



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 46 OF 2016

(An Appeal arising out of the conviction and sentence of Hon. Khaemba – Ag.SRM delivered on 29th May 2015 in Kibera CMC. CR. Case No.417 of 2013)

AMBASADOR MAKORI MUROGI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant, Ambassador Makori Murogi was charged with others with the offence of **house breaking and stealing** contrary to **Section 304(1)(a)** as read with **Section 279(b)** of the **Penal Code**. The particulars of the offence were that on diverse dates between 22nd November 2012 and 2nd December 2012 at Utawala Estate Embakasi in Nairobi County, the Appellant, jointly with others not before court, broke into and entered the dwelling house of Zacharia Mairura Kinyondi with intent to steal therein, and did steal assorted electronics, household goods, clothes and beddings as listed in the charge sheet valued at Kshs.700,000/- the property of Zacharia Mairura Kinyondi. When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charge. After full trial, he was convicted as charged. He was sentenced to serve five (5) years imprisonment on each limb of the offence. The sentences were ordered to run concurrently. The Appellant was aggrieved by the conviction and sentence. He has appealed to this court.

In his petition of appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. He was aggrieved that he was convicted yet his constitutional and fundamental rights were grossly violated hence causing a miscarriage of justice. He was aggrieved that he was convicted yet the evidence adduced by the prosecution witnesses did not establish his guilt to the required standard of proof. He faulted the trial magistrate for rejecting his defence without taking into consideration that he had given an explanation regarding the circumstances in which he was found in possession of the particular items which had been robbed from the complainant's house. In the premises therefore, the Appellant urged the court to allow the appeal, quash the conviction and set aside the sentence that was imposed by the trial court.

During the hearing of the appeal, the Appellant presented to court written submission in support of his appeal. In summary, the Appellant submitted that the prosecution had failed to adduce sufficient, credible and cogent evidence to establish, to the required standard of proof that he was involved in the crime in question. On her part, Ms. Aluda for the State submitted that the trial court had properly applied the doctrine of recent possession to convict the Appellant. She submitted that the Appellant was properly

convicted. His appeal should therefore be dismissed as it lacked merit.

From this court's perusal of the trial court's proceedings and judgment, it was evident that the Appellant was convicted solely on the application of the doctrine of recent possession. In **Malingi –Vs- Republic [1989] KLR 225 at P.227** the court held thus:

“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 his possession after the prosecution have proved certain basic facts. Firstly that the item he had in his possession had been stolen; it had been stolen a short period prior to the possession; that the lapse of time from the time of its loss to the time the accused was found with it was, 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 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.”

The prosecution was required to establish that the Appellant was found in possession of property that was stolen from the house of the complainant. The recovery of the stolen property from the Appellant's possession must be within a period proximate to the time the property was stolen from the complainant. There is a rebuttable presumption that the doctrine of recent possession may not be applied if the Appellant gives a reasonable explanation of how he came to be in possession of the stolen property.

In the present appeal, the complainant (PWI) Zacharia Mairura Kinyondi testified that he left his house at Utawala Estate, Embakasi Nairobi on 22nd November 2012 for official duty in Eldoret. He locked his house. When he returned on 2nd December 2012, he found the house having been broken into and nearly all his electronics, clothes and beddings had been stolen. This property was listed in the charge sheet. That the property that was stolen was confirmed by PW3 Thomas Kinyondi, the brother of the complainant who visited the house of the complainant soon after he made the discovery that the property had been stolen. Among the property that was stolen was a Samsung mobile phone. The complainant had configured it in such a way that if another SIM card was inserted in the phone, the IMEI number would show in another mobile phone that was in his possession. He made a report of the theft to the police.

A few days after the theft, he noted that the Samsung mobile phone was being used. He alerted the police. They were able to trace the mobile phone to Matinyani area in Kitui County. In possession of the mobile phone was PW2 Tabitha Ngie Kibaki. She explained to the police that she was given the mobile phone by her estranged boyfriend called Jared Akoko. She agreed to accompany the police to Nairobi to the house of the said Jared Akoko who was the Appellant's co-accused before the trial court. When she reached near the house in Githurai in Nairobi, she called the said Jared Akoko to meet her at the bus stage. The said Jared Akoko responded to the call. He was arrested. He escorted the police to his house where certain items which were stolen from the complainant's house were recovered. The said Jared Akoko then escorted the police to the house of the Appellant at Huruma Estate in Nairobi where they recovered a radio, cloth materials, VCD/MP3/CD player. All these items were positively identified by the complainant as being among the property that was stolen from his house.

The Appellant did not deny that these items were found in his possession. He did not deny that these stolen items were found in his possession within the approximate period from the time the same was stolen from the complainant's house. The Appellant gave the explanation that the property belonged to his late brother who was killed by a “mob justice” on 27th December 2012. He alleged that the police found him in his late brother's house. He was not aware that the items had been stolen from the complainant's house. In essence, the Appellant was saying that he was not found in possession of the stolen items and further, that he had given a reasonable explanation as to why he was in possession of the said items.

This court's re-evaluation of this evidence leads it to the irresistible conclusion that indeed the Appellant was found in possession of the property stolen from the complainant's house in circumstances that clearly

pointed that he was the one who participated in the break-in and theft. The Appellant's explanation that the house and property belonged to his late brother does not hold. The Appellant did not produce a death certificate to establish that indeed his brother had been killed by a mob or that the house in which the stolen items were found belonged to his late brother. It was instructive that the Appellant's accomplices, who led the police to the house where the Appellant and the stolen items were found, explained to the police that the house belonged to the Appellant. In the premises therefore, this court finds no merit with the Appellant's appeal against conviction. The same is dismissed.

As regards sentence, the Appellant is on firmer ground. The Appellant complained that the trial court did not take into account the period he had been in remand custody before sentencing him. According to the **Sentencing Policy Guidelines** published by the Judiciary at Page 20:

“7.10 The proviso to Section 333(2) of the Criminal Procedure Code obligates the court to take into account the time already served in custody if the convicted person had been in custody during trial. Failure to do so impacts on the overall period of detention which may result in an excessive punishment that is not proportional to the offence committed.”

In the present appeal, it was clear that the trial court did not take into account the period of more than two (2) years that the Appellant was in remand custody. In the premises therefore, this court takes into account that period as a result of which the custodial sentence of the Appellant is commuted to the period already served. The Appellant is ordered set at liberty forthwith and released from prison unless otherwise lawfully held. It is so ordered.

DATED AT NAIROBI THIS 30TH DAY OF JANUARY 2018

L. KIMARU

JUDGE