REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYAHURURU

CRIMINAL APPEAL NO.42 & 44 OF 2018

(Appeal Originating from Nyahururu CM's Court Cr.No.2136 of 2017

by: Hon. S.N, Mwangi – S.R.M.)

PGM.....1ST APPELLANT

JAMES MAIGWA NJERI.....2ND APPELLANT

- V E R S U S -

REPUBLIC.....RESPONDENT

J U D G M E N T

PGM and James Maigwa Njeri were convicted by Hon. S.N. Mwangi (SRM) for the offence of breaking into a building and committing a felony contrary to Section 306(a) of the Penal Code.

The particulars of the charge are that on 14/12/2017, at Ol'Kalou Township, jointly with another not before the court, at unknown time, broke and entered the hotel of Jane Mumbi Kibe and stole from therein one table, a thermos, amplifier, frying pan, sufurias, cups, spoons and foodstuff all worth Kshs.20,000/=.

Upon conviction, each was sentenced to serve 3 years imprisonment.

Being aggrieved by the conviction and sentence, each appellant filed their respective appeals HCr.A.42/2018 and 44/2018 which were consolidated to proceed as Cr.A.42/2018.

Both appellants had similar grounds of appeal which are as follows:

1. ***The court failed to consider that they had been in remand for five (5) months before being arraigned in court;***

2. ***The court failed to consider that the conviction went against the weight of the conviction;***

3. ***That the court failed to consider that they were students at Gichungo Secondary School in Ol'Kalou;***

4. ***That the sentence meted is harsh;***

When the court asked the appellants to file submissions, each appellant filed supplementary grounds as follows;

5. ***The 1st appellant in his supplementary grounds argued that he is a first offender;***

6. ***He works as a casual laborer;***

7. ***That he has been rehabilitated and has acquired Grade III in upholstery which can help him earn a decent living;***

8. ***That the court did not seek a pre-sentence report before sentencing him;***

9. The appellants requested that the court give them a noncustodial sentence if the appeal is unsuccessful;

10. The 2nd appellant added that he is studying theology.

The appellants pray that the conviction be quashed and the sentence to set aside and they be set at liberty.

This being a first appeal, this court has a duty to examine all the evidence tendered before the court, analyze it and arrive at its own findings and conclusions. However, the court has to bear in mind that it neither saw nor heard the witnesses testifying in order to assess their demeanor. I am guided by the decision of *Okeno v Republic (1972) EA 32 at pg 36*, *the EA C*ourt of Appeal said:

> *"An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya v Republic (1957) EA 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (Ruwalla v Republic (1957) EA 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions. It must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peter v Sunday Post (1958) EA 424."*

The appeal was opposed. Ms. Rugut learned counsel for the State filed her submissions on 3/6/2020. Counsel seemed to submit on sentence alone; that the court exercised its discretion in sentencing; that under Section 306 (b) of the Penal Code the maximum sentence is 7 years and the appellants were handed only 3 years imprisonment; that the court must have considered that they were treated as first offenders and what they said in mitigation. Counsel urged the court to dismiss the appeal.

In support of its case, the prosecution called a total of two witnesses, namely Jane Mumbi Kibe (PW1) the complainant and PC David Mulatia of Passenga Police Station. PW1 told the court that she has a hotel at Ol'Kalou. On 15/12/2017 about 3.00 p.m. she was informed by an employee that he had gone to the hotel about at 3.00 p.m. and found it broken into and the padlock was missing. She was informed that some items were missing. PW1 she proceeded to the hotel and found that indeed a table, thermos, amplifier, frying pan, sugar, cooking oil, sufurias, cups and spoons and cash Kshs.3,500/= all worth about 29,000/= had been stolen. She proceeded to the shop, bought some items and left the employees cooking. She reported at the police station and one officer accompanied her to the hotel. The next day, PW1 was called by a police officer PC Mulatia to go to Police Station to identify some items. PW1 was shown items which she identified as hers, that is; a flask which had a crack, cups were green. PW1 identified the items as hers and was shown the appellants as the persons found with the items.

PW2 PC Mulatia recalled that on 12/12/2017, he was with PC Mbatia when they were sent to Mahiga Village where some suspects had been arrested. They found the two appellants arrested by members of public who wanted to lynch them. He found them with a table, thermos, foodstuff and etc. That on 15/12/2017 a report of breaking into and stealing a hotel had been made at the station and he had visited the scene saw the broken padlock. On arresting the appellants, he called PW1 to go to station to verify if the goods were hers and she did. Photographs of the items were taken; that the members of public refused to record statements because they had been barred from lynching the appellants. According to PW1, both appellants are adults; that the 2nd appellant's father confirmed that he was 22 years; that 1st appellant had once been taken to Gichungo Police Post for refusing to go and school.

After close of the prosecution case, the appellants were called upon to defend themselves. The 1st appellant, in his unsworn evidence, denied knowing about the charge but that he was a car washer.

The 2nd appellant also gave an unsworn evidence that he used to do wiring at Ol'Kalou and denied knowing anything about the charge.

The appellants both claim to have been casual workers yet in the same breath, in their grounds of appeal, they claim to have been students at [Particulars Withheld] School which they never alluded to in their defence or at the hearing. It is only PW2 who claimed that the 1st appellant had been taken to the police post for failing to attend school. The 1st appellant further contradicted himself by stating in his unsworn defence that he worked at a carwash and therefore he was not a student at [Particulars Withheld] Secondary School.

The 2nd appellant also contradicted himself and stated that he was doing wiring with another electrician (fundi). It means that he was not in Form III at [Particulars Withheld] High School as alleged in their grounds of appeal.

PW1 did not know who had broken into her hotel. She only learnt of it from her employee. PW1 had locked her hotel on the evening of 14/12/2017 but her employee found it broken into on 15/12/2017. Ideally, the employee who found the breakage should have testified. PW1 went to the hotel later and found that indeed it was broken into and the items named in the charge sheet were missing but she found and identified some of them at the police station.

PW2 was called by members of public who had arrested the two accused. PW2 said that the members of public were unwilling to come to court because they were denied a chance to lynch the appellants. However, PW2 found the appellants were at a house where the items were allegedly recovered.

PW1 on being informed of the theft went to her hotel and confirmed the theft. PW2 visited the scene and confirmed the breakage. PW1 later identified the items which were photographed as hers. She specifically identified the flask by a dent on it. It was not a coincidence that all the items recovered were similar to those stolen from PW1 hotel. I am satisfied that PW1 identified the items as hers.

The trial court found that the appellants were found in recent possession of the said goods.

The hotel had been broken into between 14th and 15th December, 2017. The items were allegedly recovered on 17/12/2007 about two days after the theft. In the case of *Eric Arum v Republic Kisumu Court of Appeal CRA.85/2005*, the Court of Appeal discussed what ingredients constitute the doctrine of recent possession. The same decision was quoted by the trial court. The court said:

> *"In our view, 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 the property is positively the property of the complainant; thirdly, that the property was stolen recently 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 be moved from one person to another."*

No doubt PW1 identified the goods as hers. They had been stolen only two days earlier. The goods had been recently stolen.

The only question left is whether the appellants were found in possession of the said goods. The meaning of possession was elucidated in *Kinyali v Republic (1984) eKLR* where the Court of Appeal held that in defining *'being in possession'* full control of the object or article in possession of the accused is not necessary nor is it a requirement of the definition. It further held that in order to prove possession, it is enough to prove either that the accused was in actual possession or custody of another person or that he had the item in any place (regardless of whether the place belongs or is occupied by him or not) for his use or benefit or another person. The court also held that knowledge that the item is in actual possession or in one's custody or of another person may be inferred from the circumstances or proved facts of the particular case.

PW2 found the two appellants surrounded by members of public, outside a house, where the items were recovered and it is the house the appellants were living in. The onus rested on the appellants to give a reasonable explanation how the said items came to be in their house, nor did they specifically deny that where they were found was their house. Their defences were bare denials which the court correctly rejected and I agree with the court.

I agree with the trial court's finding that the appellants were found in recent possession of PW1's goods for which they did not give a plausible explanation. The court therefore presumes that they are the thieves.

Having considered all the evidence, I find that the conviction is well founded and there is no reason to disturb it. I affirm the conviction.

During the trial, both appellants claimed to be 17 years. I have seen the age assessment reports on the file which indicate that indeed both were 17 years. However, the 2nd appellant's birth certificate was produced by the father and it shows that he was born on 27/4/1999 meaning that in 2017, he was 18 years old which is not far from the doctor's assessment.

I have noted that the court erroneously sentenced the appellants on two limbs. The charge did not have two limbs.

The appellants claim that the sentence was harsh and that they are first offenders.

The 1st appellant was indeed 17 years old at the time of commission of the offence and the court should have sentenced him as a minor under Section 191 of the Children's Act. In view of the fact that so far, the appellants have served two years from 11th May, 2018, I hereby set aside the sentence of 3 years imprisonment and instead sentence both appellants to the term so far served. They are set at liberty forthwith unless otherwise lawfully held.

Dated, Signed and Delivered at *NYAHURURU* this *18th* day of *June,* 2020.

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R.P.V. Wendoh

JUDGE

PRESENT:

Mr. Mwangangi – State Counsel

Eric – Court Assistant

PG 1st appellant

James Maigwa 2nd appellant