REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NO. 185 OF 2012

JOSEPH MAINA MWANGI…………..APPELLANT

-VERSUS-

REPUBLIC………………….....……..…RESPONDENT

(Being an appeal against original conviction and sentence in the in Karatina Senior Resident Magistrates' Court Criminal Case No. 521 of 2012 (Hon. H.W. Onkwani, Resident Magistrate) on 24th October, 2012).

JUDGMENT

The appellant was charged with one count of burglary contrary to **section 304 (2)** of the Penal Code and stealing contrary to **section 279(b)** of the **Penal Code**. According to the particulars of the offence, on the night of 5th May, 2012 and 6th May, 2012 at Gakurue village in Mathira East district within Nyeri County jointly with others not before court, the appellant broke and entered the dwelling house of Joseph Gathogo with intent to steal therein and did steal a gas cylinder, a radio cassette, seven sufurias, sofa settee cushions all valued at Kshs 14,300/= the property of the said Joseph Gathogo. In the alternative, the appellant was charged with handling stolen goods contrary to **section 322 (1) (2) of the Penal Code** the particulars of which were that on the 8th day of May, 2012, at Jambo Trading Centre in Mathira East District within Nyeri County otherwise in the course of stealing, the appellant dishonestly undertook the disposal of one gas cylinder by a motor cycle knowing or having reason to believe it to be stolen goods.

The appellant was acquitted the principal count of burglary and stealing under section 210 of the Criminal Procedure Code; however, at conclusion of the trial, the learned magistrate found the appellant guilty of the alternative count and convicted him accordingly; she sentenced him to 8 years imprisonment.

On 31st October, 2012, the appellant filed his appeal against conviction and sentence and in his petition of appeal he raised the following main grounds:

1. The learned magistrate erred in law and fact by failing to hold that the prosecution evidence was contradictory;

2. The learned magistrate erred in both law and fact by failing to hold that the appellant had proved that he owned the gas cylinder;

3. The learned magistrate erred in law and in fact for failing to hold that the prosecution had failed to establish a prima facie case against the appellant;

4. The learned magistrate erred in both law and fact for failing to uphold the appellant's defence;

5. The learned magistrate erred in law and in fact in meting out the sentence that was manifestly harsh and excessive.

At the hearing of the appeal all the appellant told the court was that he had not participated in the trial effectively because he had not been charged before; he urged the court to reduce his prison term. The learned counsel for the state opposed the appeal and urged that the appellant was properly convicted because he was found in possession of property that was proved to have been stolen. As for the sentence, counsel submitted that the maximum sentence for the kind of offence that the appellant was convicted of was fourteen years yet he was jailed for only eight years. She urged that in sentencing the appellant, the learned magistrate also considered the probation report that had been filed in court. I understood counsel to submit that the sentence was neither harsh nor excessive in the circumstances; she urged the court to uphold both the conviction and sentence.

It is necessary, as a matter of law, to evaluate the evidence on record afresh in order for this court to not only arrive at its own conclusions but also to appreciate the appellant's case and determine whether indeed the learned magistrate came to the wrong decision as the appellant wants this honourable Court to believe. I am minded, however, that the trial court was better placed to assess the evidence during the trial since it saw and heard the witnesses first hand.

On or about 6th May 2012 at around 9 AM, the complainant, James Gathogo, got information that his house had been broken into and that several items, including a 6 kg gas cylinder, two seat cushions, a Sony radio and seven Sufurias were stolen. He made a report of this theft to the police; on 8th of May, 2012, a police officer laid an ambush at Divers Inn at Karatina town; the officer was together with the complainant and as they waited the appellant is said to have appeared with a gas cylinder. The complainant identified it as his cylinder by its serial number 194630, scratch marks by a chain that was used to secure it and the initials of his name JKG scratched at its bottom. A further proof of ownership was a receipt of Kshs 7000 /= which he was issued with on 27th November, 2010 when he purchased the gas cylinder. He recorded two statements with the police, one on 7th May, 2012 and the second one on 8th May, 2012.

The police officer who recorded the report of the break-in and theft at the complainant's house was corporal **Justus Kirimi (PW2)** of Ihwagi police post. He testified that on 6th May, 2012 at about 10:35 AM he was in his office when one **James Muriuki (PW5)** came and informed him that he had been sent by the complainant to report a case of housebreaking and theft. He recorded his statement in the Occurrence Book on that particular day. According to him, the complainant was in Nairobi. On the 8th May, 2012, this officer got information that the appellant had a gas cylinder and was on his way to Karatina where he was to sell it. He proceeded to Karatina together with his colleague where they laid an ambush at Jambo Inn. He arrested the complainant with the cylinder and immediately called the complainant to identify it. According to his evidence, the complainant identified the cylinder by scratches of a chain used to secure it and the initials of his name at the bottom of the cylinder. The witness testified that the appellant had informed him at the police station that the gas cylinder was his though he had initially told him that he had been given the gas cylinder by one Githithi to sell.

The officer also visited the complainant's home and established that there was an attempt to break the door to his house and that whoever stole the complainant's property gained entry through a window; the windows grill made up of a wire mesh and wood had been destroyed. He collected a chain and a padlock from the scene. Of all the properties that are alleged to have been stolen, only the gas cylinder was recovered. He produced all these items as exhibits in court. He also produced a receipt for the purchase of the gas cylinder; he testified that he was given this receipt later but before the appellant was charged. He added that he knew both the appellant and the complainant; the latter was a police officer and he had worked with him previously, apparently in that capacity.

Joseph Maina (PW3) testified that on 6th May, 2012 at around 7 AM he found one **Kinyua (PW5)**, **Cecilia Gathogo (PW4)** and Githinji outside the complainant's house. The padlock to the house had been broken and the window at the back had also been broken. When they informed the complainant of this

break-in, he asked Kinyua to enter the house and check whether his property was intact. He then asked them to make a report to the police after it was established that his gas cylinder, amongst other properties, had been stolen. They made the report as requested.

Cecilia Gathogo (PW4) testified that Mr James Kinyua came to her home looking for a job on 6th May, 2012 at around 7 AM. After giving him the quotations for the job he was looking for he left but when he got to the complainant's house he noticed that the padlock was missing and informed her accordingly. She went to the house and indeed confirmed that the padlock was missing. They were later joined by **Joseph Maina (PW3)** and together they went round the house and found out that the window had been broken. They noticed that the gas cylinder was missing.

Joseph Kenya Muriuki (PW5) testified that he went to Cecilia Wanjiku's home on 6th May, 2012; he noticed that the door to her brother's house did not have a padlock and therefore enquired whether he was around. He went round the house and found the window had been broken. When the complainant was informed, he asked this witness to enter the house; he then accessed it through the broken window and established that the gas cylinder was missing. He testified that he used to visit the complainant whenever he was around and was therefore aware that there had been a gas cylinder in that house. He reported the matter to the police.

With this evidence the learned magistrate ruled that the main count of burglary contrary to **section 304(2)** and **stealing contrary to section 279 (b)** of the Penal Code had not been proved beyond reasonable doubt. She therefore acquitted the appellant of this charge and put him on the defence on the alternative count of handling stolen property contrary to **section 322 (1)** and **(2)** of the **Penal Code**.

In his defence, the appellant testified that on 8th May, 2012, his wife was apparently admitted in hospital to deliver. He had a bill of Kshs 8500/= to settle in the hospital and since he did not have that money, he decided to sell his gas cylinder to settle it. As he tried to sell the gas cylinder at Karatina, he encountered the complainant who claimed the gas cylinder was his; soon thereafter police officers joined him and arrested the appellant on the allegations that he had stolen the gas cylinder. He was subsequently charged; he denied the charge and insisted that the gas cylinder was his; indeed he produced a receipt, showing that he purchased the cylinder in the year 2010.

That is as far as the evidence at the trial went. Having carefully evaluated it, I find the evidence of Joseph Gathogo (PW1), corporal Justus Karimi (PW2), Joseph Maina PW3 and Cecilia Gathogo (PW4) to have been consistent that indeed the complainant's house was broken into either on the night of 5th May, 2012 or in the wake of 6th May, 2012. There is nothing on record that suggests that the learned magistrate should not have believed in these witnesses in this regard. She was not, however, convinced that there was sufficient evidence to prove that the appellant broke into the complainant's house and stole the items that are alleged to have been stolen and for this reason she acquitted him on the charge of burglary contrary to **section 304(2)** and stealing contrary to **section 279(b)** of the Penal Code. Again, I find no reason why the learned magistrate should have reached any different conclusion mainly because none of the prosecution witnesses linked the appellant with the burglary and theft.

The only question that the trial court was rightly concerned with was whether the gas cylinder the appellant was arrested with was stolen property and therefore whether the appellant was correctly charged with the offence of handling stolen property. The Court of Appeal for East Africa set out what I suppose is the threshold for proof of this kind of offence in **Ratilal & Another versus Republic (1971) E.A at 577;** it stated as follows:

> ***"First the handling must be of stolen goods and done otherwise than in the course of stealing. We agree that this is a necessary element which must be proved by the prosecution. The prosecution must prove that the goods are stolen and must further satisfy the court that the handling of the goods was "otherwise in the course of stealing". This altered element can, however, be proved by circumstances from which the court can infer and decide whether the offence was theft or handling of stolen goods. The prosecution should therefore always, except***

where the evidence positively establishes either that the act was theft or was one of handling stolen goods, lay alternative counts to cover both offences. This was done in this case.”

As noted from the evidence, both the complainant and the appellant laid claim on the gas cylinder; on his part, the complainant identified this item as his own by the scratch marks caused by the chain that was used to secure it to his bed. This chain was produced in court as exhibit. Apart from the scratch marks, the complainant had the initials of his name scribbled on the underside of the cylinder. Again in proof of ownership, he produced a receipt dated 27th November, 2010 showing that he purchased the gas cylinder together with its burner from Kenol Oil at Kshs 7,000/=. The receipt also had the serial number 194030 which is the same serial number that was on the gas cylinder. According to the complainant, he had never changed the cylinder since he purchased it because he rarely used it as he was in Nairobi most of the time. The learned magistrate was satisfied that this was sufficient proof that the complainant owned the cylinder. She dismissed the appellant’s claim on this property and in particular noted discrepancies on the receipt which the appellant produced to support his claim. Again though the appellant had stated in his evidence that the cylinder had particular marks, he was unable to point them out when the cylinder was brought to court for this purpose. Having come to the conclusion that the receipt which the appellant produced was not authentic and, in the absence of any proof of particular marks on the cylinder, the learned magistrate concluded, rightly in my view, that the appellant’s defence did not carry much weight and more importantly, it did not raise any reasonable doubt as to the complainant’s ownership of the gas cylinder in question.

One other thing about the cylinder, the appellant alleged that he was disposing of it to secure the money required to settle his wife’s hospital bill. While I am minded that it is the duty of the prosecution to prove its case beyond reasonable doubt, the appellant should have gone further than simply state that his wife was in hospital and that he had a bill to settle. The moment he adopted this line of defence, it was incumbent upon him to go further and, at least, produced some proof of such a bill or that his wife was admitted in hospital if not for anything else, to demonstrate that he was disposing part of his property to meet his immediate financial needs. He did not produce such a proof and neither did he even call his wife to support his claim that the cylinder was a family property or that she had been admitted in hospital. Although, this evidence will not have, by itself, proved the appellant’s claim on the cylinder, it would have cast reasonable doubt on who between him and the complainant owned this property. In the absence of such a doubt, I am inclined to agree with the learned magistrate, that the complainant was the owner of the gas cylinder; in the same vein I am satisfied that it was proved beyond doubt the cylinder was stolen property and the complainant handled it in circumstances other than in the course of stealing.

It must also be noted the gas cylinder was recovered less than two days after it was stolen; although the learned magistrate did not expressly say so, I think this is a proper case to which the doctrine of recent possession applied. Having held that the cylinder belonged to the complainant, I find that the appellant did not offer any satisfactory or reasonable explanation as to how he came into possession of the complainant’s property soon after it had been stolen. In the absence of such explanation, the doctrine of recent possession could properly be applied and the inference drawn that the appellant handled stolen property. This doctrine of recent possession has been explained in **Chaama Hassan Hasa versus Republic (1976) KLR** at page 10 where the High Court (Trevelyan and Hancox JJ) explained it as follows:

“Where an accused person has been found in possession of property very recently stolen, in the absence of an explanation by him to account for his possession, a presumption arises that he was either the thief or a handler by way of receiving (though not by way of retaining).”

The appellant was found in possession of property that had been stolen less than two days before and, in my view, his claim on the property without any sufficient proof of such ownership could not rebut the presumption that he was a handler. In the case of **Chaama Hassan Hasa versus Republic** (supra), the court said of the conviction based on this doctrine of recent possession;

“Whether the accused should or should not be convicted, depends not simply on his possession, but on all the facts since such possession is but one aspect of the circumstantial evidence the

sum total of which must be unexplainable upon any reasonable hypothesis other than that of guilt of the person charged, before a conviction can be recorded.

The facts which comprise the circumstantial evidence in this case, upon any reasonable hypothesis, point to the appellant's guilt rather than his innocence.

On the question of sentence, the learned magistrate considered the appellant's mitigation and the probation report and concluded that the proper sentence was custodial; he was imprisoned for 8 years which sentence I find to have been within the law. For this reason, there is no basis to interfere with the sentence meted out by the learned magistrate.

In conclusion, I am not persuaded that the appellant's appeal has any merit; I uphold the conviction and sentence and hereby dismiss the appeal.

Signed, dated and delivered in open court this 28th October, 2016

Ngaah Jairus

JUDGE