**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KAKAMEGA**

**CRIMINAL DIVISION**

**CRIMINAL APPEAL NO. 48 OF 2014**

**BETWEEN**

**BENSON KAYI ISSA …….....APPELLANT**

**AND**

**REPUBLIC …….…….....REPUBLIC**

**(Being an appeal from original conviction and sentence in Mumias PMCR. Case No. 285 of 2015 dated 15/04/2014 )**

**J U D G M E N T**

**Introduction**

1. The appellant, alongside Mwanaisha Suleiman was arraigned before The Principal Magistrate's court at Mumias on one count of breaking into a building and committing a felony contrary to section 306 (a) of the Penal Code. The particulars of the charge are that Mwanaisha Suleiman and Benson Kayi Issa on the night of 10th and 11th April , 2013 at Mumias Township , Nabongo location in Mumias district within Kakamega County jointly broke and entered a building namely a store of one Adongo Tatu Mohammed and committed therein theft of assorted shop goods . The property of the said **ADONGO TATU MOHAMMED** was valued at Kshs. 33,490/.

2. The appellant faced an alternative charge of handling stolen goods contrary to section 322(2) of the Penal Code the particulars being that on 16th April, 2013 at Mumias Township Nabongo location in Mumias District within Kakamega county, otherwise than in the cause of stealing, dishonestly received and retained one leg warmer knowing or having reason to believe it to be stolen goods.

3. The appellant pleaded not guilty to both the main and the alternative counts and as a result of that plea, the prosecution called 5 witnesses in an effort to prove its case against the appellant and his co- accused. The appellant also testified in his defence by giving sworn evidence in which he denied committing the offence. He did not call any witnesses.

**Judgment of the learned trial court**

4. At the conclusion of the hearing and after carefully considering all the evidence on record, the learned trial Magistrate found that the prosecution had failed in its duty of proving the main charge against the appellant beyond any reasonable doubt and acquitted him alongside his co – accused. The appellant and

his co-accused were however found guilty on the alternative charge and convicted accordingly. Upon receipt and careful consideration of a social inquiry report, the appellant, who was found to be a repeat offender with no fixed abode was sentenced to 7 (seven ) years imprisonment . The appellant's co-accused was sentenced to 3 years' probation. The appellant's co – accused did not file any appeal.

**The appeal**

5. Being aggrieved by both conviction and sentence, the appellant filed this appeal on grounds : that the learned trial magistrate was biased in his findings that the judgment of the learned trial Magistrate lacked probative value and caused a miscarriage of justice; that the sentence was harsh; that the learned trial magistrate ignored the appellant's defence of alibi for no good reason; that the evidence adduced by the prosecution did not prove the case against the appellant and finally that the learned trial magistrate relied on uncorroborated evidence by the prosecution to convict the appellant. The appellant plea is that the appeal be allowed conviction quashed and sentence set aside so that he may be set free.

**The Duty of this Court**

6. As this is a first appeal this court is under a duty to reconsider and evaluate the evidence as a whole with a view to coming to its own conclusion in the matter, the only caution the court should take is that it has no opportunity of seeing and hearing the witnesses as the trial court did, and the court should also remember that it would not be in a hurry to overturn the findings of the learned trial magistrate unless it is clear that such findings are premised on wrong principles or are unsupported by the evidence on record. In the case of **MARK OIRURI MOSE VS REPUBLIC (2013) eKLR**, the Court of Appeal held, inter alia that the first appellate court "is under a duty to revisit the evidence tendered before the trial court afresh, evaluate it analyse 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".

7. In the earlier case of **MWANGI VS REPUBLIC ( 2006 ) 2KLR 28** , the Court held inter alia that " an appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination" The above is indeed the law on the role of a first appellate court.

**The prosecution case .**

8. From the evidence of the 5 prosecution witnesses, the case for the prosecution is as follows: Adongo Tatu Mohammed the complainant in this case and who testified as PW1 runs a small business at Makale village in Matungu, Mumias. She sells clothes materials and body lotions. The business is a Kiosk just outside the Cooperative Bank. She normally buys her stock from Nairobi. On 10th April, 2013 she closed her business at around 5.00 pm, leaving the stock safely secured inside. When she reported for duty on 11th April, 2013 in the morning she found some clothes materials, rice, body lotions, tooth pastes and panties for ladies missing. Other items were also missing from the Kiosk. After taking an inventory of the missing items PW1 (Adongo) went to Mumias police station where she made a report and left the police to investigate the matter. She was also told to be on the lookout for any leads about the theft.

9. On 16th April , 2013 while Adongo was at her place of work she saw the appellant herein wearing one of the items stolen from her kiosk, namely a leg warmer. He was wearing it on his head. Adongo called a police officer who was on duty nearby. The appellant was immediately arrested and upon interrogation the appellant told the police that it was his co- accused Mwanaisha Suleiman who had given him the leg warmer. On further investigations, which included a visit to and search on Mwanaisha house a number of items which had been stolen from Adongo's Kiosk during the break in on the night of 10th and 11th April , 2013 were found hidden under the bed.

10. PW2, Eunice Akello Odero ( Eunice ) also testified and told the court that on the 16th April , 2013 , while she was at her place of work next to Adongo , she saw the appellant wearing a leg warmer on his head. Eunice stated further that she was aware that Adongo had lost a lot of property during the break in and that because of the proximity of her kiosk to that of Adongo she knew the items which were in

Adong's kiosk. Eunice also testified that the leg warmer which the appellant was found wearing on his head was part of a pair she had bought from Adongo.

11. Number 92273 police constable Yator Kimutai of Mumias Police Station testified as PW3. He is the one who received a report from Adongo after she (Adongo) had had the appellant apprehended upon being found with Adongo's leg warmer on his head . Pc Kimutai visited the scene and apprehended the appellant and also visited the home of the appellant's co accused from where he recovered a number of the items Adongo had indicated were stolen from her Kiosk. Thereafter Pc Kimutai charged the appellant alongside his co – accused Mwanaisha Suleiman. Pc Kimutai also testified that when he interrogated the appellant and his co – accused they told him that the items they had were for their personal use. The stolen recovered and identified items were produced in court as PExhibit 1,2,3, and 4.

12. During cross examination PC Kimutai testified that both the appellant and his co – accused did not produce any documents to support their allegations that the recovered items were for their personal use, nor did they produce any business license to show that they were dealing in those items.

13. PW4 was Police constable Yator Langat from the CID Office in Mumias. During his testimony he gave to the court details of the inventory made by Adongo on the missing items. He also visited the scene of crime. Miriam Moraa Nyambeche (Miriam) testified as PW5. Her testimony was that she accompanied Adongo and the Police to look for the appellant's co –accused after the appellant had been arrested. She said she saw the recovered items even as they were being identified by Adongo one by one, and that the appellant could not explain how he had come to possess those items.

**The Defence Case**

14. With the testimony of Eunice the prosecution closed its case. The appellant was put on his defence. He testified of his arrest on some date in the month of April, 2013 on allegations that he had on him a cap that belonged to Adongo. He also testified that he was called a " Chokoraa" – street boy – by the Police and other witnesses. It was his testimony that the leg warmer found in his possession was his own having owned it for some two years previously. He also testified that apart from Adongo, the other witnesses did not connect him to the offence. The appellant did not call any witnesses.

**Submissions**

15. At the hearing of the appeal the appellant relied on his written submissions in which he pointed out that he was a stranger to his co – accused. That the sentence imposed upon him was a long sentence. That his mitigation was not considered by the learned trial Magistrate: and that by imposing a sentence that was harsher than that of his co-accused, the learned trial magistrate treated him unfairly.

16. The appeal was opposed by Mr. Juma Ochieng, prosecution counsel under four main sub –headings:-

a) Whether the prosecution proved its case beyond any reasonable doubt against the appellant.

b) Whether there was corroboration of the prosecution evidence.

c) Whether the appellants alibi defence was considered.

d) Whether the doctrine of recent possession was properly applied.

17. In his submissions counsel answered all the above four questions in the affirmative. On the fourth issue in particular, counsel gave the principles to be applied by courts in cases whose strength rests on the doctrine of recent possession. Reliance was placed on the cases of **David Mugo Kimundu Vs Republic – Criminal Appeal No. 4 / 2014 [2014] eKLR** in which the court stated that before reliance is placed on the doctrine of recent possession it must be satisfied that:-

i. the property in question is found with the suspect.

ii. the property is positively identified to belong to the complainant.

iii. the property must have been stolen from the complainant.

iv. the property must have been stolen recently.

18. In the earlier case of **ISAAC NG'ANG'A KAHIGA alias PETER NG'ANG'A KAHIGA VS REPUBLIC**, Criminal Appeal No. 272 of 2005 (UR), the elements necessary for the application of the doctrine of recent possession were stated in the following words:-

> " ……It is trite that before a court of law can rely on the doctrine of recent possession as a basis for 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 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."

19. The above stated principles are the ones I shall apply in the instant case.

**Analysis and Determination**

20. From the judgment of the learned trial Magistrate, the success of this appeal rests on whether or not there was proof, that the appellant was found in possession of the leg warmer which had allegedly been recently stolen from the complainant and secondly whether the sentence imposed upon the appellant was prejudicial to him, considering the fact that the appellant's co-accused who was convicted of the same offence was placed on probation for a period of 3 years.

21. From the record, there is no doubt that the appellant was found in possession of the leg warmer, which he was wearing on his head. The appellant refers to it as a Marvin. Adongo and her business neighbour Eunice both identified the leg warmer as belonging to Adongo. Infact Eunice testified that the leg warmer found on the appellant's head had remained in Adongo's shop after she (Eunice) bought the second warmer from Adongo. Adongo also testified that the said leg warmer was among the items stolen from her Kiosk on the night of 10th and 11th April, 2013. The appellant was found wearing the leg warmer on 16th April, 2013, just some five or so days after the same was stolen from Adongo. The stealing was thus a recent event when considered against the backdrop of the time the leg warmer was found with the appellant. I am therefore satisfied that the happenings surrounding the stealing and recovery of the leg warmer lend themselves very well to the principles set out above. Having reached the above conclusion, I am of the humble view that the other issues of identification and alibi defence do not come into play with this kind of case since even the appellant himself does not dispute the fact that he was found in possession of the leg warmer.

22. I have myself also carefully considered the aspect of the appellant's defence but find no merit in it considering the strong prosecution evidence that the leg warmer was one of the items stolen from Adongo on the night of 10th and 11th April, 2013.

23. The only other issue for determination is whether the sentence imposed upon the appellant by the learned trial court was prejudicial to him. Prosecution counsel did not make any submission on this point, but the position is that appellate courts can only interfere with sentence on appeal if the sentence imposed was in clear breach of the law or premised on a wrong principle since sentencing is a matter of discretion for the trial court. See the case of **Samson Kirumbi M'Ikamati Vs Republic- Court of Appeal at Nyeri in Criminal Appeal No. 71 of 2005 ( unreported).**

24. In the case of **Marando Vs Republic (1980) KLR 114**, the Court held that it was wrong in principle to impose different sentences on two people who had been convicted of the same offence, except for good reason. In **Ambani VS Republic (1990) KLR 161**, the court held that where the item stolen was of so negligible value then an appellant would not deserve a harsh treatment, the rationale being that sentences

imposed on accused persons must be commensurate to the moral blameworthiness of the offender. Also see **OMUSE VS REPUBLIC (2009) KLR 214** where the Court of Appeal held, inter alia, that the sentence imposed on an accused person must be commensurate to the moral blameworthiness of the offender and it was thus not proper exercise of discretion in sentencing for the court to have failed to look at the facts and circumstances of the case in their entirety before settling for any given sentence."

25. In the instant case the learned trial magistrate called for social inquiry report before sentencing. Whereas the first accused was found to be a first offender, the appellant was found to be a repeat offender with no fixed abode. The trial court was of the view that if he was given a non-custodial sentence, it would be impossible to supervise him. For the above reasons given by the learned trial magistrate, I am satisfied that there was a good reason for imposition of different sentences in this case. I would therefore have no good reason to interfere with the same.

**Conclusion**

26. For all the reasons given above I find no merit in the appellant's appeal on both conviction and sentence. The same is accordingly dismissed in its entirety. The judgment of the learned trial magistrate is hereby confirmed. The appellant has a right of appeal to the Court of Appeal within fourteen (14) days from today.

27. It is so ordered.

Judgment delivered, dated and signed in open court at Kakamega this 18 day of September 2017

**RUTH N. SITATI**

**JUDGE**

In the presence of

In person but absent…….....for Appellant

Mr. Jamsumba (present)…….….for Respondent

Polycap…….....…Court Assistant