



**REPUBLIC OF KENYA**

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

**CRIMINAL DIVISION**

**CRIMINAL APPEAL NO.148 OF 2013**

*(An Appeal arising out of the conviction and sentence of Hon. E.G. NDERITU (MRS.)- PM delivered on 2<sup>nd</sup> February 2013 in Nairobi CMC. CR. Case No.303 of 2009)*

**EDIN MUROW MOHAMUD..... APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

The Appellant, Edin Murow Mohamud was charged with three (3) others (who were however acquitted by the trial court) with the offence of **breaking into a godown and committing a felony** contrary to **Section 306(a)** of the **Penal Code**. The particulars of the offence were that on 2<sup>nd</sup> February 2009 at Industrial Area within Nairobi County, the Appellant, jointly with others not before court, broke into a godown and stole 7,650 rolls of clothing material valued at Kshs.90 million the property of Jamal Muhammed Ali (the complainant). The Appellant was alternatively charged with the offence of **handling stolen goods** contrary to **Section 322(2)** of the **Penal Code**. The particulars of the offence were that on 9<sup>th</sup> February 2009 at Eastleigh Estate within Nairobi County, the Appellant, jointly with others not before court, otherwise than in the course of stealing dishonestly undertook to dispose of 629 rolls of assorted clothing material valued at Kshs.2,959,740/-, the property of Jamal Muhammed Ali. When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charge. After full trial, the Appellant was convicted of the main charge. He was sentenced to serve five (5) years imprisonment. The Appellant was aggrieved by his conviction and sentence. He has filed an appeal to this court.

In his petition of appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. He was aggrieved that he had been convicted on the charge of breaking and stealing when no evidence was adduced to support his conviction. He faulted the trial magistrate for ignoring the evidence that was adduced by the prosecution witnesses and thereby erroneously convicted him. He took issue with the fact that he was selectively convicted yet some of the stolen items were recovered from the houses of his co-accused who were however acquitted. The Appellant was aggrieved that the trial magistrate had failed to evaluate all the evidence adduced and thereby reached an unjust decision. He faulted the trial magistrate for failing to take into account his defence before reaching the verdict of convicting him. He was of the view that the verdict was made against the weight of evidence adduced. He was finally aggrieved that he had been sentenced to serve a custodial sentence that was excessive, vindictive and against the principles of sentencing. In the premises therefore, the Appellant urged the court to allow the

appeal, quash the conviction and set aside the sentence that was imposed on him.

Prior to the hearing of the appeal, counsel for the Appellant and the prosecution agreed by consent to file written submission in support of their respective opposing positions. The submission were duly filed. When counsel for the parties appeared before this court, they requested the court to write its judgment on the basis of the written submission. This judgment is therefore written on the basis of the said submission. This court has read the said submission. Whereas the Appellant was of the view that the prosecution had failed to establish a case to warrant his conviction, the prosecution was of the view that it had adduced sufficient evidence to secure the conviction of the Appellant. This court shall revert back to the arguments made on this appeal after briefly setting out the facts of this case.

The complainant in this case was in a partnership with others in a business under the trade name, Young Traders. The business dealt with clothes both new and used. The owners of the business imported textile materials from South Korea and Indonesia. They then sold these clothing materials to various traders within and out of Nairobi. The business was based in a godown near City Stadium behind Ukwala Supermarket along Jogoo Road. The complainant testified as PW1. He recalled that on 1<sup>st</sup> February 2009, he closed his place of business as usual and went home. He left the premises guarded by security guards from two security firms, namely G4S Security and Apex Security. The two security firms were assigned different security duties at the godown. On the morning of 2<sup>nd</sup> February 2009, when PW1 reported on duty, he found the small pedestrian gate open. On investigation, he discovered that the padlock of the main door to the godown had been cut. The door was open. On entering the premises, he realized that a total of 7,650 rolls of textile materials had been stolen. It was apparent that the thieves had gained access into the godown through the roof. They used the main entrance to exit from the premises. PW1 produced the documents, including bills of lading, import declaration forms, commercial invoices and packing lists to prove that indeed he had imported goods worth Kshs.90 million. Upon realizing that the store had been broken into and goods stolen, PW1 made a report to the police. PW1's testimony in regard to what transpired on the material day was corroborated by the testimony of PW3 Omar Hussein who had been employed as a stores manager at the godown. The security guards who guarded the premises on the night of the robbery were not found in the premises. They were not traced either by their employers or by the police. They were therefore not charged with the accused person. The police were not able to lift any useable finger prints from the premises.

The police commenced investigations. PW2 Corporal James Kilonzo, PW10 PC Samson Mulinge and PW12 Sergeant Arthur Onyango were assigned to investigate the case. According to PW10, on 7<sup>th</sup> February 2009, he received information to the effect that there were some stolen materials in a shop in Eastleigh, 12<sup>th</sup> Street. The shop belonged to the Appellant. Accompanied by other police officers, he went to the shop and searched it. He recovered wrapping materials which he believed were used to wrap the clothing materials stolen from the complainant. He took an inventory of the same and escorted the shop assistants to Pangani Police Station. On 10<sup>th</sup> February 2009, he received further information that more of the materials were kept in House No.182 at Jerusalem Estate. They went to the house and recovered 79 rolls of clothing material. On 11<sup>th</sup> February 2009, they proceeded to Isiolo where they recovered another 444 bales of clothing materials. The materials were recovered in a room at Garissa Shopping Centre at Isiolo. On 23<sup>rd</sup> March 2009, they recovered 434 rolls of clothing material from House No.180 at Jerusalem Estate. All these rolls of clothing material were positively identified by the complainant as the ones that were stolen from his godown. In total 1,142 rolls of assorted clothing materials were recovered. They were produced in court as evidence.

The evidence that connects the Appellant with the theft of the clothing material was essentially that of PW11 Ali Suleiman. He testified that on 10<sup>th</sup> February 2009, he met with the Appellant while at Isiolo Town. He knew the Appellant. Infact, they were related. The Appellant and PW1 were in-laws. PW11 explained that the Appellant had married from his family. After exchanging greetings, the Appellant requested him to look for market for the clothing materials. The Appellant told him that he had opened a store at Isiolo to sell clothing materials. The Appellant requested PW11 to accompany him to Meru Town to market the said clothing materials. They were able to get a lady who bought the materials on the basis of samples that had been shown to her. They returned to Isiolo. On the following day, they loaded the

materials on a mini-truck and transported it to Meru. As they were unloading the materials at about 2.00 p.m., a man (the complainant) accompanied by police officers who included PW15 PC Solomon Waweru came to the shop. They demanded that they produce receipts to prove that they were the owners of the particular rolls of clothing material. The Appellant told the police that he had documents to establish ownership of the said rolls of clothing materials. The Appellant requested the police to allow him to get the documents from his car which he had parked near the mosque. The Appellant did not return. The police arrested PW11 and detained him at Meru Police Station. After two days, he was brought to Nairobi where he recorded his statement before he was released.

The evidence adduced by the prosecution witnesses established that other than the Appellant, others were involved in the transportation of the rolls of clothing material from Nairobi to Isiolo. In particular, a person known as Hassan appears to have been involved in the hiring of motor vehicles and transportation of the particular rolls of clothing materials to Isiolo.

When he was put on his defence, the Appellant denied that he broke into and stole from the godown belonging to the complainant. He explained that when the police visited his shop at Eastleigh, they searched it and did not find any clothing material. The only thing the police seized were 17 tyres and 4 tubes which were later returned to him after it was established that he had legitimately purchased them for resale. He explained that the reason why he had gone to Isiolo (where he met PW11) was to purchase cattle for sale to Kenya Meat Commission in Nairobi. After purchasing the cattle, he returned to Nairobi. He was informed that he was being looked for by police officer from the Flying Squad. He went to the police station and was arrested. He denied the allegation by PW11 to the effect that he had accompanied him to Meru to sell the rolls of clothing materials.

This being a first appeal, it is the duty of this court to re-consider and re-evaluate afresh the evidence adduced before the trial magistrate's court with a view to reaching an independent determination whether or not to uphold the conviction of the Appellant. In doing so, this court must bear in mind the fact that it neither saw nor heard the witnesses as they testified and therefore must give due allowance in that regard. (See **Njoroge –Vs- Republic [1987] KLR 19**). The issue for determination by this court is whether the prosecution adduced sufficient evidence to establish the charge brought against the Appellant to the required standard of proof beyond any reasonable doubt.

This court re-evaluated the evidence adduced before the trial court. It has also benefitted from the written submission filed by the parties to this appeal. From the evidence adduced by the prosecution witnesses, it was clear that the Appellant was convicted on the application of the doctrine of recent possession. The Appellant was found in possession of some of the rolls of clothing materials which were positively identified by the complainant to have been stolen from his business premises on the night of 1<sup>st</sup> February 2009. Although the Appellant denied ever being in possession of the particular rolls of clothing material, upon re-assessing the evidence adduced by the prosecution witnesses particularly PW10 and PW11, it was clear to this court that the rolls of clothing material that was transported from Isiolo to Meru was under the actual possession of the Appellant. There was no reason why PW11, a relative of the Appellant, could give false testimony against him. The testimony of PW10, PW11 and PW15 regarding the circumstances under which the Appellant was found in possession of the rolls of clothing material was consistent, cogent and corroborated each other in all material respects. The only reason why the Appellant escaped from the scene in Meru when he was called upon to produce document establishing his ownership of the particular clothing materials, was because he knew that the particular clothing materials had been stolen from the godown of the complainant.

The issue for determination by this court is whether the circumstances under which the rolls of clothing materials found in possession of the Appellant was sufficient to connect him with breaking and stealing of the particular rolls of clothing material from the godown of the complainant. As stated earlier in this judgment, the prosecution relied on the doctrine of recent possession to secure the conviction of the Appellant. Does the doctrine of recent possession apply in this case? In this court's considered opinion, yes, it does. As was held by Bosire J (as he then was) in **Malingi –Vs- Republic [1989] KLR 225 at P.227**:

***“By the application of the doctrine the burden shifts from the prosecution to the accused to explain his possession of the item complained about. He can only be asked to explain his possession after the prosecution have proved certain basic facts. Firstly that the item 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 item. 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.”***

In the present appeal, the Appellant was found in possession of the rolls of clothing material that were stolen from the godown of the complainant. He was found with the said clothing materials about nine (9) days after the breaking and stealing of the said rolls of clothing material. From the nature of the goods, the possession obviously was recent. From the testimony of PW11, it was clear that the Appellant was clandestinely trying to dispose of the said clothing materials. The police found wrappings in the Appellant’s shop at Eastleigh. These were the wrappings that the rolls of clothing materials were packed in when they were stolen from the godown of the complainant. From the nature of the goods, it was evident to this court that the period between the stealing of the items from the godown of the complainant and its recovery in the Appellant’s actual possession is such that the court can apply the rebuttable presumption that he was one of the persons involved in the breaking in and stealing of the said rolls of clothing material from the complainant’s godown. The Appellant did not give any explanation that would rebut the presumption that he was one of the persons who broke into and stole from the godown. His defence was evasive, prevaricating and did not dent the otherwise strong evidence adduced against him by the prosecution witnesses.

The upshot of the above reasons is that the appeal lodged by the Appellant against conviction lacks merit and is hereby dismissed. As regard sentence, this court is of the view that the punishment fitted the crime. If the Appellant was sentenced to serve a lesser term in prison, it would amount to the Appellant being rewarded for causing such a colossal loss of the sum of Kshs.90 million to the complainant. The appeal against sentence similarly too lacks merit and is hereby dismissed. The conviction and sentence of the trial court is hereby upheld. It is so ordered.

**DATED AT NAIROBI THIS 28<sup>TH</sup> DAY OF OCTOBER 2015**

**L. KIMARU**

**JUDGE**