



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CRIMINAL APPEAL NO. 57 OF 2015

JACKSON WANGORO

JOHN SAMUEL MWITA.....APPELLANTS

-VERSUS-

REPUBLIC.....RESPONDENT

(Being an appeal from the conviction and sentence by Hon. C. M. Kamau Acting Senior Resident Magistrate in Kehancha Senior Resident Magistrate's Court Criminal Case No. 129 of 2013 delivered on 27/09/2013)

JUDGMENT

1. **JACKSON WANGORO** and **JOHN SAMUEL MWITA**, the Appellants herein, were jointly charged with two others namely **EMMANUEL FRANGI** and **SAMSON CHACHA MWITA** with the offence of **breaking into a house and committing a felony** contrary to **Section 306(a) (b)** of the **Penal Code**, Chapter 63 of the Laws of Kenya. The particulars of the offence were that: -

“On the nights of 6th and 7th days of April 2013 at Isebania Township in Kuria West District within Migori County, jointly with others not before court, broke and entered into a building namely a store of ABDI ALI MAHAMUD and stole therein 66 ten litres jericans of Ufuta Cooking Oil and 30 Bales of Black polythine bags all valued at Kshs. 253,500/= the property of the said ABDI ALI MAHAMUD.”

2. **JOHN SAMUEL MWITA**, the second appellant faced an alternative charge of handling stolen goods contrary to **Section 322** of the **Penal Code**.

3. On denying the charges, the prosecution availed six witnesses in support of the case. They were **Wuled Ibrahim Farah (PW1)**, **Jackson Mwita Werema (PW2)** who was employed as a night watchman by one Mzee Okero (not a witness) and also used to guard the premises of PW1. **PW3** was **Nyamohanga Robert Samwel**, the owner of the premises in which the offence was allegedly committed in, **PW4** was **No. 86730 PC Edwin Cherotich** from Isebania Police Station, **No. 57399 PC David Kwemai Ndiema** from Isebania CID office testified as **PW5**. He was the investigating officer in the case. **PW6** was one **Joseph Kirima Ichego**.

4. The brief facts of the case are that in the night of 07/04/2013 PW1 and PW3 were called by PW2, who had discovered that PW1's shop had been broken into and assorted goods removed some of which were lying at the back of the shop. PW1 rushed to the scene in the company of his two colleagues namely Abdi Ali and Noor Mohammed (not witnesses). PW1 confirmed that indeed his shop had been broken into and assorted goods stolen. He reported the matter to the police who visited the scene. Later the following day,

PW1 learnt that the police had arrested some suspects and recovered some items suspected to have been stolen from the premises. He testified that a total of 66 jerricans of Ufuta Cooking Oil and 30 bales of black polythene bags had been stolen all valued at Kshs. 253,500/=. According to PW1 the stolen items were his as he was the one running the shop which was broken into.

5. PW3 was sleeping on one side of the premise where the theft took place. As he was woken up by PW2, he rushed to the door only to find that the same had been locked from outside. He opened the window and called PW2. As he was at the window he saw someone running across the security lights towards the wall. He recognized him as **SAMSON CHACHA MWITA**, who was the fourth accused person before the trial court. PW2 managed to free him and went to record his statement with the police the following morning.

6. PW5 immediately visited the premises in the night of the theft and confirmed the break in. He then continued with investigations. PW4 received information at around 10:00am the morning after the theft that the suspected robbers were inside a certain house. He was accompanied to the premises by his other two colleagues who went and arrested three suspects and recovered six containers of 10 litres of Ufuta cooking oil. Those arrested were the two appellants herein together with **EMMANUEL FRANGI** who was the third accused person before the trial court. **SAMSON CHACHA MWITA** was later arrested in Isebania.

7. As the prosecution closed its case, the then accused persons were placed on their defences. They all gave unsworn defences and basically denied committing the offence and reiterated how they were arrested.

8. The Appellants were all found guilty of the offence of breaking into a house and committing a felony and accordingly convicted. They were sentenced to six years' imprisonment.

9. Being dissatisfied with the conviction and sentence, the appellants jointly lodged this appeal. The other two accused persons **SAMSON CHACHA MWITA** and **EMMANUEL FRANGI** lodged **Migori High Court Criminal Appeal No. 20 of 2014** (Formerly Kisii High Court Criminal Appeals Nos. 104 and 105 of 2013). That appeal was heard and determined vide a judgment delivered on 13/10/2014 where **SAMSON CHACHA MWITA** was acquitted and the conviction against **EMMANUEL FRANGI** affirmed but the sentence was reduced to 4 years' imprisonment. I have had the advantage of reading that judgment.

10. At the hearing of the appeal the appellants challenged the lower court findings on mainly the ground of identification and that the evidence was full of unreconciled contradictions.

11. As this is the Appellant's first appeal, the duty of this court is well settled. It was so held in the case of **Okemo vs. R (1977) EALR 32** and further in the Court of Appeal case of **Mark Oiruri Mose vs. R (2013) eKLR** that this Court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyze it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and give allowance for that.

12. I have carefully perused the lower court record including the judgment and the appeal before this Court together with the submissions. It has come to my attention that indeed the complainant did not testify. The offence facing the appellants has two limbs; that is the offence of breaking into a building and that of stealing. These are two distinct offences where one can be found guilty of either both or either.

13. In respect to the offence of breaking into a building, I find that sufficient evidence was tendered in proof of the break-in. That break-in was clearly demonstrated and proved. I will however deal with the issue as to whether the appellants were the ones who broke into the building later in this judgment.

14. On the issue of the identification of the appellants, I note that they were convicted on circumstantial evidence when the trial court relied on the doctrine of recent possession. As earlier on stated, there was an

earlier appeal by one of the three suspects who was arrested with the appellants herein (Emmanuel Frangi). The judgment thereof dealt with the aspect of the appellants' possible participation in the commission of the offence by dint of the doctrine of recent possession. I have looked at the said judgment and tend to agree with the legal reasoning therein. The Learned Judge in the **said Migori Criminal Appeal No. 20 of 2014** had the following to say:

“23. The 2nd appellant’s complaint is that he was convicted on the basis of circumstantial evidence. Indeed, no one saw him break into PW1’s shop and steal. None of the prosecution witnesses knew him. The learned trial magistrate relied on the doctrine of recent possession to convict him. The learned magistrate cited the case of Morris Kinyalili Liema Vs. Republic [2012] eKLR where the doctrine was explained as follows;-

“To invoke the doctrine of recent possession, the prosecution must prove beyond reasonable doubt each of the following four elements: First, that the property was stolen; Second, that the stolen property was found in the exclusive possession of the accused; Third, that the property was positively identified as the property of the complaint; and Fourth, that the possession was sufficiently recent after the robbery.”

24. Once the facts are proved, the accused is called upon to provide a reasonable explanation of his possession. In Malingi Vs. Republic [1989] KLR 225, the Court of Appeal observed that ;

“By the application of the doctrine the burden shifts from the prosecution to the accused to explain his possession of the item complained about.... The doctrine 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 or was a guilty receiver.”

25. Possession can be either actual or constructive under Section 4 (a) of the Penal Code which defines possession as follows;

“Be in possession’ or’ have in possession’ includes not only having one’s personal possession, but also knowingly having anything in the actual possession or custody of any other person, or having anything in any place (whether belonging to or occupied by oneself or not) for the use or benefit of oneself or of any other person”

26. According to the totality of the evidence, the stolen items were found the morning after the theft had occurred in the house where the 2nd appellant was arrested. Accordingly he was in the possession of the items with the other accused. He was therefore required to furnish a reasonable explanation of his possession of the items found in the house.

27. The 2nd appellant stated that the he was arrested on 8th April 2013 with the other accused at the house. PW4 testified that the accused were arrested on 7th April 2013. The testimony of PW4 regarding the date of arrest is confirmed by the extract of the OB produced by PW5. I therefore agree with the conclusion of the learned magistrate that the accused denied that they were arrested on 7th April 2013 to avoid explaining their possession of the stolen goods. In the circumstances, the 2nd appellant did not offer any reasonable explanation why he was found in possession of the stolen items on 7th April 2013. I therefore affirm his conviction. In the circumstances the appellant’s conviction cannot be supported and is unsafe.

16. Since the appellants herein gave more or less defences as the one tendered by the said Emmanuel Frangi, I find that their defences were tailored as to avoid giving an explanation on the items which were found in their possession. The appellants were rightly convicted. The appeal on conviction is therefore dismissed.

17. Turning to the issue of the sentence, I will as well agree with the Learned Judge that the sentence of six years was manifestly harsh given that the appellants were first offenders. Since the appellants have

served that sentence close to four years, I will substitute the sentence of six years with the period the appellants have already served.

18. Before I come to the end of this appeal, I wish to point out that the Appellants were charged with the offence of **breaking into a house and committing a felony** contrary to **Section 306(a) (b)** of the Penal Code. This offence has two limbs; that of breaking into a house and the commission of a felony therein. The lower court ought to have clearly recorded how the Appellants pleaded to each limb. The court ought to equally make specific findings in its judgment on each limb since each limb defines a specific offence and an accused person may be convicted on all or either of the two limbs. The trial court therefore erred in treating the main charge as a single offence both at the plea taking as well as in the judgment. In the event an accused person is convicted on the two offences then unless stated otherwise the sentences ought to run concurrently. I have however cured the said error by dint of **Section 382** of the Criminal Procedure Code, Chapter 75 of the Laws of Kenya since no miscarriage of justice was demonstrated as against the appellants. The appellants fully participated in the trial and never raised any issue on the charge as then presented.

19. In conclusion, the appellants are hereby set at liberty unless otherwise lawfully held.

20. It is so ordered.

DELIVERED, DATED and SIGNED at MIGORI this 11th day of April 2017.

A. C. MRIMA

JUDGE