REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

CRIMINAL APPEAL. NO 62 OF 2016

ABEDNEGO MUTUNGA MUINDE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

Being an Appeal from Original Conviction and Sentence in

Criminal Case No 22 of 2015 at Mavoko Law Courts

before Hon.L.Mummassaba, Resident Magistrate,

dated 11th September 2015.

JUDGEMENT

1. The Appellant, Abednego Mutunga Muinde was charged with the offence of shop breaking and committing a felony contrary to Section 306(a) as read with Section 306(b) of the Penal Code.

The Particulars of the offence were that on diverse dates between 23rd December,2014 and 16th January, 2015 at Mlolongo Township in Athi River District within Machakos County, jointly with others not before court broke and entered into a shop of Hellen Wambui with the intent to steal therein and committed therein a felony namely theft of the following items , one drier, one blow dry, one barber, a bag, shaving machine and assorted shop goods and cash all valued at Kshs.43,000/= the property of Hellen Wambui.

2. The Appellant also faced an Alternative Charge of handling stolen goods contrary to Section 322 (1) as read with Section 322(2) of the Penal Code.

> The Particulars of the charge are that on the 9th day of January, 2015 at Mlolongo Township in Athi River District within Machakos County, otherwise than in the course of stealing dishonestly retained one bag, one drier, one barber, shaving machine and assorted shop goods all valued at Kshs 10,000/= knowing or having reason to believe them to be stolen goods or unlawfully obtained.

3. The Appellant denied the charges and a plea of not guilty was entered on 12/1/2015.The Prosecution called three (3) witnesses in support of their case and the accused gave unsworn statement without calling any witnesses.

4. The Trial Magistrate having been satisfied that the prosecution had proved its case beyond reasonable doubt proceeded to convict and sentence the appellant on the alternative charge under Section 215 of the Criminal Procedure code accordingly and acquitted him on the main count for lack of evidence.

5. The appellant being dissatisfied by the decision of the trial court appealed against the judgment on the following grounds that;

> ***i. The Learned trial Magistrate erred in both Law and facts by applying the doctrine of recent possession in the judgment to support his conviction.***
>
> ***ii. The Learned trial Magistrate failed to observe that the prosecution did not prove their case beyond reasonable doubt as required in a criminal trial.***
>
> ***iii. That the Learned trial Magistrate erred in Law and fact by wrongfully applying the principles of circumstantial evidence.***
>
> ***iv. That, the Learned trial Magistrate erred in law and facts by imposing a manifestly harsh sentence and failed to consider the provisions of Section 333(2) of the CPC on the period the appellant had spent in custody***.

SUBMISSIONS BY THE APPELLANT.

6. The Appellant filed his submissions dated 18th May,2017.On the first ground of appeal, regarding the doctrine of recent possession he submitted that each of the elements of doctrine of recent possession were not proved beyond reasonable doubt as required by the law. He placed reliance on the High Court decision in **Morris Kinyalili- Vs- Republic (2012) eKLR** where the four elements of doctrine of recent possession were laid out as follows;

- That the property was stolen.
- That the property was found in exclusive possession of the accused.
- That the property was positively identified.
- That the possession was sufficiently recent after the theft. As to what constitutes recent possession is a question of fact depending on the circumstances of each case including the kind of property, the amount or volume thereby the ease or difficulty with which the stolen property may be assimilated into legitimate channels; the property's character and so forth.

7. He went on to state that the shaving machine was not in his possession at the time of arrest and therefore the persons with whom it was found ought to have been charged as well. There was no proof that the house where the goods were found belonged to him and further no inventory was prepared for the goods or property recovered.

8. In regard to ground 2 of the appeal the appellant stated that the prosecution had failed to call all the crucial witnesses for example the person who was found in possession of the shaving machine who was a potential witness to this case, failure of which creates an impression that, the evidence which the said person would have tendered would have been unfavourable to the Respondent.

9. In support of his argument above he quoted the criminal appeal case of **Nguku -Vs- Republic (1985) KLR 412** where the Court of Appeal observed that;

> ***"…. Where a party fails to produce certain evidence, a presumption arises that the evidence produced would be unfavorable to that party''***

10. His submission regarding the application of principles of circumstantial evidence was that the tests of circumstantial evidence were not proved by the prosecution as set out in the case of **Abanga Alias Onyango- Vs- Republic Criminal Appeal No.32 of 1990 (UR) at page 5** as follows;

"It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests:

i. The circumstances, from which an inference of guilt is sought to be drawn, must be cogently and firmly established.

ii. Those circumstances should be of definite tendency, unerringly pointing towards guilt of the accused.

iii. The circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that with all human probability the crime was committed by the accused and no one else.''

11. In conclusion on the final ground the appellant stated that the trial magistrate misdirected herself by failing to consider that the appellant spent substantial amount of time in prison and the same was not factored into the sentence he is currently serving, as per the provisions of Section 333(2) of the Criminal Procedure Code, and also failure for him to be given remission by the prisons authorities upon his conviction hence the sentence needs to be reviewed. He prayed to court to allow the appeal.

12. The Respondents filed their submissions on 27th April 2017.Prosecution counsel pointed out that the appellant had not challenged both the conviction and sentence but only opted to mitigate on the sentence seeking leniency of the court to reduce his sentence from custodial to non-custodial sentence. The same was opposed by the prosecution.

13. It was the prosecution's submission that the grounds raised for appeal by the appellant do not qualify to be grounds of appeal since they are mitigation factors which ought to have been raised at the trial court.

14. It was the Respondent's further submissions that all the facts raised by the appellant were facts well known by the appellant during trial and the same would have been safely addressed then. As a result no new facts are being raised by the appeal and the appellant is misguided in bringing the appeal. The conviction against the appellant was safe and within the law, as a result the court ought to dismiss the appeal and subsequently uphold both the conviction and sentence.

ANALYSIS AND DETERMINATION

15. The general principles upon which the first appellate court interferes with sentences are now well settled. It has jurisdiction to interfere with sentence imposed by the trial court if it is satisfied that in arriving at the sentence, the trial court did not take into account a relevant factor or that it took into account an irrelevant factor or that in all the circumstances of the case, the sentence is harsh and excessive. However, the Court should not lose sight of the fact that in sentencing, the trial court exercises discretion and as long as the discretion is exercised judicially and not capriciously, the appellate court should be slow to interfere with that discretion (see ***Wanjema v Republic*** **[1971] EA 493**).

16. Having looked at the evidence adduced by the witnesses and the accused in this case I do find that the main issue to be determined is;

i. Whether the appellant stole the goods or he was found in possession of stolen goods?

17. It is imperative to note that no evidence has been adduced before this court to prove that the appellant was indeed seen stealing the goods. It was PW 1's evidence that upon closing her shop, she left for Christmas and when she came back she found that her shop had been broken into and goods were stolen. She reported to the police. Later her friend informed her that she had passed by a particular shop and she saw her shaving machine which had been stolen. They proceeded to the shop and they were informed that the machine had been brought for repair by a certain person and on inquiry the said person said that he had bought the machine from the Appellant. They tricked the Appellant to meet up with them and he took them to his house where other stolen goods were recovered.

18. The Appellant in his defence did not give any explanation as to how he came to be in possession of the goods. He just denied without giving any explanation. It is imperative therefore to note that the Appellant was in both constructive and direct possession of the goods. Direct in the sense that stolen goods were recovered from his house and constructive in the sense that he had sold the stolen shaving machine to another person.

19. I therefore do agree with the trial magistrate that the offence of stealing was not proved and therefore this brings us to the charge of handling stolen goods.

20. The principles of law upon which the doctrine of recent possession is based were well laid out in the case of **Isaac Ng'ang'a Kahiga alias Peter Ng'ang'a Kahiga v R Criminal Appeal No. 82 of 2004** that;

> **"... It is trite that 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 from the complainant and lastly, that the property was recently stolen 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 move from one person to the other. In order to prove possession there must be acceptable evidence as to search of the suspect and recovery of the allegedly stolen property, and in our view, any discredited evidence on the same cannot suffice no matter from how many witnesses."**

21. Further in the persuasive authority in **Malinga v R [1989] KLR 225** Bosire, J (as he then was) expressed himself thus 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 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 the 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."**

22. It is my finding that all the principles outlined by the above authorities had been well established and the appellant offered no explanation as to how he obtained the goods found in his possession. The trial courts finding was quite proper.

23. As regards the claim by the Appellant that the trial Court's sentence was manifestly harsh as it failed to consider the period he had been in remand custody, I wish to point out that the offence of handling stolen goods contrary to Section 322(2) of the Penal Code attracts a maximum sentence of fourteen (14) years. Indeed the trial court received the Appellant' s mitigation as well as a pre-sentence report and noted that the said report was not in favour of a non-custodial sentence. I find the trial court exercised its discretion and meted out a sentence of three (3) years which in my view is the least minimum possible sentence. I am unable to interfere with the said sentence.

24. In the result, I find that the appeal herein has no merit and is dismissed.

It is so ordered.

Dated and delivered at Machakos this 20th day of March , 2018.

D.K. KEMEI

JUDGE

In the presence of:

Abednego Mutunga Muinde- the Appellant

Machogu for the Respondent

Kituva - Court Assistant