REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NANYUKI

CRIMINAL APPEAL NO. 162 OF 2015

LUKAS NJUGUNA...APPELLANT

versus

REPUBLIC...RESPONDENT

(Being an appeal from the original conviction and sentence in

Nanyuki Chief Magistrate's Court Criminal Case No. 55 of 2015

by Hon. E. BETT Senior Resident Magistrate on

25th September 2015).

JUDGMENT

1. **LUKAS NJUGUNA** was charged on the main count before the Chief Magistrate's Court at Nanyuki with the ***offence of house breaking contrary to section 304(1) and stealing contrary to section 279(b) of the Penal Code***. In the alternative count he was charged with the ***offence of handling suspected stolen property contrary to section 322(1) and (2) of the Penal Code.*** After trial he was convicted on the main count and was sentenced to serve 5 years imprisonment with regard to the first limb of that count and 2 ½ years in respect of the second limb of that count. He has filed his appeal against both conviction and sentence.

2. This is the first appellant court. The duty of this court as stated many times before is that the evidence adduced at the trial court should be subjected to re-evaluation and the court in carrying out that re-evaluation may or may not reach a different conclusion to that of the trial court. In re-evaluating the evidence the court should bear in mind that it did not see or hear the witnesses testify. OKENO V REPUBLIC (1972)EA 32.

3. The prosecution's case is that the complainant one Elijah Kinuthia left his home at Muramati at about 7 a.m. on 22nd January 2015. He went to his place of work. On reaching his place of work he was informed that the work had been stopped. At 9 a.m. he returned home only to find that his radio, blue jeans, USB and a remote were missing. He said that when he left for his place of work he had not padlocked the door but had simply shut the door. When he discovered that his house had been broken into he made an inquiry to his brother who said that he had seen Irungu entering the house. Shortly after that the complainant was telephoned and informed that a suspect had been arrested and was at Muramati Police Post. On going there he found the items that had been stolen from his house. He stated that the

value of his property in total was Kshs. 5,200/=. He also found the appellant under arrest. He said that th appellant was his former class mate.

4. The evidence of PW 2 and PW 3 was to the effect that they joined up with others who were chasing the appellant and when the appellant realised that he was being chased he dropped a bag in which the complainant stolen property was found. The appellant was arrested and taken to Muramati Police Post together with the recovered items. PC Charles Muturi re-arrested the appellant and confirmed to the court that the items that were stolen from the complainant were handed to him by those that had initially arrested the appellant.

5. The appellant gave a sworn testimony in his defence. He stated that on the 21st without stating the month or the year he was told that his grandmother had been attacked by an elephant. He took her to Nanyuki Hospital for treatment. However he did not have sufficient funds and therefore he asked someone called Peter to give him some money. On 22nd again without indicating the month or the year he said that he went to the home of someone called Moses Kamau to inquire about the money he needed. He was told that the money was in the telephone of Moses Kuria but as soon as he took the phone a crowd surged toward him armed with pangas and others on motorcycle. As a result he ran and hid in the bush. He was arrested by PW 2 and the complainant who took him to Muramati Police Post. At the police station he said that he was only found in possession of a phone.

6. In his submission before court in support of his appeal the appellant faulted the prosecution for failing to produce the investigating officer. He said that that failure caused him prejudice. He did not elaborate what prejudice he suffered. He also faulted the prosecution for failing to call the brother of the complainant to testify.

7. The appeal was opposed by the learned counsel Mr. Tanui the Principal Prosecution Counsel. In his view the appeal had no merit. He submitted that no prejudice was suffered by the appellant in the absence of the evidence of the investigating officer and the brother of the complainant. He further submitted that both PW 2 and PW 3 saw the appellant and chased him upon which he dropped the bag containing the complainant's property. In his view the evidence against the appellant was sufficient to prove the charge in the main count. In view of previous record of the appellant Mr. Tanui submitted that the sentence meted out to the appellant was correct.

8. In response to the submissions made by the appellant it should be noted that ***Section 143 of the Evidence Act Cap 80*** provides that there is no particular number of witnesses that can prove a fact. That section is in the following terms:

> ***"No particular number of witnesses shall in the absence of any provision of law to the contrary, be required for the proof of any fact."***

In discussing that section the court in the case of **BUKENYA & OTHERS VS REPUBLIC(1972) EA 549,** stated:-

> ***"While the director is not required to call superfluity of witnesses, if he calls evidence which is barely adequate and it appears that there were other witnesses available, who were not called, the court is entitled under the general law of evidence, to draw an inference that the evidence of these witnesses, I called would have been tended to be adverse to the prosecution case."***

That being so the prosecution did not necessarily have to call the investigating officer or the brother of the complainant to testify. In my re-examination of the prosecution's evidence the witnesses who testified before the trial court sufficiently proved the prosecution's case. The failure to call those witnesses cannot draw an adverse inference. They would have no added value to the prosecution's case if those two witnesses were called.

9. The proximity of the arrest of the appellant to the breaking in and theft of the complainant's goods in terms of date time and locality leads me to conclude that the doctrine of recent possession is applicable.

The recovery of the items stolen from the complainant was within an hour of the discovery of the breaking in. In this regard the case of **R VS LOUGHLIN 35 CR. APP. R69** is very apt:-

> ***"If it is proved that the premises had been broken into and that certain property had been stolen from the premises and that shortly afterwards a man is found in possession of that property that is certainly evidence from which the jury can infer that he is the housebreaker or shopbreaker."***

This decision was quoted with approval in the Kenya Court of Appeal in the case **SAMUEL MUNENE MATU VS RE. CRIMINAL APPEAL NO. 108 OF 2003.**

10. The doctrine requires a party to explain his possession of stolen goods after the prosecution has proved that the property in his possession had been stolen shortly prior to his possession. The nature of the items should also be considered whether it is an item that can easily exchange hands. The doctrine is a rebuttable presumption. The appellant should have explained his possession of those items to rebut the presumption that he stole the goods. In view of the above finding I am in agreement with the trial court conclusion that the appellant was guilty of the offence of breaking in and stealing the property of the complainant. The doctrine of recent possession of stolen goods was applicable to the appeal. **The appeal against conviction therefore is rejected.**

11. The appellant was sentence as stated before to imprisonment of 5 years and 2 ½ years. Those two sentences were to run concurrently. In his submission before court the appellant stated that he did not understand why he was given two sentences. In simple response the appellant having been found guilty of offence of breaking in and offence of stealing the court was right to sentence him as it did. Those sentences in my view were not in excesses and will therefore not attract this court's interference. It is important to note that the appellant had previous conviction of stealing contrary to section 275 of the penal code. That conviction rightly was borne in mind by the trial court as it sentenced the appellant. It follows that the **appellants appeal against sentence is dismissed.**

DATED AND DELIVERED THIS 31ST DAY OF MAY 2016.

MARY KASANGO

JUDGE

CORAM:

Before Justice Mary Kasango

Court Assistant – Njue

Appellant: Lukas Njuguna …………………….

For the State: …....................................

COURT

Judgment delivered in open court.

MARY KASANGO

JUDGE