**No. 152/ 2014**

**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 176 OF 2011**

**BONIFACE MWANGI KINAE .......................................APPELLANT**

**VERSUS**

**REPUBLIC...............................................................RESPONDENT**

**(Being an appeal from the original conviction and sentence in Tawa principal Magistrate's Court Criminal Case No. 256 of 2011 by Hon. J.W. Gichimu R.M. on 27/9/2011)**

**JUDGMENT**

1. **Boniface Mwangi Kinae** (*1st appellant*) and **Oliver Mutuku Titi** (*2nd Appellant)* were jointly charged with the offences of burglary contrary to **Section 304(2)** and stealing from a dwelling house Contrary to **Section 279(b)** of the **Penal Code**. Particulars thereof being that on diverse dates between **26th** day of **June, 2011** and **10th** day of **July, 2011** at **Kasola Village, Mavindu Sub-location** in **Mbooni West District** within **Makueni** County jointly broke and entered into a dwelling house of **Jeremiah Ngei** with intent to steal from therein and did steal 19 plates, 32 cups, 1 bag, 1 dip freezer, 1 speaker, 10 seat covers, 1 blanket, 3 bed-sheets, 2 pairs of shoes, 1 camera, 1 woven seat cover, 3 bows all valued at Kshs. 20,000/= the property of **Jeremiah Ngei.**

In the alternative, they were charged with the offence of handling stolen goods contrary to section 322(2) of the Penal Code. Particulars being that on **10th** day of **July, 2011** at **Kasola Village, Kalawani** Location in **Mbooni West District** within **Makueni County** otherwise than in the course of stealing jointly dishonestly retained 19 plates, 32 cups, 1 bag, 1 dip freezer, 1 speaker, 10 seat covers, 1 blanket, 3 bed-sheets, 2 pairs of shoes, 1 camera, 1 woven seat cover, 3 bows all valued at Kshs. 20,000/= the property of **Jeremiah Ngei** knowing or having reasons to believe them to be stolen goods**.**

2. The appellants were tried and convicted of the main count of burglary and stealing. They were sentenced to serve seven (7) years imprisonment each. Being dissatisfied with the conviction and sentence they appealed on grounds that the trial magistrate erred in law and fact by convicting them when there was no proof of recovery of stolen items whereby the doctrine of recent possession was inapplicable and that the charge was defective.
3. The prosecution's case was that **PW1**, **Jeremiah Ngei** was away from home when his house was broken into. On receipt of the information he went and confirmed the breakage. Inside the house items mentioned in the particulars of the offence were missing. The suspects were already in police custody. He identified the items that were recovered,
4. **PW2, John Mule Kikumbi** who lived in the complainant's house had travelled to Nairobi on the 26th June, 2011. He was notified by their sister **Stella** about the breakage. He then informed

PW1. PW3, **Sammy Mutunga Kileke** who was constructing a house at Kalawani went to the site on the 10th July, 2011 and found the grill on the window removed. Some household items had been kept near the items. He suspected them to be stolen items then reported to the Administration Police at Kalawani District Office. The Administration Police lay an ambush. At midnight some two (2) young men emerged from the bush and entered the house. The police surrounded the house. They dropped the items at the door. The first appellant had a driving licence, pliers and remote control unit. The 2nd appellant held a stick. The witness was not able to tell when the items were taken to his house. He denied an allegation that his workers are the ones who kept the items in the house.

5. **PW4, APC Albanus Ndeke,** one of the officers who lay ambush stated that he saw the two (2) appellants go to the house at midnight. They surrounded the house. The appellants who were coming out of the house dropped the items and tried to run back inside the house. They arrested the two, recovered a driving licence, pair of pliers and a remote control unit from the 1st appellant. The 2nd appellant who wore a helmet held a walking stick.
6. **PW5**, **No**. **67117 Corporal Thomas Odhoo** of Tawa Police Patrol Base re-arrested the appellants when they were taken there. He investigated the case and charged the appellants.
7. The 1st appellant stated in his defence that he travelled to Nairobi in company of the co-appellant. They reached Kalawani at 9.00pm. They encountered a person who flashed a torch at them. They escaped and went to drink at a bar until 11.00pm. On the way home they were stopped by people who claimed to know him. They made them go to a house where they were to assist them in carrying some stolen items. They handcuffed them. They took from him Kshs. 500/= and miraa. The 2nd appellant's evidence corroborated that of the 1st appellant in all material facts.
8. This being the first appeal, it is my duty as the court to re-evaluate and reconsider the evidence adduced before the trial court bearing in mind the fact that I did not see or hear the witnesses ***(see Charo & Another versus Republic [2007] E.A. 43)***
9. At the hearing both appellants relied on their written submissions. The learned State Counsel **Mrs Abuga** in her written submissions opposed the appeal.
10. Per the evidence adduced and as correctly found by the trial court, it is not in doubt that the house of the complainant was broken into. Items that were recovered at the house of PW3 were identified by the complainant in an endeavour to prove ownership. Nobody else claimed ownership of the said goods. There was no eye witness to the breakage therefore it was not proved when exactly the house was broken into. It could not be said with certainty that it was at night. The offence of burglary in the circumstances could not be proved beyond doubt. With regard to stealing, nobody saw the two (2) appellants taking the items from the house. In convicting the appellants the trial court believed that they were the ones who broke into the house of the complainant, kept the stolen items at the house of PW3 which was under construction and on the material date they had gone to collect the items to take them to a place best known to them. It is in evidence that there were people working for PW3. On Cross-examination PW3 said the "*fundi*" was not working over the weekend but he could not tell when the items were left at the house. The mason who was working at the house was an important witness who could have shed some lights on how the items got into the house.
11. Stating that the appellants knew the items were hidden inside the house of PW3 the trial court stated thus:-

"***The accused persons knew the items had been hidden in the house of PW3. That is why they came to collect the same. The accused persons never gave any explanation as to how they came into possession of stolen items and/or how they knew that the items were inside the house of PW3"***

12. The doctrine of recent possession was expounded in the case *of* ***Isaac Nanga Kahiga*** *alias* ***Peter Nganga Kahiga versus Republic, Criminal Appeal No. 272/2005*** where the Court of appeal stated thus:-

"***It is trite law that before the court of law can rely on the doctrine of recent possession as a basis of conviction in a criminal case, the possession must be positively proved. In other words, there***

***must be positive proof, first that the property was found with the suspect, and secondly that the property is positively the property of the complainant, thirdly that the property was recently stolen from the complainant. The proof as to time, as has been stated over and over again, will depend on the easiness with which the stolen properties can move from one person to another. In order to prove possession, there must be acceptable evidence as to the alleged stolen property, and in our view, any discredited evidence on the same cannot suffice no matter how many witnesses."***

13. Guided by the authority the issues to be determined will be whether;-

i. The complainant positively identified the properties in issue as his.
ii. The property was recently stolen.
iii. The property was found with the appellants.
iv. The explanation given was plausible.

14. In his testimony PW1 identified some 19 plates, 32 cups, one camera, one blanket, 2 pairs of shoes, 3 bed-sheets, 10 seat coves, 1 bag, 3 bows and two (2) seat covers. On cross-examination he said the plates had a letter "J" inscribed thereon. PW2 had put a sticker on the speaker. It can be taken that the identification was positive.
15. PW1 said that the last time he was at the house was during Easter Holidays. This would suggest that he was there between the months of March-April, 2011. His brother, PW2 stayed in his home. It was his testimony that he left the home on the 26th June, 2011. He later learnt of the breakage on the 11/10/2011. Circumstances would show that the goods were stolen between one and fifteen days prior to being recovered. The uncertainty established may mean that the goods in issue may have been recently stolen.
16. The prosecution stated that the appellants had knowledge of where the items were hence in possession of the same. The appellants were not seen keeping the items in the house of PW3 which was under construction. These was a gap left by the prosecution who failed to call the persons who were constructing the house as witnesses to tell the court whether or not they had knowledge of the presence of the items at the house. According to the prosecution witnesses, the appellants were seen entering the house at midnight. When they confronted them, they had taken the items. PW3 said cups and plates were inside a freezer while the blankets, bag and seat covers were inside the paper-bag. PW3 stated thus:-

"***The accuseds were then arrested together with the items. Accused 1 had a driving licence, pliers and remote control. Accused 2 was holding this stick"***

17. PW4, stated;-

***"...they then dropped the items at the door and tried to run inside. We entered and arrested the two (2). We recovered a driving licence from accused 1, pair of pliers and remote control. Accused 1 was carrying a bag. The 2nd accused wearing a helmet. He was also holding a stick."***

18. The explanation given by the appellant was that they were arrested elsewhere and taken to the house where the items were found. What is evident in the instant case is the fact that there was no proof beyond reasonable doubt that prior to being arrested the accused persons were in control *(dominion*) of the property. Evidence adduced tends to establish the fact that the appellants may have been caught attempting to take away what had been stored in the house without the consent of the person who deposited them therein. This precludes the court from making an inference that the appellants are the ones who broke into the house of Pw1 and stole therefrom. I do emphasise the fact that they may have been caught because the prosecution witnesses said that when they caught them they dropped what they carried on the floor. Some of the items were breakables. The fact that they did not break may suggest otherwise. The explanation given by the appellants in the premises may not be preposterous.
19. From the foregoing it is apparent that the case against the appellants was not proved to the

required standard. The appeal is therefore allowed; the conviction is quashed and sentence set aside. The appellants should be set free unless otherwise lawfully held.

20. Orders accordingly.

**DATED, DELIVERED** and **SIGNED** this **17th** day of **JANUARY, 2014.**

**L.N. Mutende**

**Judge**