



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT CHUKA

HCCRA NO. 13 OF 2017

NATHAN MUCHIRI NDUNDA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being appeal from original conviction and sentence in the Principal Magistrate's Court at Marimanti in Criminal Case No. 232 of 2017 delivered by S.M. NYAGA - (Resident Magistrate (R.M) on 26th July, 2017).

J U D G M E N T

1. **NATHAN MUCHIRI NDUNDA**, the appellant in this appeal was charged with the offence of House Breaking contrary to **Section 304(1) (b) of Penal Code** and stealing contrary to **Section 279 of the Penal Code**.

The particulars of the charge were that on 4th April 2017 at Nkondi Location in Tharaka the appellant broke into his father's dwelling house with intent to steal and did steal the following items belonging to his father,

- a) 26 Kg of green grams
- b) 2 litres of cooking oil
- c) 1 knife
- d) one cannon camera
- e) one blanket
- f) power bank
- g) 2 pair of pliers
- h) a kitchen knife all valued at Kshs.34,250/-

2. The appellant denied committing the offence but the trial court found him guilty upon full trial where the prosecution presented five witnesses. He was convicted and sentenced to serve 10 years imprisonment. He felt aggrieved and preferred this appeal. Before I consider the grounds upon which he has preferred this appeal, let me consider brief facts deduced from the evidence presented to the trial court.

3. The appellant was accused of breaking into his father's (PW1) house and stealing therefrom the items listed above. Reverend Solomon Ndunda (PW1) gave evidence to the trial court on how his house was broken into from the kitchen window and items stolen from both the kitchen and the living room. He suspected his son, the appellant therein owing to his past conduct and the fact that he disappeared from that day and on 24th April, 2017. He told the trial court that his suspicions were confirmed when the appellant was nabbed at Mukothima Market and later directed police officers to where he had taken the items he had stolen. A white power bank (P. Exhibit 1), Camera (Canon P. Exhibit 2), 1 pliers red (P.Exhibit 3), a blanket (P.Exhibit 4) and a bag (P.Exhibit 5) were all recovered in different places where the appellant had directed the officers including Corporal Patrick Gachungi (PW3) who confirmed to court that indeed the appellant led them to where they recovered the items.

4. Isaac Mbogo (PW2) and Gitonga Julius David (PW4) testified that the appellant gave them a power bank (P.Exhibit 1) and camera (canon- P Exhibit 2) respectively as a collateral for the beer the appellant drank without paying and Kshs.500/- he took from PW2 and PW3 respectively.

5. The investigating officer P.C Joab Muhande (PW5) gave evidence on the investigations carried out and also gave evidence regarding the character of the appellant which he described as bad and criminal which was also an issue confirmed by the social inquiry conducted before sentencing the appellant.

6. When placed on his defence, the appellant denied committing the offence saying that he was at the material time sleeping in his house after spending his day at Nkondi market. He further told the trial court that he also learnt from his father (PW1) that his house had been broken into and items stolen. He dismissed the evidence of witnesses who testified that stolen items were found in their possessions saying that they could have been the thieves.

He further defended himself stating that he was framed by his father because he had differed with him and his brother. He faulted his father saying that he was against him getting back his wife.

7. The trial court upon evaluating evidence found that the prosecution's case against the appellant had been proved beyond reasonable doubt and convicted him and sentenced him to serve a total of 10 years imprisonment.

8. The appellant has raised 4 grounds in his appeal namely;

(i) That the learned trial magistrate erred both in law and fact by failing to note the principle of the doctrine of recent possession were not satisfactory met.

(ii) That the case against him was not proved beyond reasonable doubt.

(iii) That the learned magistrate erred by failing to observe that the testimonies tendered by witnesses were not credible.

(iv) That the learned magistrate rejected his defence without giving reasons.

9. This appeal proceeded by way of written submissions and the appellant has submitted that the doctrine of recent possession does not apply to him since he was not caught in possession of them. He has further argued that the complainant did not prove that the items recovered belonged to him because he said that he had lost receipts. He has further faulted the evidence of PW2 who stated that he was left with a power bank as a collateral stating that he should have called a witness from the bar who witness the transactions. He has further submitted that PW2 and PW4 should have been held accountable for being found with stolen items and that there was no connection between the items stolen and the appellant.

10. The Respondent on the other hand has opposed this appeal vide written submissions by James Machirah learned prosecution counsel for the Respondent.

11. On doctrine of recent possession, the Respondent contended that the doctrine applied in the case as the property stolen were found to have been used by the appellant as a lien to obtain credit from people who were called to testify. The Respondent has referred this court to the evidence tendered by PW2 (Isaack Mbogo), Corporal Patrick Gachungi (PW2), and Gitonga Julius David (PW4). The Respondent has submitted that the doctrine applied because the stolen property belonged to the complainant (PW1). He has given the example of Canon camera tendered as Exhibit 2 which perfectly fitted the cameral disc (P. Exhibit 6) which the complainant had left at home. The state has also referred this court to the evidence of the appellant who conceded that the camera belonged to his father (complainant). Machirah has cited the provisions of **Section 268(2)** for the **Penal Code** which provides the definition of stealing and "**special owner**" submitting that any person with ultimate right or title to a thing or having physical control of a thing can rightly be referred to as the owner and that the complainant fitted that bill.

12. The Respondent has also submitted that the doctrine of recent possession applied because evidence tendered at the trial proved that the items stolen had been recently stolen arguing that the items were stolen on 4th April 2017 and recovered on 24th April 2017 with the assistance of the appellant. The Respondent further submits that possession as defined in **Section 4** of the **Penal Code** includes not only own possession but includes possession by 3rd parties for the use of the person in whose benefit the item is kept. The state has submitted that the appellant was in constructive possession of some of the items recovered and hence the applicability of the doctrine of recent possession.

13. This court has considered this appeal and the submissions made by both parties. This appeal raises basically one issue which is whether the evidence tendered against the appellant at the trial met the threshold of beyond reasonable doubt. The appellant was charged and convicted of house breaking or burglary with a twin charge of stealing as per the charge sheet. I will come back to that issue later in this judgment though it was not one of the grounds or issues in this appeal.

The appellant main ground of appeal is that the doctrine of recent possession did not apply to the case facing him at the trial. I have considered well the evidence tendered by the complainant (Reverend Solomon Ndunda), a retired preacher and father to the appellant and one can almost sense the pain and frustration he had undergone due to the previous activities of the appellant which was expressed in his testimony as follows:-

"you are my son. I love you but I am now tired."

This was in regard to the fact that he had previously bailed him out even after reportedly breaking a neighbours leg among other criminal activities.

14. The appellant in his defence stated that his father may have given false evidence due to the past differences but the appellant pointed out

an issue totally different from the history his father gave. According to the appellant, his father was unhappy that he was trying to get his wife back which really does not make any sense no wonder the trial court never took it seriously because why would a parent and a retired pastor at that be against his child staying with his wife? The appellant ought to have adduced more convincing evidence as to why his father would harbour ill will against him as to be motivated to lie or suspect him for breaking into his house.

15. The evidence of the complainant (PW1) regarding items stolen from his house and the recovery of some of the items to wit camera (P. Exhibit 2) and power bank (P. Exhibit 1) from PW3 and PW2 respectively showed a clear nexus to the appellant. The complainant testified that his son (appellant herein) disappeared immediately he discovered that his house had been broken into at around 5 p.m on 4th April, 2017. The fact that he was arrested on 24th April, 2017 and voluntarily led the arresting officers (PW3) to where he had given out the camera (PW4- Gitonga Julius David) and power bank (PW2- Isaac Mbogo) as lien or security for beer taken and 500/- cash taken from PW4 and PW2 respectively proved beyond reasonable doubt that the appellant was connected to the crime committed. The doctrine of recent possession was clearly applicable as submitted by the Respondent. This is because the three elements of recent possession was established and proved beyond reasonable doubt.

16. For one the items recovered belonged to the complainant. It is true that the complainant never produced receipts to prove ownership but ownership is not only proved by receipts. The provision of **Section 268(2)** clearly expands the latitude or the scope of the meaning of ownership to include something in possession/ control or use by person. There is no dispute that the Canon camera which the retired pastor stated that he was given a gift by a missionary in Marakwet during a religious function belonged to him notwithstanding the fact that he had no receipt. Even the appellant himself conceded in his evidence that the Canon camera (P.Exhibit 2) belonged to his father. The camera disc (P.Exhibit 6) which was brought by the complainant fitted the Canon camera which was further a proof that the camera belonged to the complainant.

17. On the element of "**recently stolen**", it is clear from the evidence tendered that the cited items recovered from PW2 and PW4 on 24th April, 2017 had been stolen on 4th April, 2017 which was recent by any definition.

18. On the element of "**possession**", I agree with the Respondent's submission that **Section 4** of the **Penal Code** defines '**possession**' to include constructive possession which covers the nature of the "**possession**" the appellant had on the Canon camera left behind as collateral or lien over Kshs.500/- he borrowed from Gitonga Julius (PW4) and power bank he left with Isaac Mbogo (PW2) as a lien over three bottles of Tusker beer he consumed without paying. In actual sense though possessions were in the hand of 3rd parties (PW2 and PW3) the appellant still had possession because he could redeem them simply by paying for the beer and refunding Kshs.500/- to PW2 and PW4 respectively.

19. It is quite clear therefore that the doctrine of recent possession applied to the case facing the appellant and even if the doctrine did not necessarily apply it does not mean that for an offence of home breaking and stealing therefrom. Conviction can only lie if the doctrine of recent possession is established. The bottom line in my view is establishment of the threshold of standard of proof required to found a conviction. On this score I am convicted beyond reasonable doubt the evidence tendered by the prosecution met the requisite threshold in criminal law.

20. I have noticed from the typed proceedings that though investigating officer P.C Joab Muhande (PW5) tendered evidence and exhibits recovered the typed proceedings do clearly show that items marked for identification was produced as exhibits. However, the handwritten proceedings from the lower court clearly shows that the exhibits were properly produced as P Exhibit 1, 2, 3, 4, 5 and 6. That puts the issue to rest.

21. On the question of the charge sheet, though the appellant did not raise it, I have noted that the charge sheet presented to court was defective for duplicity. The charge reads as follows:

" House breaking contrary to section 304(1) (b) and stealing contrary to section 279 of Penal Code."

The charge as described under **Section 304(1)** of **Penal Code** was sufficient to cover the crime committed by the appellant which was house breaking and burglary or breaking into a dwelling house and stealing therefrom. Nonetheless, the defect in my view is one of those defects curable under **Section 382** of the **Criminal Procedure Code**. However I find that the sentence prescribed under **Section 304(2)** is a maximum sentence of 7 years. The legal sentence handed to the appellant should have been 7 years and the 10 year jail term was erroneous and unlawful.

In the premises and for the reasons aforesaid, the appeal against conviction fails. The same is upheld but I will set aside the sentence meted out against the appellant and in its place sentence him to 7 years imprisonment given the mitigating circumstances and probation report which are all against him.

Dated, signed and delivered at Chuka this 24th day of September, 2018.

R. K. LIMO

JUDGE

24/9/2018

Judgment signed, dated and delivered in the open court in the presence of appellant in person and Machirah for State/Respondent.

R.K. LIMO

JUDGE

24/9/2018