miscarriage of justice by arriving at a decision without analyzing the evidence on record.

10. On sentence, the Appellant stated that the trial court ignored his mitigation and instead stated that "*the Crime of Burglary and Stealing is widespread within this jurisdiction*". That in so doing, the trial court went beyond the boundaries, was biased and considered extraneous factors. He urged the court to set him at liberty on this basis.

11. The State opposed the appeal through written submissions dated 12th July, 2021 in which learned State Counsel asked the court to dismiss the appeal in totality and uphold the conviction and sentence imposed by the trial court.

12. According to the State Counsel, it was clear from the evidence that a woman who was not named, confirmed to the Police who went to her home that the Appellant, whom she knew by the *alias* Brown, had sold her two chicken. The woman led the Police to the house where the Appellant lived and there, the Police recovered three (3) chicken hidden in a sack. The Complainant positively identified the three (3) chicken as his missing ones. That the evidence of the Complainant, who testified as PW1, was corroborated by PW2 who was with the Complainant alongside other individuals when the Police visited the home of the Appellant and made the recoveries.

13. It was urged that whereas the woman who led the Police to the Appellant's home never testified, it was not coincidence that part of the stolen items were recovered at the Appellant's home. The State Counsel submitted that the doctrine of recent possession required the Appellant to explain how he came to be in possession of the three (3) chicken but that the Appellant gave a blanket denial and did not provide a reasonable explanation as to how the chicken were found in his house. The State Counsel urged that the Prosecution did prove its case against the Appellant beyond reasonable doubt.

14. To this end, the State Counsel relied on the decision in **Paul Mwita Robi vs. Republic [2010] eKLR** in which the Court of Appeal (Omolo, Onyango Otieno & Nyamu, JJ.A) held that:

> **"Thus while the law is generally in criminal trials, the prosecution has the burden of proving the case against the accused throughout and the burden does not shift to the accused, however, in a case where one is found in possession of a recently stolen property like in this case, the evidential burden shifts to him to explain his possession. That explanation only needs to be a plausible one but he needs to put it forward for the court's consideration. This is what the superior court was alluding to in its judgment."**

15. On the sentence, the State Counsel submitted that the four (4) years' and three (3) years' imprisonment terms imposed on the Appellant respectively are provided in law and are legal. That in any case, the learned trial Magistrate gave a justification for the sentence by stating that the offence was widespread within the jurisdiction hence the need for a deterrent sentence.

16. This being a first appeal, I am cognizant of my duty as the first appellate court to re-evaluate, re-analyze, and re-consider the evidence on record and draw my own conclusions. This is while bearing in mind that I neither saw nor heard the witnesses as they testified and ought to give due allowance therefor. (See – **Njoroge vs. Republic [1987] KLR 19**).

17. The allegation that the Appellant was convicted on a charge to which he did not plead is unfounded. From the record, it is clear that the main charge indicated in the charge sheet had two limbs and was indicated as "*Burglary contrary to section 304(2) and Stealing contrary to section 279(b) of the Penal Code.*" The record further shows that when the Appellant was first arraigned in court for plea taking on 17th May, 2018, the substance and every element thereof of both the main charge and the alternative charge were read out to the Appellant to which he pleaded not guilty. Later on 24th August, 2018 the charges were read afresh at the behest of his co-accused and on 28th August, 2018, the facts in respect of the charges were read out to which the Appellant still pleaded not guilty. I am therefore not swayed by the argument that the charges were unclear, or that the Appellant was convicted on charges to which he did not plead, as the record demonstrates otherwise.

18. The Appellant herein was charged under **section 304(2)** of the **Penal Code** which provides for the offence of burglary. A wholesome reading of **section 304** reveals that the offence of burglary occurs when in addition to satisfying the ingredients of housebreaking under **section 304(1)**, the offence is proved to have occurred at night. In **Anthony Kilonzo Mutuku vs. Republic [2019] eKLR**, Odunga, J had this to say while deliberating on **section 304(1)**:

> **"In my view, section 304(1)(a) deals with three scenarios. The first scenario is where a person breaks and enters into a building, tent or vessel used as a human dwelling with intent to commit a felony therein. The ingredients here are that the person must break and enter into a building, tent or vessel. That building, tent or vessel must be one that is used as a human dwelling and the entry therein must be with the intention of committing a felony therein. Therefore, even without committing any offence therein, the offence thereunder is complete as long as the intent is proved. However, section 304(1)(b) applies where the person, being already inside the building, tent or vessel used as a human dwelling with intent to commit a felony therein, breaks out thereof. Therefore, once it is proved that a person was inside the building, tent or vessel used as a human dwelling and harbouring the intention of committing a felony, breaks out thereof, the offence is complete without necessarily committing an offence. The last scenario is still under section 304(1)(b) but here, the person, being already inside the building, tent or vessel used as a human dwelling with or without intent to commit a felony therein, does commit a felony therein and breaks out thereof. So under section 304(1)(a), the breaking is for purposes of gaining ingress while section 304(1)(b), the breaking is for purposes of egress."**

19. In his testimony, the Complainant narrated that on the material night he had, before going to bed, checked all doors and confirmed that they were locked. His wife would wake him up later that night stating that there were noises outside. He took his torch and went out to investigate only to find his kitchen door open and six (6) chicken and some food (maize and beans) missing. His testimony was corroborated by his neighbour PW2 who stated that the Complainant woke him up on the material night at around 1 a.m. stating that someone had broken into his kitchen and stolen his six (6) chicken and some food. They searched around but did not find anything. Two (2) of the missing chicken would later be recovered from an unnamed person who stated that it was the Appellant who had sold her the chicken. The person led the Complainant, PW2, the Police and members of the public to a house identified as that of the Appellant, where three (3) more chicken were recovered. The Complainant identified the chicken as those that were missing from his kitchen. The chicken were photographed and handed over to the Complainant. The photographs were produced during the trial.

20. Despite the fact that there was no eye witness who saw the Appellant break into the Complainant's house, the evidence led by the Prosecution demonstrated that the Appellant was found in possession of three (3) of the missing chicken, the night after that on which they were stolen. The doctrine of recent possession therefore applies and linked him to the commission of the offence. Additionally, he was stated to have sold two (2) of the chicken to an unnamed person who identified him as the seller and led the Police to his house where he was arrested together with his co-accused upon recovery of three (3) more chicken.

21. In determining whether the doctrine of recent possession can be invoked in the circumstances of this case, I make reference to the decision in **Isaac Ng'ang'a Kahiga & another vs. Republic [2006] eKLR**, where the Court of Appeal (Tunoi, Bosire & Githinji, JJ.A.) opined thus:

> **"It is trite that before a court of law can rely on the doctrine of recent possession as a basis of conviction in a criminal case, the possession must be positively proved. In other words, there must be positive proof, first; that the property was found with the suspect, secondly that; that property is positively the property of the complainant; thirdly, that the property was stolen from the complainant, and lastly; 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 property can move from one person to the other. In order to prove possession there must be acceptable evidence as to search of the suspect and recovery of the allegedly stolen property, and in our view any discredited evidence on the same cannot suffice no matter from how many witnesses."**

22. I am alive to the fact that this is a criminal case and the burden of proof rested with the Prosecution to prove the Appellant's guilt. It was not upon the Appellant to prove his innocence. However, the evidence tendered by the prosecution in the instant case demonstrated that three (3) of the missing chicken were found in the Appellant's possession. As was the holding by the Court of Appeal (Omolo, Githinji & Waki, JJ.A.) in **Jumanne Mohamed Hassan vs. Republic [2005] eKLR**, where an accused person is found in possession of recently stolen property, in the absence of any reasonable explanation to account for his possession, a presumption of fact arises that he is either the thief or the receiver.

23. In this case, it can be inferred that the Appellant was the thief. This is especially so since, first, he did not have a reasonable explanation for being in possession of the chicken a day after they were stolen. Second, an unnamed person to whom he had sold two (2) of the chicken identified him as the seller and led the police to his home where he was arrested and the additional chicken were recovered.

24. It is therefore apparent that since it has been demonstrated that the Appellant stole the Complainant's chicken, which chicken were housed in a locked kitchen, it can be inferred that it was the Appellant who broke into the Complainant's kitchen and stole the chicken therefrom. Since the purpose of the break in was to enter a dwelling house and commit a felony therein, and the offence was committed in the night, the main charge of the offence of burglary and stealing was proved against the Appellant to the required standard.

25. Whereas the unnamed person to whom the Appellant is said to have sold two (2) of the missing chicken was not called as a witness, I find that this did not prejudice the Prosecution's case since the witnesses who testified were able to establish the Prosecution's case. Under **section 143** of the **Evidence Act**, no particular number of witnesses shall, in the absence of any provision of the law to the contrary, be required for the proof of any fact.

26. Whereas the Appellant also averred that he was not given sufficient time to avail his defence, there is nothing on record to support his averments. On the contrary, the record shows that he was given sufficient time. On 13th June, 2018 the Appellant told the court that he would give a sworn statement in his defence and call two (2) witnesses. He proceeded to give his sworn testimony on that date and prayed for another date to enable him avail his witnesses. His prayer was granted and a date was given for further defence hearing.

27. On the date of the further hearing on 17th June, 2019, the Appellant stated that he had called his witnesses. However, when the names of the witnesses were called out by the Court Assistant, there was no response. The Appellant did not ask for additional time to avail his witnesses but instead proceeded to close his case. As such, it cannot be stated that he was not granted sufficient time to avail his witnesses.

28. The Appellant also prayed that the sentence imposed upon him by the trial court be reduced. The offence of Burglary contrary to **section 304(2)** of the **Penal Code** carries a sentence of seven (7) years imprisonment while that of Stealing under **section 279(b)** of the **Penal Code** carries a sentence of fourteen (14) years imprisonment. The Appellant was sentenced to serve 4 (four) years imprisonment for the offence of burglary and three (3) years imprisonment for the offence of stealing.

29. It is trite that sentencing is essentially an exercise of discretion of the trial court. Therefore, for this court to interfere with the sentence it must be shown that in passing the sentence, the court took into account an irrelevant factor or that a wrong principle was applied or short of those, the sentence was so harsh and excessive that an error in principle might be inferred. (See – **Shadrack Kipchoge Kogo vs. Republic, Criminal Appeal No. 253 of 2003**).

30. From the foregoing, I find that the trial court, directing itself to the evidence before it and the law applicable, reached the correct

conclusion. The conviction entered against the Appellant was well founded. I note that the property stolen in the second limb was worth Kshs. 3000/= and that five (5) out of the six (6) stolen chicken were recovered and restored to the Complainant. In view of this, coupled with the fact that the Appellant was a first offender and has thus far served two and a half years' imprisonment, I hereby reduce the sentence imposed by the trial court on both limbs to the period so far served. The Appellant is therefore set at liberty forthwith unless he is otherwise lawfully held.

It is so ordered.

DATED SIGNED AND DELIVERED IN VIRTUAL COURT THIS 24TH DAY OF NOVEMBER, 2021.

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L. A. ACHODE

HIGH COURT JUDGE

In the presence of.....Appellant in Person.

In the presence of.....State Counsel.