REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

CRIMINAL APPEAL NO. 166 CONSOLIDATED WITH NO. 167 OF 2012

LOPOT LENES JACKSON .....1ST APPELLANT

STEPHEN MWANGI MUREITHI .....2ND APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

(APPEAL ARISING FROM THE JUDGMENT OF THE PRINCIPAL MAGISTRATE'S COURT AT WANG'URU (E.K. NYUTU – S.R.M) IN CRIMINAL CASE NO. 551 OF 2011 DELIVERED ON 14TH MAY 2012)

JUDGMENT

This judgment is in respect to two appeals being High Court Criminal Appeal Nos 166 of 2012 and 167 of 2012 which were consolidated. The two appellants are:-

1. LOPOT LENES JACKSON – 1ST APPELLANT

2. STEPHEN MWANGI MUREITHI – 2ND APPELLANT

The two were among five (5) accused persons who were charged at the Principal Magistrate's Court at Wang'uru with the offence of shop breaking and stealing contrary to ***Section 306 (a) and 279 (b) of the Penal Code*** the particulars being that between 28th and 29th July 2011 at Ngurubani township in Kirinyaga County, they jointly broke and entered into a Communication shop of CATHERINE MUTHONI KIMANI with intent to steal and did steal therefrom an assortment of mobile phones and cash. They also faced the alternative counts of handling stolen goods contrary to ***Section 322 (2) of the Penal Code***.

After trial, the two appellants were convicted on the main count of shop breaking and stealing and sentenced to serve five (5) years imprisonment by E.K. NYUTU (Senior Resident Magistrate) on 14th May 2012.

It is against that conviction and sentence that they have now filed this appeal raising similar grounds being:-

1. ***That the trial magistrate erred in law and in fact by relying on contradictory evidence***
2. ***That the case against them was poorly investigated***

3. ***That the trial magistrate erred in law and in fact by holding that they had a case to answer when no evidence pointed at them***
4. ***That their defences were not considered***

During the appeal, they also asked me to look at their submissions.

In opposing the appeal, the State Counsel Mr. Omayo urged me to confirm the conviction and sentence on the ground that both appellants were arrested with some of the complainant's stolen goods a day after the theft and the sentence was lawful.

The case against the appellants in the lower Court may be summarized as follows. The complainant CATHERINE MUTHONI KIMANI (PW1) runs a shop in Wanguru town which sells mobile phones and other accessories. She closed the shop at 6.30 p.m. on 28th July 2011 but when she reported to work the following morning, she found that it had been broken into and an assortment of twenty two (22) handsets of mobile phones plus two hundred (200) batteries together with twenty (20) sim cards and cash 500/= all valued at Ksh. 65,000/= had been stolen from the shop. She reported to the police.

On 30th July 2011, the police called her and when she went there, she was able to recognize one phone a Nokia F 20 which she identified as part of her stolen phones. On 31st July 2011, she was again called to the Police station where she recognized three other phones being Alcatel, Techno and Wing as part of her stolen goods.She did this by comparing their serial numbers with the list of goods supplied to her by the dealer.

The evidence of INSPECTOR MUTEGI KATHENYA (PW4) was that upon receipt of this complaint, he instructed Corporal GEOFFREY KILUTHA (PW5) to investigate and the same day the 2nd appellant who was the 2nd accused in the lower Court was arrested with the Nokia F 27 phone which was identified as part of the complainant's phone. Further, a Wing V 20 phone was also recovered from the 1st appellant who was the 3rd accused in the lower Court.

CORPORAL KILUTHA (PW5) testified that acting on information, he first arrested the 2nd appellant who was 2nd accused in the lower Court and recovered a phone on him and the 2nd appellant led him to the other co-accused person from whom other phones were recovered including the 1st appellant who was the 3rd accused in the lower Court from whom a Wing phone identified by the complainant was also recovered. This appellant was infact the watchman of the shop.

In their defences, both appellants told the Court that they were arrested on 30th July 2011 but nothing was recovered on them. They denied the charges facing them.

As a first appellate Court, I must re-examine the evidence afresh to draw my own conclusions as to whether or not the conviction and sentence can stand. In so doing, I must take into account the fact that the trial magistrate had the advantage of observing the witnesses as they testified.

The first ground of appeal is that the prosecution witnesses contradicted themselves. It has not been demonstrated in which way the said witnesses contradicted themselves. The brief evidence against them was that the complainant's shop was broken into on the night of 28th – 29th July 2011 and they were arrested within two days of the commission of the offence while in possession of some of the complainant's phones.The complainant said she identified her phones by comparing the serial numbers using the information on the dealer's documents. That was straight forward and consistent evidence and I see no contradiction whatsoever.

It is also alleged that the case against them was poorly investigated. The nature of investigations depend largely on the circumstances of each case. In this case, following the complaint that the shop had been broken into, police, with the assistance of informers, managed to arrest the appellants in possession of the stolen items. The complaint having identified those items satisfactorily, the police had no option but to

charge the appellant as there was nothing else to investigate. That ground similarly fails.

It is also alleged that they had no case to answer on the evidence on record and further, that their defences were not considered. Having been arrested in possession of the stolen phones on 30th and 31st July 2011, the appellants were in recent possession of stolen property because the complainant's shop was broken into on the night of 28th – 29th July 2011. They were therefore in possession of the stolen items within two days of the theft. They were, in law, in recent possession of stolen property. The principle of law germane to the doctrine of recent possession was stated as follows in the English Case of ***R.V LOUGHIN 35 CR. APP 1269*** where the Lord Chief Justice of England said:-

> "***If it is proved that premises have been broken into and that certain property has been stolen from the premises and that very 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 house - breaker or shop breaker.***

The above was approved by the Court of Appeal of Kenya in ***MATU VS REPUBLIC 2004 1 K.L.R 510*** where the Court held that the fining of the stolen property on the accused some twenty (20) days after the theft was sufficiently reasonable to invoke the doctrine of recent possession. In their respective defences in the trial Court, the appellants simply denied possessing the stolen items. The trial magistrate was satisfied from the evidence that the appellants possession of the stolen items was sufficient to convict them. Having re-evaluated the evidence as I should, I am satisfied that the trial magistrate arrived at a proper decision to convict the two appellants. There was nothing to suggest that the two officers who recovered the stolen items on the appellants would have any reason to give false testimony against the appellants. The trial magistrate was clearly alive to the application of the doctrine of recent possession because in his judgment, he states as follows:-

> ***"The 3rd accused was found in possession of the stolen phone on 30th July 2011. I am satisfied that the time lapse between the committing of the offence and the recovery of the stolen phone from 3rd accused is short enough to safely make an inference that the 3rd accused and (sic) indeed involved in committing of the crime"***

And with respect to the 2nd accused, the trial magistrate said:

> ***"This same reasoning applies to 2nd accused from whom a phone make Nokia F 201 together with 5 batteries all of which were stolen from complainant were recovered"***

The trial magistrate therefore properly appreciated and applied the doctrine of recent possession and on the evidence before him, the appellant's conviction was inevitable. I uphold the conviction and dismiss the appeal against it.

On sentence, the appellants were imprisoned for five (5) years on each limb the sentences being concurrent. They were both first offenders and the value of the goods was put at Ksh. 65,000/=. I will reduce the sentence to four (4) years from the time of their conviction. The appeal succeeds only to that extent.

It is therefore ordered as follows:-

1. ***Appeal against conviction is dismissed***
2. ***Appeal against sentence is allowed and sentence is reduced to four (4) years on each limb. Sentence to be concurrent.***

B.N. OLAO

JUDGE

31ST JANUARY, 2014

31/01/2014

Coram

B.N. Olao – Judge

CC – Mwangi

Mr. Sitati State Counsel present

Appellants present

COURT: Judgment delivered this 31st day of January 2014 in open Court

Mr. Sitati State Counsel present

Appellants present

Right of appeal explained. Copies given to appellants.

B.N. OLAO

JUDGE

31ST JANUARY, 2014