



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CORAM: D.S. MAJANJA J.

CRIMINAL APPEAL NO. 7 OF 2019

BETWEEN

CHARLES MAJUMA OYONDI.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from the original conviction and sentence of Hon. J. K. Mutai, RM

dated 19th October 2018 at the Magistrate's Court at Ogembo

in Criminal Case No. 1679 of 2018)

JUDGMENT

1. The appellant **CHARLES MAJUMA OYONDI** and his co-accused were charged and convicted of the offence of burglary and stealing contrary to **section 304(2)** as read with **section 279(b)** of the *Penal Code (Chapter 63 of the Laws of Kenya)*. The particulars of the offence were that on 11th July 2018 at Magenche Sub-location at Gucha South Sub-County within Kisii County they jointly broke and entered the Matiero SDA Church with intent to steal therein and did steal therefrom one amplifier, five white table cloths and one microphone valued at Kshs. 24,450/-, the property of the said church.

2. After the trial, the appellant was convicted and sentenced to 5 years' imprisonment. The appellant has now appealed against conviction and sentence based on his petition of appeal. He has also filed written submissions in which he contends that the charge against him was not proved beyond reasonable doubt. Counsel for the respondent, Mr Otieno, took the contrary position and submitted that the case against the appellant was proved to the required standard.

3. Since this is a first appeal, I am required to re-appraise the evidence and reach my own conclusions as to whether to sustain the conviction bearing in mind that I neither heard or saw the witnesses testify (*Okeno v Republic [1972] EA 32*). In order to do so I now set out briefly the evidence as it emerged before the trial court.

4. Jason Onyimbo Moguche (PW 1), a church elder Matiero SDA Church and two members of the congregation; Nicholus Okenawa Maindi (PW 2) and David Aberi Magenche (PW 3). They all testified that on the morning of 12th July 2018, they all went to the Church where they found the window grill had been cut and the door to the store broken. They also stated that a microphone, table cloths and an amplifier had been stolen. They proceeded to report the incident at Nyamaiya Police Station. On the next day, 13th July 2018, they were called to the police station where they identified the microphone, amplifier and table cloths as the items that were stolen from the church.

5. Corporal Alex Gitonga (PW 4) of Nyamaiya Police Station recalled that on 13th July 2018, he was at work when members of SDA Matiero came to report to him that their church had been broken into and a microphone, amplifier, 5 table cloths and 4 plastic chairs stolen. On the same day at about 8.00pm, the Commanding Officer ("OCS") received information that some people had been arrested in a house in Nyamondo Village. He accompanied the OCS there and found the appellant and his co-accused, they also found 5 table cloths, microphone and a black speaker. They took them back to the station and called the church members who positively identified the table cloths and the microphone as belonging to the church. On 15th July 2017, the Commanding officer received a report that a battery and amplifier had been recovered in the same house where the appellant and his co-accused were found. After collecting the items, the members of the Church were called to identify the items. They identified the amplifier as theirs. PW 4 also visited the church and found the window had been broken in order to gain entry.

6. In his sworn testimony, the appellant denied the charges against him. He stated that he had a problem with his wife and children and after she attacked him, he reported the incident at Nyamaiya Police Station and the matter reported in the Occurrence Book as No. 7/16/9/2017. When he went to the police station on 12th July 2018 to collect a P3 form he was arrested and detained in the cells. On 14th July 2018, he was called by the Commanding Officer to his office where he found his wife and her brother. He gave them his house key when it was demanded. He stayed in the cells until 16th July 2018 when he was charged with the offence.

7. The prosecution relied on the doctrine of recent possession in order to link the appellant to the burglary and stealing. The doctrine entitles the court to draw an inference of guilt where an accused is found in possession of recently stolen property in unexplained circumstances. In **Arum v Republic [2006] 1 KLR 233**, the Court of Appeal set out conditions that must exist before a court can rely on the doctrine of recent possession as a basis of conviction in a criminal case. These include proof that:

- (a) The property was found with the suspect;
- (b) The property was positively the property of the complainant;
- (c) The property was stolen from the complainant;
- (d) The property was recently stolen from the complainant.

The proof as to time will depend on the easiness with which the stolen property can move from one person to another.

8. Once the primary facts are established, the accused bears the evidential burden to provide a reasonable explanation for the possession. While the law is that in a criminal trial, the prosecution bears the burden of proving the case against the accused throughout the case, in a case where one is found in possession of recently stolen property like in this case, the evidential burden shifts to him to explain his possession. That explanation need only be a plausible one but one needs to put it forward for the court's consideration (see **Malingi v Republic [1988] KLR 225**).

9. From the evidence I have outlined, the testimony of PW 1, PW 2 and PW 3 confirms that on the night of 11th July 2018, the Matiero SDA Church was broken into and items stolen. Their evidence was corroborated by PW 4 who visited the scene and found the window grills broke. He also received the report of loss of items from the Church. PW 1, PW 2 and PW 3 all identified that the amplifier, microphone and tablecloths as belonging to the church and which were recovered after the burglary and theft were reported. The evidence therefore satisfies elements (b), (c) and (d) which I have set out in para. 7 above.

10. The issue that has caused me great anxiety is whether the appellant was found in possession of the stolen items. Under **section 4** of the **Penal Code**, 'possession' is defined as either actual or constructive, thus:

(a) "be in possession of" or "have in possession" includes not only having in one's own personal possession, but also knowingly having anything in the actual possession or custody of any other person, or having anything in any place (whether belonging to or occupied by oneself or not) for the use or benefit of oneself or of any other person;

(b) if there are two or more persons and any one or more of them with the knowledge and consent of the rest has or have anything in his or their custody or possession, it shall be deemed and taken to be in the custody and possession of each and all of them;

11. The circumstances in which PW 4 found the appellant and his co-accused was that he was under arrest in a house. It is not clear under what circumstances he was arrested and indeed whose house he was arrested. Was the appellant found with the items elsewhere then arrested. PW 4's role was to go and arrest the appellant. It is my finding that the prosecution did not prove that the appellant was in actual possession of the stolen property or even constructive possession as contemplated in **section 4** of the **Penal Code**. My conclusion is fortified by the fact that on 15th July 2018, the Commanding Officer received a call informing him that the amplifier and a battery had been found in the house where they arrested the appellant. This begs the question, how did the police fail to recover the amplifier and battery on the day they had gone to arrest the appellant and his co-accused. Could the items have been delivered from elsewhere to the house to implicate the appellant? To my mind, these issues raise reasonable doubt as to the appellant's complicity.

12. For the reasons I have set out, I allow the appeal, quash the conviction and sentence. The appellant is set free unless otherwise lawfully held on a separate warrant.

DATED and DELIVERED at KISII this 27th day of FEBRUARY 2019

D.S MAJANJA

JUDGE

Appellant in person.

Mr. Otieno, Senior Prosecution Counsel, instructed by Office of Director of Prosecutions for the respondent.