REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL NO. 89 OF 2012

(AN APPEAL AGAINST BOTH CONVICTION AND SENTENCE OF THE PRINCIPAL MAGISTRATE'S COURT AT VIHIGA IN CRIMINAL CASE NO. 480 OF 2011

[S. N. MWANGI RM] DATED 13TH APRIL, 2012)

EVANS ODARI ….....……..……. APPELLANT

VERSUS

REPUBLIC ….....……..…….. RESPONDENT

JUDGMENT

The appellant was charged jointly with one SIMON JEMO KITIGA with burglary and theft contrary to **Section 304 (2)** of the Penal Code. The appellant was the 1st accused. The particulars of offence were that on the night of 8th/9th May 2011 at Kisienya village, Mungoma Location within Vihiga district of Western Province broke and entered the dwelling house of Justus Ngesa Alonye with intent to steal therein and did steal from therein, cash Ksh.10,300/=, a thermos flask, a flash torch, a radio - Sonitec, a jug, a fertilizer can 4kgs, paraffin 2½ litres, and a mobile phone Motorolla CII8 the property of the said Justus Ngesa atonye all being valued at kshs.15,000/=.

In the alternative, each of the two was separately charged with handling stolen goods contrary to **Section 322 (1) (2)** of the Penal Code. The particulars of offence for the appellant were that on the 9th May 2011 at Kisienya village in Mungoma Location within Vihiga District of Western Province otherwise in the course of stealing retained a mobile phone Motorolla CII8, a flash torch, a jug, 4 Kgs of fertilizer, kerosene/paraffin 2½ ltrs and cash kshs.300/= knowing or having reason to believe them to be stolen goods or unlawfully obtained.

The particulars for the co-accused were that on the same day and place, otherwise than in the course of stealing dishonestly retained one radio knowing or having reason to believe it to be stolen or being unlawfully obtained.

They denied all the charges. After a full trial, both were convicted on the main count of burglary and theft, as well as the alternative count of handling stolen goods. They were sentenced to serve two (2) years imprisonment for burglary and two (2) years imprisonment for handling stolen property. The sentences were to run consecutively. They were not sentenced on the respective alternative counts.

The appellant has now appealed to this court challenging both conviction and sentence. He has informed the court that his co-accused died in prison. Consequently, the co-accused did not appeal.

At the hearing of the appeal, the appellant tendered written submissions and relied on the same. I have

perused the said written submissions.

Learned Prosecuting Counsel, Ms Opiyo opposed the appeal, and supported both conviction and sentence. Counsel clarified that the appellant was known both as Evans Odari Omonya Evans Odari. Counsel emphasized that the stolen items were recovered from the appellant's house as demonstrated by the evidence of PW1. This evidence in Counsel's view, was corroborated by the evidence of PW2, PW3 and PW4. Counsel submitted lastly that the appellant was not tortured.

The facts of the case in brief, are that on the 8th of May 2011, PW1 Julius Ngesa went to bed at 10.00 p.m. He was in his house with his wife and five (5) children. At around 2.00 a.m., one of the children started crying. The wife of PW1 who was PW2 Rachel Opili, came out of bed and went to the children's room. She lit the kerosene lamp and heard some disturbance in the sitting room. She went to the sitting room and she saw the co-accused SIMON JEMO standing. They struggled, but he ran out through the backdoor of the house. On later checking with PW1, they found a number of items missing from the house. They initially feared to go out of the house because they thought the intruders might still be outside the house. At around 3.00 a.m., they got courage, came out, and went to the house of the co-accused who refused to open the door. They then went to the house of his mother who opened her door. With the assistance of the Assistant-chief, they went to the house of the co-accused. They found a radio make Sonitex, outside the house hidden in a sack in a compost pit. That co-accused mentioned the name of the appellant.

A report on the incident was later made to the Administration Police Post and at around 6.00 a.m. At that time PW1, PW2, and PW3, the Assistant-chief together with Administration Police Officers went to the house of the appellant. They found the doors of the house wide open. He was in the house. On conducting a search, they found a black torch, fertilizer can, green jug, thermos and mobile phone as well as Kshs.300/=.

The items, except the money were confirmed as belonging to PW1 and PW2. The appellant and his co-accused were then charged in court with the offences.

When put on their defences, both gave sworn testimony. The appellant stated that nothing was recovered from him. He complained that he was assaulted on arrest. The co-accused also denied committing the offence.

Faced with this evidence, the trial court found that the prosecution had proven both guilty beyond reasonable doubt. Both were convicted and sentenced. Since the other convict died in custody, only the appellant has appealed to this court.

As a first appellate court, I am duty bound to re-evaluate all the evidence on record and come to my own conclusions and inferences, taking into account that I did not have the opportunity to see the witnesses testify to determine their demeanour, and give an allowance for that. See the case of **Okeno -vs- Republic [1972] EA 32.**

The appellant was not identified at the scene of the burglary and theft. He was mentioned by a co-accused as having been involved in burglary and theft. That is why he was traced to his house.

His conviction is grounded on the application of the doctrine of recent possession of stolen property. He was found in possession of recently stolen goods. That is why he was charged with the offences and convicted. The application of the doctrine of recent possession was considered in the case of **Maina & Others -vs- Republic [1986] KLR 301** wherein the Court of Appeal relied on what was stated in the English case of **R. vs Loughin [35] Cr. Appl. R69** in which the Chief Justice of England stated -

"If it is proved that premises have been broken into and 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 housebreaker."

The above inference can be rebutted if there is a reasonable explanation from the person. In the present case, the incident took place at around 2.00 a.m. The stolen items were found in the house of the appellant at 6.00 a.m. He was alone. This was a difference of a mere 3 hours. There was independent evidence from the Assistant-chief on the recovery of the items. The appellant did not offer any explanation as to how those things came to be in his house. He did not claim that they were his property. In my view, the short duration of a mere 3 hours, and the fact that the appellant did not offer any explanation on how those items were found in his house and in his presence brings into play the application of the doctrine of recent possession. In my view, the doctrine is applicable in this case, and the appellant was rightly found by the trial court to have been involved in the theft of the items from the house of PW1.

The main charge is housebreaking and theft. The alternative charge was handling stolen goods. The conviction of the appellant on both the main and the alternative charges was a mistake on the part of the trial court. An alternative charge is merely an alternative. An accused person can be convicted on either the main or the alternative charge. He cannot be convicted on both. Was there evidence to prove the appellant committed burglary and theft?

As for the main count of burglary and theft, no evidence was tendered that the door or doors to the house of PW1 were closed or locked. The definition of breaking and entering under **Section 303** of the Penal Code requires that the breaker either breaks, opens, unlocks, pulls, pushes or lift the door, window, shutter, flap or other thing intended to close the premises. There being no evidence that the door was closed, it cannot be said that the appellant committed the offence of burglary and theft.

In my view, what was proved by the prosecution was theft from a dwelling house contrary to **Section 279** of the Penal Code. The evidence on record establishes that he was involved in the commission of the main offence on the application of the doctrine of recent possession. However, the evidence proves a cognate offence of theft from a dwelling house. I will therefore quash the conviction for burglary and theft and substitute therefore a conviction and sentence for the offence of theft from a dwelling house contrary to Section 279 (b) if the Penal Code.

In the result, I quash the conviction of the trial court and set aside the sentence imposed. I substitute therefore a conviction for theft from a dwelling house contrary to Section 279 (b) of the Penal Code. The appellant will serve a sentence of two (2) years imprisonment from the date on which he was sentenced.

Dated and delivered at Kakamega this 29th day of January, 2014

George Dulu

JUDGE