REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL APPEAL NO.139 OF 2014

ELIUD GITARI KABUGA....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the original conviction and sentence in criminal case No. 405 of 2012 of the Chief Magistrate's Court at Isiolo by Hon. J.M Irura – Ag. Principal Magistrate)

JUDGMENT

The appellant, **ELIUD GITARI KABUGA**, was convicted for the offence of handling stolen goods contrary to section 322(2) of the Penal Code and for the offence of burglary contrary to section 304(2) and stealing contrary to section 279 (b) of the Penal code.

The particulars of the offence were that after a robbery on 23rd August 2012, on 9th September 2012 he was found in possession of Nokia mobile phone of **LUCY MUMBI** knowing or having reasons to believe it to be stolen or unlawfully obtained. On 18th August 2012 at about 3 a.m together with others not before court, in Bula Pesa of Isiolo county, they broke and entered into the house of **MOHAMED ALI** with intent to steal and stole from therein one DVD player valued at Kshs. 5200/= the property of the said **MOHAMED ALI**.

The appellant was sentenced to serve seven years imprisonment on each count. He now appeals against both conviction and sentence.

The appellant was in person. He raised four grounds of appeal that can be summarized as follows:

1. That the learned trial magistrate erred in law and in fact by convicting him on the charge of handling the phone whereas he had not been charged with that offence.

2.That the learned trial magistrate erred in law and in fact by convicting him in respect of the DVD without indicating to which count it related.

3. That the learned trial magistrate erred in law and in fact by failing to resolve whether he had been identified at the police station or not.

4. That the learned trial magistrate erred in law and in fact by convicting him on charges that were not proved.

The state opposed the appeal through Mr. Odhiambo, the learned counsel.

The facts of the prosecution case briefly were as follows:

On the 23rd august 2012 there was a robbery Poolman's Bar in Isiolo town. The victims were not able to identify any of the robbers. However, Lucy Mumbi, one of the victim of the robberies recovered her mobile phone which was in possession of another lady who implicated the appellant as the person who sold it to her. At the time of arrest, a DVD that had been stolen from the house of **MOHAMED ALI** was also recovered on him.

The appellant denied any involvement in the offences.

This is a first appellate court. As expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court and I have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated case of **OKENO vs. REPUBLIC [1972 EA] 32.**

Section 179 of the Criminal Procedure Code allows the reduction of a charge to a lesser one where that lesser offence forms part of the particulars of the offence charged and the evidence proves the lesser offence. It provides:

> ***(1) When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and the combination is proved but the remaining particulars are not proved, he may be convicted of the minor offence although he was not charged with it.***
>
> ***(2) When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it.***

In the instant case, this is what the learned trial magistrate did in respect to the charge of robbery in count one, though she did not state under which provision of the law she was doing so.

Although in the first count there was a DVD that had been robbed of the complainants thereof, the evidence on record was very clear as to which DVD was recovered. It was the DVD in the second count. The complainant thereof identified it and produced a purchase receipt for it. This ground of appeal lacks merit.

The issue of identification at an identification parade was brought out by **FAITH KENDI** (P.W2). She testified that at a parade she identified the appellant by touching him. This was not necessary for in her evidence she said prior to the purchase of the mobile phone in issue from the appellant, she had known him for two years. The prosecution did not purport to adduce evidence of identification at an identification parade.

What evidence did the prosecution adduce in respect of the counts he was convicted in?

LUCY MUMBI (P.W1) testified that when robbers struck at Poolman's Bar on 23rd August 2012, she did not identify any of the culprits. The two robbers who entered the bar wore masks. Among the items the robbers took, was her Nokia mobile phone. This is the phone she found **FAITH KENDI** (P.W3) with on 9th September 2012.

FAITH KENDI testified that on 29th August 2012, she was in company of her friend, Makena. They passed by the kiosk of the appellant. As they were talking, the appellant overheard her tell Makena that she did not have a mobile phone. He offered to sell her one which he claimed was his but was not using. She bought it at Kshs.800/=. This is the phone that **LUCY MUMBI** found her with on 9th September 2012.

The appellant disposed of the phone 5 days after the robbery. If he was not part of the robbers, then he

was a handler of stolen goods with knowledge that they were stolen or unlawfully obtained. The learned trial magistrate correctly addressed her mind to the evidence at her disposal and convicted the appellant for the lesser charge in count one. she cannot be faulted for doing so.

The burglary in the shop of the **MOHAMED ALI** (P.W3) was perpetrated on the night of 17th and 18th August 2012. His DVD player was stolen. This DVD player was recovered by police officers who were in an operation on 8th September 2012, from the kiosk of the appellant. In his defence the appellant denied that the item was recovered from his kiosk.

The learned trial magistrate was satisfied as I am that the recovery was at the kiosk of the appellant. Although she did not state that she was invoking the doctrine of recent possession to arrive at her conclusion, this is what she did.

The principles of law upon which the doctrine of recent possession is based were well laid out by the Court of Appeal in the case of **ISAAC NG'ANG'A KAHIGA alias PETER NG'ANG'A KAHIGA vs. R CRIMINAL APPEAL NO. 82 OF 2004** as follows:

> ***.. 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.***

By application of the doctrine of recent possession the burden of proof on a balance of probabilities shifts to an accused person. In **MALINGA vs. R [1989] KLR 225** Bosire, J (as he then was) expressed himself as follows 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.***

In the instant case, the appellant was found in possession of the stolen DVD after 21 days of the stealing. He had a duty to explain how he came to have it in his possession. He did not discharge this duty. The learned trial magistrate was therefore entitled to make a finding that he must have been the thief. The conviction on the second count was based on strong evidence against the appellant.

On sentence, I wish to briefly comment on the second count. In offences where there are limbs like in the second count, the sentence ought to have been ordered as follows:

> ***... to serve 7 years on each limb. The sentence to run concurrently***.

I therefore make an order for rectification of the sentence in count two to read as aforestated.

From the foregoing analysis of evidence on record, I make a finding that the appeal lacks merit. The same

is dismissed.

DATED at **MERU** this **26th** day of **April, 2017**

KIARIE WAWERU KIARIE

JUDGE