**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**CRIMINAL APPEAL NO. 127 Of 2017**

**DOUGLAS NTHENGETHA MBITHI………………APPELLANT**

**VERSUS**

**REPUBLIC…………………………………………..RESPONDENT**

**(*Appeal against the conviction and sentence by Hon. D. Orimba (SPM) delivered on 2nd October, 2017 in Kangundo SPMC Cr. Case No. 797 of 2015*)**

**JUDGEMENT**

1. The appellant was charged with the offence of store breaking contrary to section 304 (1) of the Penal Code, a second count of stealing contrary to section 275 of the Penal Code and a third count of handling stolen goods contrary to section 322 (2) of the Penal Code. He was convicted of count one and two and sentenced to serve two years and twelve months imprisonment respectively which were to run concurrently.

2. Facts as they are on record are that **Shadrack Mutinda Kasyoka (PW1)** who deals in agrovet business closed his shop on 1st August, 2015 at 6.00 pm. On 3rd August, 2015, his Manager Joanes Mwendwa found the store broken into. Joanes informed him of the incident and he proceeded to the store. He discovered that maize seeds, dog food, molasses cross bars and four pieces of spring had been taken. He reported the matter to the police where he recorded a statement. On 16th September, 2015, he got information from a member of the public about of the appellant selling seeds. He sent someone to go and make a purchase from him. Two packets were bought. He stated that he identified the packet which had the same batch number which resembled those stolen from him. He called the police and directed them to the appellant. The police conducted a search and 4 bags were recovered totaling to 6 packets. He stated that the lady who was selling the items stated that the items belonged to the appellant. That the appellant was not able to confirm the seeds to be his that is batch number CI/43/3/9931, Ref. - 129102EM20862 dated 3rd March, 2015. The six pieces of seeds were produced as P. Exhibit 2 (a-f).

3. **Joanes Mwendwa (PW2)** stated that on 3rd August, 2015 he was sent by PW1 to the store to collect items. On reaching the store he found the door broken. He informed PW.1 of his discovery. He later recorded a statement with the police and later confirmed that packets of maize were recovered.

4. Cpl. James Miano took over investigation of the matter from PC James Kipsang who was transferred to Bungoma. He stated that on 3rd August, 2015 PW1 reported that his store had been broken into and the following items stolen. 4×20 kg dog food, 7×12 Duma, 43 maize, 1 cross bar, 4 pieces of spring valued at KShs. 60,500/=. That the police visited the scene and found that the padlock and wire mesh were broken. That on 19th September, 2015 at 11.00 am PW1 got information that the appellant was selling Duma maize at Tala market. The police were informed. They proceeded to the place and found the appellant

with 6 packets. That PW1 produced receipts with which he purchased the maize. The appellant was then arrested and charged in relation to the theft.

5. The trial court found the appellant to have a case to answer and subsequently put him on his defence. He gave unsworn statement as follows; that he does business within Tala market. That he had bought 12 bags of maize on 2nd March, 2015. He planted 6 and was left with 6 which he was to plant later. That he had a problem and wanted to sell the 6 bags left to get money. That an old man bought two bags. After selling he was called by the police claiming that he stole the seeds. The appellant produced a receipt D. Exhibit 1.

6. In her submissions, the appellant' counsel faulted the charge sheet for reading 2nd August, 2015. She submitted that the charge sheet should have read between 1st August, 2015 and 3rd August, 2015. She submitted that the charge was brought under Section 304 (1) of the Penal Code which deals with breaking into human dwelling places and not store warehouses and the likes. That the charge should have been brought under section 306 (a) of the Penal Code. She contended that the Appellant should have been charged with breaking into a building and committing a felony which was stealing. That the problem with the charge sheet is that it led to duplication of the charge in count 2. That in count 2 he was charged with stealing contrary to section 275 of the Penal Code. He contended that in the particulars of count 2, it was not indicated where the property stolen came from. That the charge says that the offence was committed at Tala Market Matungulu Sub-county. That the complainant was however specific that the goods were stolen from his store. That charging the appellant with stealing after charging him with an offence of breaking into a store with an intent to steal was duplicating an offence that could have been one. She submitted that count 3 was an offence of handling stolen property. That the same should have been an alternative count and not a third count. That one cannot be guilty of breaking, stealing and handling. That it is either the first two condensed into one or the second and third count should always be an alternative of the first two.

7. The appellant lamented that the trial magistrate stated that the appellant was guilty of both counts without specifying which one exactly yet he was charged with three counts. That he gave no reasons for arriving at the said finding. That it can be assumed that he based his finding on the fact that the complainant claimed the recovered goods were found in the kiosk owned by the appellant and they were on sale. That the trial court must have assumed that the goods had been recently stolen and so since the appellant had them, he was the thief. The appellant raised the question as to whether 16th September, 2015 recent counting from 2nd August, 2015 when the maize seed was said to be stolen and whether Duma was a type of maize seed for planting. That the complainant stated that he identified the seeds as his since he had receipts for the purchase of the same. It was contended that the seller of the seeds ought to have been called as a witness to show how peculiar their seeds and packaging was. That had the batch number been important, it would have appeared on the receipt. That the receipts produced on record all bore the same date and must have been the complainant's and that the appellant cannot be said to have produced the receipts for umbrellas and chaff cutters.

8. It was further contended that it became more mysterious when the handling charge stated that on 6th September, 2015, the appellant handled stolen property while the evidence adduced says he was found in possession of stolen property on 16th September, 2015. That the contradiction is material as the date of handling is very important to show that the witnesses were sure about what they were telling the court. That it is also important for court to determine whether after how long the goods were recovered. It was finally submitted that there was no sufficient evidence to warrant the appellant's conviction.

9. The respondent submitted that the appellant was charged with various offences that is housebreaking contrary to section 304 (1) (a) of the Penal Code and stealing contrary to section 275 of the Penal Code. That section 306 on the other hand provides for the offence of breaking into a building and committing a felony. That the evidence adduced during trial indicated that the appellant broke into a store and committed an offence of stealing which is contrary to the offence that the appellant was facing. It was submitted that the question at hand is whether or not the appellant understood the charge well in order for him to prepare his defence. That even though the appellant was able to cross examine all the prosecution

witnesses that cannot be used as escape route for a charge that was not in conformity with the particulars. That in this case, the trial court erred in convicting the appellant for an offence that was not supported by evidence adduced.

10. It was submitted that the appellant was charged with the offence of store breaking contrary to section 304 (a) of the Penal Code and the second count of stealing contrary to section 275 of the Penal Code. That according to the evidence of PW1, PW2 and PW3, the offence was committed on 3rd August, 2015. That the appellant was arrested on 16th September, 2015 and was found in possession of goods similar to those that were stolen from the complainant's store. That the foregoing raises issues of recent possession, and whether it is only the complainant who had a monopoly of owning and explicit rights of selling those goods. That no evidence was tendered to so prove. That the said goods were those that would be found anywhere in the County and in any shop therefore the appellant would have bought the same from any other shop.

11. That on the issue of recent possession which the trial magistrate failed to address, the applicable principles of law is based in the case of **Isaac Ng'ang'a Kahinga alias Peter Ng'ang'a v. Republic (2006) eKLR**. It was submitted that possession of recently stolen goods will, in the absence of an innocent explanation, support an inference that the possessor knew that they were stolen. That the facts on which the inference depends are; the possession and the absence of an innocent explanation, and if a person be charged with possession of stolen goods, he is entitled to an acquittal if the court is left with reasonable doubt as to either or both of these facts. That in the present case, the goods were recovered more than a month after they were stolen which defeat the basic principle of recent possession, but that when the appellant was put on his defence he offered such a reasonable explanation. That he rebutted the presumption of recent possession, hence the finding by the trial magistrate that the appellant is guilty in this case was erroneous. In view of the same, the respondent invited the court to make a finding that the conviction and sentence imposed upon the appellant was not supported by the evidence adduced and the law and should not be allowed to stand. The respondent urged this court to quash the conviction and set aside the sentence and order that the appellant be set at liberty forthwith unless otherwise lawfully held.

12. This being a first appeal, this court is under duty to re-evaluate the evidence afresh with a view of arriving at its own independent conclusion bearing in mind that it did not have the benefit of seeing the witnesses' demeanor. I have given due consideration to this appeal and the submissions tendered thereto. The issues for determination are:

> ***a) Whether or not the appellant was convicted on a defective charge sheet.***
>
> ***b) Whether or not the prosecution proved its case beyond reasonable doubt.***

13. On the first issue, the charge sheet reveals that the appellant was charged with the offence of store breaking contrary to Section 304 (1) of the Penal Code, a second count of stealing contrary to section 275 of the Penal Code and a third count of handling stolen goods contrary to section 322 (2) of the Penal Code. He was subsequently convicted of count 1 and 2. The provision for store breaking is section 306 of the Penal Code and not section 304 as stated in the charge sheet. I however note that the particulars of the charge and the evidence tendered were in regard store breaking. The particulars having been read to the appellant, it cannot be said that he did not understand the charge he was facing for the mere fact that the wrong provision was cited. The appellant was able to cross examine the witnesses in a manner suggesting that he in fact understood the charge. He further did not raise the issue at the earliest instance if indeed he was faced with difficultly of prejudice for that matter.

14. Section 382 which is the substantive law on whether even with such defect justice could still be met or whether the defect is curable. The said section provides:

> ***"Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other***

> ***proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice. Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings. It follows therefore that the court in determining whether a defect caused injustice has to have regard whether the objection should have been raised at an earlier stage in the proceedings."*** (Emphasis mine).

15. In the circumstances, the appellant cannot be said to have been prejudiced by the defect and it is hereby considered not fatal. That ground therefore fails.

16. On the second issue, the appellant was said to have been found in possession of two bags of maize. The appellant in his defence stated that those were maize he had bought for purposes of planting but resorted to selling them since he was faced with some financial constraint. The offence was said to have been committed on 3rd August, 2015 and the recovery was made on 16th September, 2015 i.e. a month and a few days after the incident. In support of his defence that the maize were his, the appellant produced receipts which I have taken the liberty to peruse. The said receipts are for umbrellas, nail cutters, towels and combs. The same were not for maize. The complainant on the other hand produced receipts for maize as proof that the said items were his.

17. Bosire J., (as he then was) stated as follows in **Malingi v. Republic (1989) KLR 225** at page 227:

> ***"By the application of the doctrine the burden shifts from the prosecution to the accused to explain his possession of the item complained about. He can only be asked to explain the possession after the prosecution have proved certain basic facts. Firstly, that the item he had in his possession had been stolen a short period prior to the possession, that the lapse of time from the nature of the item and circumstances of the case, recent; that there are no co-existing circumstances which point to any other person as having been in possession of the item. The doctrine being a presumption of a fact is a rebuttable presumption. That is why the accused is called upon to offer an explanation in rebuttal, which if he fails to do an inference is drawn that he either stole it or was a guilty receiver."***

18. The Court of Appeal has this to say in the case of **Isaac Ng'ang'a Kahiga alias Peter Ng'ang'a Kahiga v. R NYERI CA Criminal Appeal No. 272 of 2005**:

> ***"It is trite that before a court of law can rely on the doctrine of recent possession as a basis for 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 and lastly, that the property was recently stolen from the complainant…"***

19. Applying the test in this case, I find that the prosecution proved its case against the appellant beyond reasonable doubt for the reason that the appellant produced receipts for items other than maize yet he stated that those were the receipts for the maize and further by the fact that he was found with the items only a month and a few days after the incident. The appellant's defence did not also suggest that he received the maize from another person. In my view, maize unlike things such as mobile phones do not necessarily change hands so fast. Even if the factor of the time period was to be overlooked, the appellant's evidence of having purchased the maize was vague since the receipts were for other items. His defence did not therefore cast doubt on the prosecution evidence. The only inference that can be made is that he stole the items.

20. Having said so, I find that the appellant ought to have been convicted of the offence of breaking into a building and committing a felony contrary to section 306 (a) of the Penal Code as well as handling stolen goods contrary to Section 322(2) of the Penal code. Since the offence of breaking into a building and committing a felony had not been preferred against the Appellant, I find the evidence adduced did not support the main charge but the alternative charge of handling stolen goods. Indeed the Complainant positively identified the recovered goods as his and which were found with the Appellant and that the

complainant availed receipts as proof of ownership unlike the Appellant. It is also noted that the property had recently been stolen. The Appellant's explanation as to how he came by the goods did not at all cause doubt on the prosecution's case since the receipts he furnished had to do with other goods but not the subject. The conduct of the Appellant in hurriedly securing a receipt which did not involve purchase of maize seeds left no doubt that he either stole the same or was a guilty receiver. The Appellant therefore had knowledge that the said goods had been stolen or unlawfully obtained.

21. On the issue of sentences, I note that the Appellant was sentenced to two years as well as 12 months on the main counts. However, in view of the above finding the only charge that shall stand will be the one of handling stolen goods contrary to Section 322(2) of the Penal Code. The same provides for a maximum sentence of not more than 14 years imprisonment. I am of the view that a sentence of 2 years imprisonment would be appropriate in the circumstances.

22. In the result, I find the Appellant's Appeal partly succeeds. The conviction and sentence by the trial court is hereby quashed and substituted with a conviction for the offence of handling stolen goods contrary to Section 322 (2) of the Penal Code and that the Appellant is ordered to serve imprisonment of two (2) years from the 2/10/2017.

It so ordered.

Dated and delivered at Machakos this **29th** day of **April, 2019.**

**D. K. KEMEI**

**JUDGE**