REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO. 14 OF 2018 AND 58 OF 2018 (CONSOLIDATED)

ABDI BARE MOHAMED..... 1ST APPELLANT

BASHIR ABDI ISSACK.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the conviction and sentence in Wajir Senior Magistrate Criminal Case No. 543 of 2017 by Hon. A. K. Mokoross (SRM)

JUDGEMENT

1. The two appellants were tried in the Magistrate's Court at Wajir. The main charge was for house breaking contrary to section 304 and stealing contrary to section 279(b) of the Penal Code. The particulars of the offence were that on 23rd November 2017 at Wajir township in Wajir East Sub-County within Wajir County jointly broke and entered the building used as a dwelling house by Shukri Elasow Mohamed and stole 1 Sony TV 36 inches, 1 amplifier, 1 apple laptop, 2 Samsung tablets, 1 phantom phone, 1 Samsung J-3, and 1 kokoi all valued at Kshs.332,000/= the property of the said Shukri Elasow Mohamed.

2. In the alternative they were charged with handling stolen goods contrary to section 322(1) (2) of the Penal Code. The particulars of offence were that on the same day and place otherwise than in the course of stealing dishonestly retained 1 apple laptop serial No. CO2H7B21DV13, 1 Samsung tablet SM-T715, 1 Dstv remote, 1 free sat remote and a white kikoi knowing or having reason to believe them to be stolen items.

3. They denied both charges. After a full trial, they were convicted on the main count of house breaking and stealing and were sentenced to serve 7 years in jail on the first limb of the offence and 3 years on the limb of stealing and the sentences to run concurrently with each other and all the other sentences meted out prior.

4. Dissatisfied with the decision of the trial court, the 1st appellant Abdi Bare Mohamed and 2nd appellant Bashir Issack filed appeals on 5th March 2018 to this court.

5. Before the appeal file of Bashir Abdi Issack was placed before this court, Abdi Bare Mohamed informed the court that he had only appealed in the case where he had been charged with Sammy Muthui. He stated that he had not filed an appeal in the case where he was charged with Bashir Abdi Issack. Later however, when the two appellants were in court and the file in appeal No. 58 of 2018 was brought to court, he did not raise any objection for the two appeals being heard together. The appeals were thus heard together with the leading file being Criminal Appeal No. 14 of 2018.

6. Before the two appeals were heard, both appellants filed amended petitions of appeal and written submissions. Their grounds of appeal are in summary as follows –

1. The charge sheet was defective.

2. Crucial witnesses were not brought to court.

3. The prosecution case was not proved beyond reasonable doubt.

4. There were massive contradictions in the prosecution evidence.

5. That the items recovered were not part of the stolen items.

6. That the investigations were shoddy and the mode of arrest was poor.

7. At the hearing of the appeal, Abdi Bare Mohamed relied on his written submissions and elected not to make oral submissions. Bashir Abdi Issack also relied on his written submissions but added that the prosecutor at the trial erroneously said that he had a previous conviction.

8. Mr. Okemwa the learned Principal Prosecuting Counsel submitted that the prosecution brought 5 witnesses. PW1 confirmed that his house was broken and PW2 confirmed this. PW3 gave evidence to show that 1st appellant offered to sell to him a TV and a radio which evidence was not denied by 1st appellant.

9. Counsel submitted therefore that the doctrine of recent possession applied in this case as the items were proved to be in the possession of the appellants shortly after the theft, and the appellants failed to give an explanation to the trial court on how they came to possess the stolen items. Counsel submitted that the magistrate relied correctly on the case of **Malingi vs Republic [1989] KLR 225** in which it was held that the burden of proof shifted in cases of recent possession to the accused person.

10. Counsel submitted also that the prosecutor was right in telling the trial court that the 2nd appellant had a previous conviction.

11. In response to the Prosecuting Counsel's submissions, the 1st appellant emphasized that he was not found in possession of the items as the same were picked from the ground. He also stated that PW4 and PW5 contradicted each other on evidence on whether a woman who pointed to them. He also stated that in the previous case, he was released.

12. The 2nd appellant on the other hand stated that the Probation Officer who was present in court did not say that he was imprisoned or that he escaped from lawful custody.

13. This is a first appeal. As a first appellate court, I am required to evaluate all the evidence on record afresh and come to my own independent conclusions and inferences. I have to bear in mind that I did not have the opportunity to see witnesses testify and to determine their demeanor and give due allowance to that fact. See the case of **Okeno vs Republic [1972] EA 32.**

14. I have perused the proceedings and the judgment, and have considered the submissions of the two appellants both written and oral. I have also considered the submissions of the Principal Prosecuting Counsel.

15. I will start with the technical issues raised in the grounds of appeal. The first is whether the charge sheet is defective. Though the appellants have said that the charge sheet is defective, I find no substantive defect on the charge that could render it invalid. The appellants have not raised any particular issue that would make the charge fatally defective. I dismiss that ground.

16. The second issue is on whether the arrest was poorly done and investigations were shoddy. From the evidence on record, the arrests were not conducted in an unlawful manner. It cannot also be said that arrests were poorly done. As to whether the investigations were shoddy, this can only come out in evaluating the actual prosecution evidence on record. I now proceed to evaluate the evidence.

17. From the evidence on record, PW1 Shukri Mohamed the complainant clearly stated that his house was broken into. He discovered this at 1 pm when he came home from his office at the Wajir County Government. He was accompanied by PW2 Noor Othowa and both reported the incident to the police that afternoon at 1 pm stating that the house had been broken into and some items missing.

18. The police immediately put their action into motion and PW5 PC David Mutua who was the investigating officer received information that some suspicious people had been found somewhere that same afternoon with stolen items. Together with PW4 PC Rajab Swaleh they proceeded to the scene near Sebule Secondary School and arrested the two appellants. Both the prosecution and the defence agree that though the appellants were arrested, some other person or persons ran away and escaped from the scene where some of the items were recovered. The same afternoon, other items were recovered from the shop of PW3 Ibrahim Mutura. These items were recovered with the assistance of the 2nd appellant. According to PW3, the items were offered to him for sale by the 1st appellant earlier that same day.

19. This is a case of house breaking and stealing. Nobody witnessed the house breaking, and there stealing. The two appellants agreed in their sworn defences that they were arrested under a shade where some of the stolen items were found, but said that they were not in possession of those items. According to them, the possessors of those items ran away and escaped.

20. In my view, the prosecution proved beyond any reasonable doubt that the house of the complainant was broken into and items stolen that day. The major issue is whether the appellants were involved in the house breaking and stealing.

21. The learned magistrate relied on the doctrine of recent possession to convict the appellant. The issue is, were the appellant in possession of the items?

22. In **Erick Otieno Arum vs Republic [2006] eKLR** the Court of Appeal stated –

> **"In our view, before a court of law can rely on the doctrine of recent possession as a basis for a 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 from the complainant. Lastly, that the property was recently stolen from the complainant."**

23. The evidence of the prosecution was that some of the items were recovered on the ground at the place where the appellants were arrested

chewing miraa. There is no evidence that any of the appellants touched those items or was in physical possession of those items. The evidence of the prosecution is also that PW3 stated that the 1st appellant wanted to sell some of the stolen items to him. The evidence of the prosecution is also that the 2nd appellant is the person who took the police to the shop of PW3.

24. The items were not such that they could be put in somebody's pocket. They were also not items that somebody would hold with his hands throughout. From the totality of the evidence on record, in my view, the appellants were in constructive possession of the items. Though they did not physically hold them, it is clear to me that they had those items in their possessions and they were trying to dispose them through sell, and were only ambushed before they managed to successfully sell or dispose off the items. I agree with the magistrate that the two appellants were in possession of the items otherwise there would not be under the tree where some items were found and then also PW3 could not have said that 1st appellant attempted to sell him items, which were pointed out by the 2nd appellant to the police at the shop of PW3. Their explanation falls far short of distancing themselves from possession as they did not give the time and circumstances under which they arrived and were found near the school where some stolen items were recovered by the police; and also why PW3 could have said that 1st appellant tried to sell him some stolen items, with 2nd appellant directing the police to where PW3 had a shop where the particular items were found.

25. The possession was also recent possession. The items were stolen that same day after the complainant went to work and before 1 pm when he came back home for lunch. Some of the items were offered for sale to PW3 by 1st appellant that same morning. That same afternoon, the two appellants were arrested at the place where the other stolen items were recovered. That short period of time of merely a few hours in the circumstances of this case in my view satisfies the requirement of recent possession. In my view the learned magistrate correctly applied the reasoning in the case of **Malingi vs Republic [1989] KLR 225** – that the appellants had the burden of explaining how they came into possession of the stolen items and they failed to give a reasonable explanation.

26. I thus agree with the learned magistrate that the prosecution proved their case against the two appellants beyond any reasonable doubt. I will uphold their conviction.

27. The sentences imposed are lawful. The sentence of 7 years imprisonment however in my view was excessive; I appreciate the fact that the magistrate has a discretion in sentencing. However, since most of the items if not all were recovered, I think imposing the maximum sentence is excessive. I will reduce the sentence of 7 years for the first limb of the offence to 3 years imprisonment. The sentences will still run concurrently.

28. Consequently, I dismiss the appeal on conviction and uphold the conviction of the trial court. As regards sentence, I set aside the sentence of 7 years imprisonment on the first limb of the offence and substitute it with a sentence of 3 years imprisonment. I uphold the sentence on the second limb of the offence. The sentences will run concurrently as ordered by the trial court.

Dated and delivered in open court at Garissa this 19th February, 2019.

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George Dulu

JUDGE