REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

H.C.CRIMINAL APPEAL NO.4 OF 2015

SAMUEL MITSAMI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction and sentence in Criminal Case No.401 of 2014 at the

RM's Court Butali (Hon T.K. Kwambai) delivered on 24th December, 2014i)

JUDGMENT

1. The appellant, **Samuel Mitsami**, was charged before the Senior Resident Magistrate Court at Butali together with two other persons namely, **Rose Lushindo** and **Pauline Wetu** with the offence of house breaking contrary to **section 304(1)** and stealing contrary to **section 279** of the penal code. Particulars of the offence were that on the 4th day of July 2014, at Malava Town in Kakamega North District, Kakamega County jointly broke and entered a dwelling house of **Anne Mukasia Cheto** and stole therein one sewing machine, one battery, one pressure lamp, one sack of maize, 10 korogos of beans, suit case and assorted clothes valued at Kshs.100,000/- property of Anne Mukasia Chetu. They also faced an alternative charge of handling stolen goods contrary to **section 322(1)(2)** of the Penal Code, particulars being that on the 4th day of July 2014 at Mawaya Area Kakamega North District Kakamega County jointly otherwise than in the course of stealing dishonestly received or retained one sewing machine, pressure lamp, battery, suit case, assorted cloths, maize, beans and table clothes knowing or having reason to believe them to be stolen goods.

2. The appellant and his co-accused pleaded not guilty to both the main count as well as the alternative and after a full trial in which the prosecution called 4 witnesses, as well as the defence evidence, the appellant and second accused were found guilty and convicted. The appellant was fined Kshs.60,000/- in respect to house breaking, in default 4 years imprisonment, and Kshs.100,000/- for stealing, in default to serve seven years imprisonment. The second accused was placed on probation for 3 years.

3. Being aggrieved, the appellant appealed against both conviction and sentence and framed his grounds of appeal as follows:-

> "1. THAT, I pleaded not guilty to the above appended (sic) charges.
>
> 2. THAT, the learned trial magistrate erred in law and facts when he never considered the truth that I was not arrested with anything that the prosecution alleged was stolen.

3. THAT, the learned trial magistrate erred in law and facts when he failed to consider the fact that I was not informed the reason for my arrest.

4. THAT, the learned trial magistrate erred in law and facts when he did not consider that I was not given adequate time and facilities to prepare my defence as showed (sic) in chapter four **Article 50(2)(c)** of the Constitution of Kenya."

4. On the basis of the above grounds the appellant prayed that his appeal be allowed, conviction quashed and sentence set aside so that he is set at liberty.

5. During the hearing of this appeal, the appellant who was unrepresented relied on his written submissions to dispose of his appeal. In those submissions, the appellant largely argued that he was not found with any of the stolen items and that the witnesses and the police never saw him with the items. He also argued that when the investigating officer (PW4) received him, he did not have the stolen goods, and that PW1 had only been told that it was him, the appellant, who had broken into her house which was, according to the appellant, hearsay. He further submitted that even though the goods are said to have been found at the Hotel, the owner of the Hotel was not called as a witness. He also took issue with the prosecution's failure to call the alleged informer. According to him the prosecution did not prove its case beyond reasonable doubt.

6. Mr Oroni learned prosecution counsel who appeared for the State, opposed the appeal submitting that the conviction was proper. He relied on the evidence of PW1 and PW2 and submitted that those witnesses' evidence was buttressed by that of PW4, the investigating officer. According to learned counsel, the evidence of the prosecution was not shaken during cross examination and therefore urged that the appeal be dismissed.

7. This being a first appeal, it is the duty of this Court being the first appellate Court to reconsider the evidence, re-evaluate and analyse the same and come to its independent conclusion, of course bearing in mind that it never saw nor heard the witnesses and give due allowance for that **(See Okeno v Republic** [1972] EA 32). That duty was restated in the **case of Joseph Njuguna Mwaura & 2 others v Repubvlic** [2013] eKLR where the Court of Appeal stated:-

> **"The duty of the first appellate court is to analyse and re-evaluate the evidence which was before the trial court and come to its own conclusions on that evidence without overlooking the conclusions of the trial court."**

8. Before the lower court, PW1 **Ann Mukasia Cheto**, the complainant, testified that on 4th July, 2014 at around 5 pm she went to her house and found that it had been broken into and a number of items stolen there from. These included battery make KV; pressure lamp, sewing machine, a suit case, table cloths, shoes, one bag of maize, 10 gorogoros (tins) of beans ATM, ID card, cash 20,000 and iron box. She reported the matter to the police station where she was informed that some goods had been recovered from two ladies. A few of them belonged to her. They were photographed and released to her. These were battery, KV, pressure lamp, sewing machine, suit case, table cloths, one pair of shoes and some maize. She saw the two ladies who had been arrested at the police station. In cross examination by the appellant, the witness told the court that the house was broken into and items stolen in her absence. She also admitted that she did not see the appellant with the items but saw him at the police station.

9. PW2, **Boniface Juma Washisino**, Assistant Chief of Shirikhwa sub-location testified that on 4th July 2014 at around 1.45 p.m, he received a call from an informer from Kakoi that two suspicious men with a heavy bag had been spotted. The witness in the company of his colleague also an Assistant Chief proceeded to Mawaya Area. The informer told them that the men had left the bag near a hotel and that bag had been collected by Rose Lishindu who was the 2nd accused in the lower court. The witness testified that they went to the house of Rose but two men escaped from that house. They found a big brief case in the house which the 2nd accused informed them belonged to the two men who had escaped. She mentioned them as **Shirengo** and **Samuel Mutsimi,** the appellant herein. They also went with **Pauline**

Wetu a neighbour to the 2nd accused to help with investigations. They escorted the two to the police station and when the bag was opened they found the items said to have been stolen from PW1's house in that bag.

10. The witness further testified that on the 5th September, 2014 he was called and informed that residents had arrested the appellant. He rushed to the scene and found the appellant almost being lynched by members of the public. The police arrived and took the appellant to Malava Police station where he was booked. The witness told the court that he was able to identify the appellant when they were escaping from the 2nd accused's house from the cloths they were wearing. In cross examination by the appellant, the witness said that the appellant was mentioned by the lady in whose house the items were found.

11. PW3, **Thomas Maikuma Shiunga,** ~Assistant Chief of Tumbeni sub-location also testified that on 4th July 2014 at about 1.45 pm he was requested by PW2 to accompany him to a scene where some goods had been dropped. They went to the 2nd accused's house but two men escaped. He described one of them as wearing a black jacket, white T-shirt, black trousers and white sports shoes. The other had a white short and green T-shirt. The owner of the house told them that the bag belonged to the men who had escaped. The police came and took the ladies to the police station. In the bag there was a car battery, sewing machine, pressure lamp, table clothes among other items. The witness said that the appellant is one of the two men who had escaped and that he had seen him while escaping and identified him.

12. PW4, **No.70716 PC Eric Kemboi,** a police officer attached to Kabras Police Station, told the court that while manning the report desk on 4th July 2014, the complainant, (PW1) made a report of house breaking, and stealing and mentioned the items that had been stolen. The witness went to the scene and found that the padlock had been damaged. He went back to the station and compiled an investigation diary. Later two ladies were escorted to the station with the stolen items. He called PW1 who went and identified the items as those stolen from her house. On the following day they received a call that one of the people who had taken the items to the 2nd accused's house had been arrested. On his way he found a crowd of people beating the appellant, a person who had been mentioned by the two ladies. He took him to the police station and preferred charges against him. He took photographs of the items which he produced as Pex 1(a)(c). In cross-examination by the appellant, the witness told the court that it was the 2nd and 3rd accused in the lower court who had implicated him.

13. When placed on their defence the appellant gave unsworn statement while his co-accused persons gave sworn statements. In his unsworn statement, the appellant told the court on 5th July 2014 while splitting timber, a village elder went to him and informed him that the Assistant Chief wanted to see him. They went together to the Assistant Chief whom he found with another man. He was informed that there was someone to talk to at Malava and proceeded there only to end up at the police station where he was placed under arrest. He was then taken to CID offices where he found the Assistant Chief. He was taken to his place where a search was conducted but nothing was recovered. He was later charged in court.

14. DW2, the second accused told the court that on 4th July 2014 she came back to her house and found the appellant with another man in her house. They requested her to collect their luggage at a Hotel where they had left it. She went and collected the bag and took it to her house. Shortly thereafter she saw two Assistant Chiefs coming towards her house which made the appellant and the other man run away leaving the bag in her house. The Assistant Chiefs whom she identified as PW2 and PW3, interrogated her briefly and she explained how the goods ended up in her house. That is when PW2 and PW3 informed her that those were stolen goods. She was taken to police station. Cross examined by the prosecutor, she told the court that the appellant and the other man had taken the car battery to her house and requested her to collect the bag for them. She said that the appellant and his colleague ran away on seeing PW2 and PW3. She told the court that the appellant had been introduced to her by the other man on that day.

15. DW3, the 3rd accused told the court that she had gone to visit her cousin but found her away. As he waited for her outside her house, two men came to DW2's house with a battery. DW2 arrived after about

10 minutes and the two whom she identified as the appellant and another man, requested DW2 to collect their items that they had left at a Hotel. DW2 went and brought a bag but shortly after, PW2 and PW3 came inquiring about the men who had entered DW2's house. On hearing this appellant and his colleague ran away. PW2 and PW3 took DW2 and her to the police station from where they were charged in court. In cross examination DW3 told the court that the appellant and the other man found her outside when they came to DW2's house while carrying a battery.

16. When cross examined by the appellant, DW3 maintained that the appellant and his colleague came to the house of DW2 with a battery during the day. She also testified that it was the first time she saw the appellant. She maintained that it was the appellant and his colleague who asked DW2 to go and collect the suit case; she further told the court that she had informed PW2 and PW3 that the goods belonged to the appellant and his friend because she saw them with the goods. From that evidence, the trial magistrate convicted the appellant on the main count but convicted the 2nd accused on the alternative charge while acquitting the 3rd accused for lack of evidence prompting the appellant to fight conviction and sentence on appeal.

17. I have duly perused the record of proceedings before the trial court re-evaluated and analysed the evidence tendered before that court afresh as well as considered submissions by the appellant and prosecution.

18. The thrust of the appellant's appeal rests on ground 2 of the petition of appeal where he complains that the trial court failed to appreciate that he was not arrested with any of the stolen goods. It is true that none of the prosecution witnesses witnessed the breaking in. The house was broken into during the day in the absence of PW1. The complainant came home only to find her house broken into and goods stolen therefrom. PW2 and PW3 were informed of the theft and where the goods had been left. They followed the issue upto DW2's house but two men, one of whom they identified as the appellant, escaped from that house. They told the court that they identified the appellant and gave a description of the cloths he and his colleague were wearing.

19. The appellant was later arrested by members of the public and handed over to police who arraigned him in court. Both PW2 and PW3 were clear in their testimony, that they saw the appellant and his friend escape from DW2's house where the goods were recovered and that they identified him. This was in broad daylight and the appellant did not deny or challenge the two witnesses' account or the fact of the cloths they were wearing on that day. The appellant did not also deny that he was in DW2's house on the material day and time as stated by the two witnesses.

20. Moreover, in her defence, DW2 was categorical that the appellant and his colleague went to her house in her absence with a battery, and when she returned shortly after, they requested her to collect their bag from some hotel where they had left it. She obliged and collected a suit case and took it to her house where the appellant and his colleague were. Shortly after, PW2 and PW3 came inquiring about the two and on hearing this, they took off leaving the luggage behind.

21. That evidence by DW2 was supported by the defence of DW3 who told the court that she saw the appellant and another man enter the house of DW2 with a battery in DW2's absence. The appellant and his colleague sent DW2 to collect a luggage and the two ran away when PW2 and PW3 came looking for them.

22. Although DW2 and DW3 were charged together with the appellant and were therefore accomplices, they gave their evidence in defence as an explanation on how the items came to be found in that house. It was not a confession but an explanation. The appellant did cross examine the two and they were firm that it was him, (the appellant), and another man who took the battery to DW2's house and asked DW2 to collect the remaining bag.

23. The goods had been stolen, and through him, they ended up in DW2's house. The defence of DW2 and DW3 corroborated the evidence of PW2 and PW3 who had information about suspicious people with a luggage. This information led them to where the appellant was and recovery of the items. DW3 saw

the appellant and his colleague with the battery, which they took to DW2's house. They were unknown to her and she had no reason to implicate the appellant, if not telling the truth.

The learned magistrate accepted the evidence of PW2, and PW3 as well as the explanation of DW2 and DW3 and quite rightly, in my view, applied the doctrine of recent possession to find the appellant guilty.

24. The doctrine of recent possession has been a subject of several decisions by courts in this country. In the case of **Isaac Ng'ang'a Kahiga v Republic** [2006] eKLR, the Court of Appeal stated on the doctrine of recent possession as follows:–

> **"It is strite 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, and lastly, that the property was recently stolen from the complainant."**

25. This position was restated in the case of **Alex Boniface Muhungi v Republic** [2014] eKLR where the Court of Appeal referring to the case of **Erick Otieno Arum v Republic,** [2006] eKLR said:-

> **"The doctrine of recent possession applies where the stolen property was found with the suspect; that the property was positively identified by complainant; that the property was stolen from the complainant; that the property was recently stolen from the complainant."**

The evidence before the trial court showed all the above principles on the doctrine of recent possession. The property had been stolen on that very day, it was positively identified as that of PW1, and there was credible evidence that it was the appellant who was in possession of the property. The appellant and his colleague took the property to DW2's house and were seen going there and when PW2 and PW3 approached, they ran away.

26. The above facts bring the appellant's case within **section 4** of the Penal code which defines possession as:-

> **a) "be in possession of" or "have in possession" includes not only having in one's own personal possession, but also knowingly having anything in the actual possession or custody of any other person, or having in any place (whether belonging to or occupied by oneself or not) for the use or benefit of oneself or of any other person."**
>
> **b) If there be two or more persons and any or more of them with the knowledge and consent of the rest has or have anything in his or their custody or possession, it shall be deemed and taken to be in the custody and possession of each and all of them." (emphasis)**

The appellant knowingly had the stolen property kept in DW2's house for his benefit and that of his friend although that house was not occupied by him, thus bringing him within the meaning of possession.

27. The application of the doctrine of recent possession was well stated in the case of **Malingi v Republic** [1989] KLR 225 where the Court had the following to say:-

> **"By the application of the doctrine the burden shifts from the prosecution to the accused to explain his possession of the items complained about. He can only be asked to explain his possession after the prosecution have proved certain basic facts. Firstly that the items 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 items. The doctrine being a presumption of 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." (emphasis)

And in the case of **James Karani M'Ikombo v Republic** [2014] eKLR, the Court of Appeal applied this doctrine and reduced the appellant's conviction for the offence of robbery with violence to handling stolen property, holding that **there was credible, congent and reliable evidence from the doctrine of recent possession.**

28. The moment the appellant was found to have been in possession of the stolen goods, the burden shifted to him. He was therefore required to either lay a claim over the property, or give a reasonable explanation how he came to be a possessor thereof. He neither laid a claim nor offered a plausible or reasonable explanation on the possession of that property. In the absence of that explanation, the trial court was enclined to draw the inference that he broke into the complaint's house and stole therefrom.

29. The appellant further submitted that the prosecution should have called the owner of the Hotel and the informer. I do not think in the circumstances of this case that was necessary. The appellant and his colleague left the items near a hotel and sent DW2 to collect them. The explanation of DW2 and DW3 was sufficient because it explained the circumstances under which the goods were found and the appellant was clearly seen with the battery which was positively identified as one the items stolen from PW1.

30. Regarding the informer, it must be appreciated that informers play a vital role in prevention of crime, and disclosing their identity will not only affect their operation in society but also endanger their own safety. There is need therefore to preserve their identity. In the case of **John Otieno Juma v Republic** [2011] eKLR, the Court of Appeal stated –

"Whether the informer should have been summoned to testify, we are aware of the fact that their protection springs from public interest considerations, because were they to testify, their future usefulness in the same role could be extinguished or their effectiveness in their work considerably impaired... In the circumstances of this case, their evidence was not necessary to determine the innocence or otherwise of the appellant because the prosecution's other evidence served the purpose."

31. In my view, borrowing from the above decision, I do not think it was necessary to call that informer in this case. The evidence on record was sufficient and it could only have been necessary to call the informer if his evidence would have pointed to the innocence of the appellant, otherwise his testimony was wholly unnecessary. The first ground of appeal therefore fails.

32. In his other ground of appeal, the appellant faulted the learned trial magistrate that he failed to consider the fact that the appellant was not informed the reason for his arrest. In his submission, the appellant did not address this question at all. **Article 49(1)(a)** of the Constitution provides that an accused person has the right to be informed promptly, in a language that he understands the reason for his arrest**.**

33. According to the record, the accused was arraigned in court on 7th July, 2014 when a plea was taken. After plea, he is recorded to have informed the court that Kshs.4,100/-, receipts for sugar cane and a phone Nokia 1680 had been taken by Assistant Chief. The court ordered investigations to be conducted and a report to court on a later date. The appellant did not complain that he had not been informed of reasons for his arrest. In any case, he had already taken plea and was aware of the charge he was facing and therefore the reasons for his arrest.

34. The record further shows that the charge was read to him in Kiswahili, which he understood and fully participated in the proceedings on that day and thereafter which shows he understood what was going on. Furthermore, both PW2 and PW4 told the court that they found the appellant having been arrested and was being beaten by members of the public, which means he knew why he had been arrested or was being beaten. He cannot allege on appeal that he was not informed reasons for his arrest. In any case, he ran away when PW2 and PW3 approached DW2's house and was therefore conscious of the fact that he was

a suspect. I do not find merit in this ground of appeal and it is also dismissed.

35. The last of the appellant's grounds of appeal attacked the learned trial magistrate for failure to consider that he was not give adequate time and facilities to prepare his defence. **Article 50(2)(c)** of the Constitution provides as follows:-

> 50(2)(c) **"Every person has the right to a fair trial which includes the right to –**
>
> **a) ---**
>
> **b) ---**
>
> **c) have adequate time and facilities to prepare a defence.**

36. Fair trial is a constitutional right and the cornerstone in criminal justice system. An accused person should be accorded sufficient time and adequate facilities to enable him prepare his defence in answer to the charge he faces. In other words, accused person should not be rushed through the process of trial which would prejudice him in terms of preparing his defence. He should be given time including allowing him an opportunity to have access to pre-trial materials, witness statements, cross examination witnesses and also allow him call his own witnesses during his defence.

37. While interpreting **section 77(2)(c)** of the repealed Constitution which was in material particulars similar to **Article 50(2)(c)** of the current Constitution, in the case of **George Ngodhe Juma & others v Attorney General** [2003] eKLR the court said with regard to what is meant by the term the **right to a fair trial:**–

> **"In general terms, it means that an accused person shall be free from difficulty or impediment, and free more or less completely from obstruction or hindrance in fighting a criminal charge made against him. He should not be denied something, the result of which denial will hamper encumber, hinder, impede, inhibit, block, obstruct, frustrate, shackle, clog, handicap, chain, felter, trammel, thwart or stall his case and defence, or lessen and bottleneck his fair attack on the prosecution case."**

38. I have perused the record of the proceedings before the trial court and noted that after the plea was taken, the appellant was given a bond of Kshs.100,000/- with a surety or cash bail of Kshs.50,000/-. There was a further order that copies of witness statement be supplied to the appellant. The bond was later reviewed downwards to Kshs.80,000/- or bail of Kshs.40,000/-, and finally to Kshs.70,000/- with one surety or cash bail of Kshs.30,000/-. The appellant did not raise any issue during the trial in the nature of an impediment in the preparation of his defence, lack of statements or any other issue that would here negatively affected his trial.

39. The appellant fully participated in the trial and ably cross examined witnesses without any hitch. The only time the appellant indicated that he did not have a witness statement was on 9th September, 2014 and the court promptly undertook to supply the statement of that remaining witness before the hearing date on 24th September, 2014. The issue of the statement was never raised again and on the day of the hearing, the appellant was ready to proceed and indeed cross examined that witness. The applicant has also not said anything about this in his submissions. I am satisfied that from the record, the trial court accorded the appellant adequate time and facilities to prepare for this trial. For that reason, I do not find any merit in this ground of appeal and it is equally dismissed.

40. Having considered this appeal and rehashed the whole evidence tendered before the trial court afresh, I am satisfied that the appellant's conviction was well founded and I affirm it. On the sentence, it cannot be said that it was either excessive or harsh. The learned trial magistrate took into account all that was before him as he was bound to do when meting out sentence. The upshot is that this appeal lacks merit and is hereby dismissed.

Dated and delivered at Kakamega this 21st day of April, 2016.

E.C. MWITA

JUDGE