REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

CRIMINAL APPEAL NO. 215 OF 2012 CONSOLIDATED WITH CRIMINAL APPEAL NO. 216 OF 2012

SAMUEL NDIRANGU MUCHIRI……...……..1st APPELLANT

JOSEPH MAINA KIRIKA …….2ND APPELLANT

-VRS-

REPUBLIC……..……..RESPONDENT

(From the original conviction and sentence in Criminal Case NO. 1085 of 2010 by Senior Resident Magistrate's Court at Baricho –Hon. J.N. Mwaniki(SRM)

JUDGMENT

Both appellants ***JOSEPH MAINA KIRIKA AND SAMUEL NDIRANGU MUCHIRI*** were tried and convicted in three counts with offences of church breaking and stealing contrary to **Section 306(a)** of the **Penal Code .**

The first appellant was also convicted in a fourth count with the offence of theft of motor vehicle parts contrary to **Section 297(g)**of the **Penal Code.**

In count 1, count 2 and count 3, the appellant had been charged jointly with ***MARY ANN WAMBUI*** who was at the end of the trial acquitted in each of the counts for lack of sufficient evidence.

Following the convictions each of the appellants was sentenced to serve seven years imprisonment in counts one, two and three while the first appellant was sentenced to the same term of imprisonment in count four.

The sentence were ordered to run concurrently.

Being dissatisfied with the trial court's judgment , the 1st and 2nd appellants filed their appeals separately challenging their conviction and sentence but when the appeals came up for hearing they were consolidated and hear together .

In their respective appeals , the appellants put forth several grounds of appeal raising complaints which were to a large extent similar. The same can be amalgamated and compressed to the following grounds.

1. **That the trial magistrate erred in law by convicting the appellants on the basis of insufficient evidence.**
2. **The learned trial magistrate erred in law and fact by failing to find that the 1st appellants**

constitutional rights were grossly violated as he had been kept in police custody from 25th December to 30th December 2010 a period of over 24 hours contrary to constitutional provisions.

3. **That the learned trial magistrate erred in law and in fact by failing to consider the appellant's defence and mitigation.**

Briefly , the case for the prosecution according to the evidence of PW1 ***SAMSON MUSYOKA SAMUEL*** a preacher with Salvation Army Church Kangaru is that on 29th December, 2010 he went to the church at about 6 a.m. and discovered that it had been broken into and a computer set, 34 plastic chairs and a maroon table cloth stolen. On the same day, he received some information that some chairs were on sale at Rukanga area. He proceeded there and witnessed the recovery of a computer screen (monitor) , a car battery, micro phones , mater keys , farm tools, chemicals and some seats bearing the names of Full Gospel Church from the 1st appellants house.

From the 2nd appellant's house, a computer CPU, a wall clock and twenty plastic chairs were also recovered.

According to the evidence of **PW2 BENSON MUGWERU** , on 28th December 2010 , he received information that the Full Gospell Church at Kinyaga had been broken into and on proceeding there, he confirmed that information and in addition noted that sixteen 916) plastic chairs , one table , one floor mat and two microphones had been stolen. He then went to Sagana police station to report the matter and this is when he was shown some property which had already been recovered.

Among the properties he was shown, he was able to identity eight plastic chairs, one table and one mat as some of the items which had been stolen from his church. The eight chairs bore the church's initials of K.F.G.C.K. He did not know how the items had been recovered.

PW3 ***JOSEPH WAWERU WANJOHI*** a preacher at Kenya God in Miracle Spirit Church also testified that on 29th December 2010 in the morning , he went to the church and found that the church had been broken into and some property stolen. He recalled noting that 35 plastic chairs , a wall clock, extension cables , decoration tables , flowers and a speaker had been stolen. He reported the matter to the police .

A few days later, he was called to Sagana police station where he identified thirty five plastic chairs and a wall clock as part of the property which had been stolen from the church on 29th December, 2010 . He was able to identify the chairs since they bore the church's initials of K.G.M .S which stood for Kenya God Miracle in Spirit . He did not also know how the items had been recovered.

The person who explained to the court how the properties identified by PW1, PW2 and PW3 were recovered was PW4 ***P.C. PHILIP KIGEN*** who was the investigating officer in this case.

He testified that after receiving complaints that the three churches had been broken into and several items stolen and that six batteries had been stolen from lories belonging to ***REUBEN ABERDARE CONSTRUCTION COMPANY*** , he received information on 29th December,2010 that there were some people selling plastic chairs bearing some initials at Githogondo village.

Following a tip off, he visited 1st accused's home but when he saw them approaching, 1st accused ran away. He found his wife who opened their house for him. In that house, PW4 recalled that they recovered one computer monitor(PH 700), sixteen plastic chairs of different colours and a lorry battery hidden under a bed. They also recovered two microphones hanged on the wall together with an extension cable, four bulbs and a bunch of master keys . They then went to the 2nd appellants home which he allegedly shared with his wife who was the 3rd accused in the lower court .

PW4 recalled that on seeing them, the two fled but 3rd accused went back and in their rented house they recovered one computer CPU , 20 plastic chairs, one wall clock hanging on the wall together with some

decorations. They also recovered one table, a floor mat and some extension cables .

In her evidence, PW5 ***MARGARET MUTHONI*** testified that on 29th December 2010 at around 6 a.m., the 2nd appellant called her and informed her that he had plastic chairs for sale. She went to his house and saw the chairs being offered for sale each for kshs 200. She noted that one chair had initials of K.F.G.C.K and another initials of K.G.M.S. The chairs were being kept in the 2nd appellant's aunt's house where he allegedly resided.

On the same day, the 2nd appellant also sold a total of 7 plastic chairs to PW7 ***ROSEMARY WAMBUI*** .When police recovered the chairs from her home later that day, on close scrutiny she found that the chairs had initials of K.G.M.S written in small letters.

PW6 also recalled in his evidence that on 29th December,2010 at 9 a.m., he met with the 1st appellant a person he knew previously for about 2 years ferrying some plastic chairs on a motor cycle . The 1st appellant sold to him one light blue chair at a cost of kshs 300/- explaining that he had been given the chairs to sell by an auctioneer. On inspecting the chair later, he found that it had initials of K.G.M.S

Pw 8 ***DAVID WAMBUGU*** testified as the last prosecution witness. He recalled that on 4th December 2010, he parked lorry registration number KBM 036Z at a parking lot at Rukanga.

On 5th December, 2010 he found the lorry's two batteries missing . He noted that four other batteries were also missing from other two lorries parked nearby. He reported the matter to his employer and to the police and on 29th December 2010, he was summoned to Sagana police station where he saw and identified one battery to be one of the two batteries stolen from the lorry in which he was working as a driver.

The appellants were later arrested at different times and were charged with the offences in respect of which they were convicted.

In their defence, the 1st appellant chose to give a sworn statement while the 2nd appellant gave an unsworn statement. Both did not call witnesses.

In his sworn statement, the 1st appellant denied having committed the offences claiming that he was arrested on 25th December, 2010 and charged and convicted with the traffic offence of riding a motor cycle without a licence. He was thereafter charged with the offences for which he was convicted which he knew nothing about.

On his part, the 2nd appellant also denied having committed the offences saying that he was arrested on 7th January, 2011 when a person selling to him tomatoes branded him a thief. And he was subsequently charged with the offences in question.

It is important to note that both appellants did not talk about the properties displayed in court which were allegedly recovered from their respective houses and which were identified by prosecution witnesses as some of the items stolen from some three churches who were the complainants in this case.

This being the first appellate court, it is enjoined to re-evaluate and reconsider the evidence to draw its own conclusions whether the convictions and sentence of the appellants were sound in law while of course taking into account that it did not see or hear the witnesses:-**see**

- **SIMIYU VS REPUBLIC (2005) I KLR 192**
- **KIILU & ANOTHER VS REPUBLIC (2005) I KLR 174**

After re-examining the evidence a fresh and considering the submissions made by the appellants and M/S Macharia for the state, I agree with the submission made by the 2nd appellant that the prosecution in this case relied primarily on circumstantial evidence as none of the witnesses claimed to have seen the appellant's committing any of the offences preferred against them .

I however find that the prosecution adduced sufficient evidence to prove that between the 18th December and the night of 28th and 29th December 2010, three churches were broken into at kangaroo, Kinyaga village and at Kagio Township and several properties which included branded plastic chairs, a computer set and wall clock among others were stolen.

Though there is no evidence to prove to any degree of certainty that the houses in which those items were recovered belonged to the appellants, there is unchallenged evidence from PW5 and PW7 that the 2nd appellant sold to them two and seven plastic chairs respectively on 29th December 2010. The chairs sold to PW5 bore the initials K.F.G.C.K which were abbreviations for the Kenya Full Gospel Churches of Kenya while those sold to PW7 had initials of G.G.M.S abbreviations for Kenya Gods Miracle Spirit Church.

There is undisputed evidence that the seven chairs with initials G.G.M.S chairs had been stolen from the said church on the night of 18th and 19th December 2010 about ten days earlier while those sold to PW5 bearing initials K.F.G.C.K had been stolen a few hours earlier.

As PW5's and PW7's evidence was not challenged by the appellants even in cross examination , it means that it had been established as a fact that the 2nd appellant had sold to them the plastic chairs they described in their evidence on the date alleged.

Consequently, I find that the Learned trial magistrate correctly made a finding that the appellants had been found in possession of recently stolen goods which invited the application of the doctrine of recent possession.

The doctrine of recent possession raises a rebuttable presumption that a person found in possession of recently stolen goods is presumed to be either the thief or a handler of the same knowing or having reason to believe that the property was stolen unless he can adduce evidence to the contrary by satisfactorily accounting for their possession.

In this case, the appellants just denied having committed the offences but made no attempt to explain how they had come across the stolen property especially the plastic chairs. They therefore clearly failed to rebut the presumption in the doctrine of recent possession.

In view of the foregoing, the learned trial magistrate was entitled to conclude as he did that the appellants must have participated in the theft committed in the three churches and that this is how they came into possession of the stolen plastic chairs among other properties . Besides, their conduct of running away when the first attempt to arrest them was made by PW4 accompanied by PW1 and PW6 further confirms guilty knowledge on their part. It showed that they had something to hide and this was clearly incompatible with their innocence.

I am therefore satisfied that the trial magistrate properly evaluated the evidence on record and arrived at the correct decision that the prosecution had proved the guilt of the two appellants beyond reasonable doubt. It is hence my finding that the appellants were rightly convicted in count 1 , count 2 and count 3 respectively.

As for count 4, I am of the view that the prosecution did not adduce sufficient evidence to warrant the conviction of the 1st appellant in that count.

I find that the evidence of PW8 was wanting with regard to identification of the battery which was found in the 1st appellants house as the same battery stolen from lorry registration number KBM 036Z.

He did not point to any special feature or mark in the battery that enabled him to identify it as the battery which was allegedly stolen from the afore said lorry. Identifying it through its make SHAN DOUG in my view is insufficient since it was not alleged nor proved that only lorries belonging to ***REUBEN ABERDARE CONSTRUCTION*** used those kinds of batteries and it is possible that such batteries could also be found in the open market. And though the 1st appellant did not say anything in his defence regarding his alleged possession of the battery in question , he did not have any obligation to prove his innocence. The onus was on the prosecution to prove all the charges against him beyond any reasonable doubt.

For the reasons aforesaid , I find that count 4 was not proved against the 1st appellant beyond any reasonable doubt. It is therefore my conclusion that the 1st appellant was wrongly convicted in count 4.

Lastly, the 1st appellant had complained that his constitutional rights had been violated by being detained in police custody for over 24 hours . His claim that he was arrested and held in police custody from 25th December 2010 to 30thDecember 2010 is not borne out by the court record. The record shows that he was arrested on 29th December 2010 and was arraigned in court on 31st December 2010. I have checked the calendar for the year 2010 and has noted that 30th December 2010 fell on a working day and therefore in compliance with **Article 49(1)(f)** of **Constitution,** the appellant ought to have been produced in court on 30th December 2012 .

Article 49(1)(f) of the **Constitution** requires that an arrested person be produced in court within 24 hours and if the 24 hours end outside the ordinary court hours then by the end of the next day.

From the foregoing, it is apparent that the appellant was taken to court after expiry of 24 hours when the day after his arrest fell on a normal working day. It is therefore possible that his constitutional rights under **Article 49(1) (f)** may have been violated but this by itself does not mean that his trial was a nullity.

The Court of Appeal has now held that even where there is a violation of an accused person's constitutional rights, the remedy available to such an accused person is not an acquittal but a claim for compensation in a civil suit –**see**

JULIUS KAMAU MBUGUA VS REPUBLIC CRIMINAL APPEAL NO. 50 OF 2008.

On sentence, the 1st appellant told the court that he had learnt skills while in prison and that he was now a reformed man. The 2nd appellant urged the court to allow the appeal against sentence and reduce the sentence imposed to the term already served.

The state opposed the appeal submitting that the appellants should be allowed to complete their sentences.

The record shows that the appellants were first offenders and that the property stolen was recovered and released to the complainants.

The learned trial magistrate does not seem to have considered these facts before passing sentence and had he done so, It is possible that he may have reached a different decision.

The offence for which the appellants were convicted attracts a penalty of a maximum of seven years imprisonment and imposing the maximum sentence on first offenders was rather harsh and excessive.

I am therefore inclined to allow the appeal against sentence which I hereby do. I set aside the sentence imposed in respect of count 1, count 2 and count 3 and substitute it with a sentence of 3 years imprisonment in each count with effect from the date of conviction namely 9th June, 2011. The sentences to run concurrently. It is so ordered.

C.W. GITHUA

JUDGE

DATED, SIGNED AND DELIVERED AT KERUGOYA THIS 17TH DAY OF JANUARY 2014 in the presence of:-

The 1st appellant

The 2nd appellant

Mr Sitati for state

Mbogo Court Clerk