



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 9 OF 2013**

**EMMANUEL MASILA KITHUKU ..... APPELLANT**

**VERSUS**

**REPUBLIC**

***(Being an appeal from the conviction and sentence of Hon. S.A Ogot Resident Magistrate delivered on 29/01/2013 in Mutomo Senior Resident Magistrate Criminal Case No. 217 of 2012)***

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***(Before Hon. B. Thurania Jaden J)***

**J U D G M E N T**

1. In Count I the Appellant, **Emmanuel Masila Kithuku**, was charged jointly with another with the offence of **burglary** contrary to **section 304 (2)** of the **Penal Code**.

The particulars of the offence were that on diverse nights between 25/7/2012 and 1<sup>st</sup> September 2012 at unknown time at **Mutomo Mission Hospital, Mutomo Location** in **Mutomo District** within **Kitui County** jointly with others not before court with intent to steal, broke and entered the house of **Anita MC Ternan** and did steal there in one laptop, one toaster, sandwich maker, electric battery, four plastic chairs, five bottles of wine, one bottle of gin, one bottle of whisky, three torches, one gas cylinder, two bags and combined unit of VCR/DVD all valued at Kshs.241,400/= the properties of the said **Anita MC Ternan**.

2. In Count II, the Appellant was charged jointly with another with the offence of **burglary** contrary to **section 304 (2)** and **stealing** contrary to **section 279 (b)** of the **Penal Code**.

The particulars of the offence were that on diverse nights between 22<sup>nd</sup> and 29<sup>th</sup> September 2013 at unknown times at **Mutomo Mission Hospital, Mutomo Location** in **Mutomo District** within the **Kitui County** jointly with others not before court with intent to steal broke and entered the house of **Anita MC Tarnan** and did steal therein 10 T- shirts, iron box, sandwich maker, kettle, extension cables, torch, solar lights, socks, beer, Amarula, Perrier water, food mixer, lady trousers, bulb, sweets, speakers, tissue papers, dressing gown, dressing top, bags, earrings, brooch, pendant, necklace, wines, DVD remote controls, cushions cover, towel, blouses, night dresses, toilet bag, underwears, adaptor, Sapphire all valued at Kshs.90,185/= the properties of the said **Anita MC Tarnan**.

3. In the alternative, the Appellant was charged with the offence of **handling stolen goods** contrary

to **section 322 (1) (2)** of the **Penal Code**.

4. The particulars of the offence were that on the 30<sup>th</sup> day of September 2012 at about 2.00 a.m. at **Mutomo bus terminals, Mutomo Location** in **Mutomo District** within the **Kitui County** otherwise than in the course of stealing dishonestly handled two remote controls, food mixer, iron box, electric kettle, bulb, tusker beer, sweets, Perrier water, sandwich maker, torch, solar lights, speakers, Amarula, tissue papers, extension cables, adaptor, underwears, dressing gown, socks, Sapphire, earrings, brooch, necklace, pendant, toilet bag, 9 T-shirts, trousers, night dresses, blouse, towel, wine and two bags the properties of **Anita MC Tarnan** knowing or having reason to believe them to be stolen properties or unlawfully obtained.
5. When the Appellant was arraigned before the trial court, he pleaded not guilty. After a full trial, the Appellant was convicted and sentenced to serve eight (8) years imprisonment for the offence of burglary and stealing.
6. The Appellant was aggrieved by both the conviction and sentence and appealed to this court on grounds that can be summarized as follows:-
  - v. **That there was no evidence that linked the Appellant to the offence of burglary and stealing.**
  - v. **That the stolen merchandise was not recovered from the Appellant but from a public service motor vehicle.**
  - v. **The sentence was harsh and excessive.**
7. During the hearing of the appeal, the learned counsels for the defence and for the State made oral submissions. I have duly considered the same.
8. This being a first appeal, this court is duty bound to re-evaluate the evidence and the record afresh and come to its own conclusions and inferences – See **Okeno –vs- Republic (1972) EA 32**.
9. The case for the prosecution was that on 25/7/12 the complainant, PW1 **Anita Ternan**, a HIV Co-ordinator at **Mutomo Mission Hospital** locked her house and went to **Ireland** on holiday. When she returned on 2/9/12, she found her house had been broken into.
10. On 21/9/12, the complainant left her workshop in **Nairobi**. On 29/9/12 the cleaner found the house had been broken into. The complainant was informed accordingly. The complainant returned to the house and confirmed that the goods listed in the charge sheet were missing. A report was made at **Mutomo Police Station**.
11. On the same night at about 1.00 a.m., PW5 **PC Japheth Kidiavai** of **Mutomo Police Station** received a tip off that the stolen goods would be transported that night in a motor vehicle headed for **Mbukoni area**. PW5 went to **Mbukoni bus stage** where he saw the Appellant loading some luggage into a motor vehicle. The Appellant was arrested and his luggage searched. The complainant's stolen property was found in the luggage. Documents belonging to the Appellant were also found in the luggage. The complainant identified the recovered goods as hers. After investigations the Appellant was taken to court.
12. In his defence the Appellant stated that he had worked at **Mutomo Mission Hospital** for about nine (9) months then left because he was hired as a driver and then given the duties of a security officer. The following month he was arrested from **Mutomo bus stop** and escorted to the police station. The Appellant denied having been arrested with any luggage.
13. It is evident that the complainant (PW1) was not in the house when the same was broken into. Her evidence however leaves no doubt that the house was broken into on two occasions and her property stolen on the second round. The evidence of the complainant is corroborated by that of her housekeeper, PW4 **Anastasia Mueni**, and that of PW2 **Raphael Nyoka** and PW3 **Josephine Nzangi** who both worked at **Mutomo Mission Hospital** and visited the scene. The Investigating Officer (PW5) **P.C. Japheth Kidiavai** also visited the scene and confirmed the house had been broken into and goods stolen during the second break in. However, there is no evidence to show whether the break in and the theft was during the day or during the night.
14. The evidence of the Investigating Officer (PW5) is that after receiving the tip off, he proceeded to lay an ambush at the bus stage where he saw the Appellant arrive at the bus stage on a motor cycle in which he was a passenger. It was the evidence of the Investigating Officer that he saw the Appellant load some luggage from the motor cycle into a public service motor vehicle. That he arrested the Appellant and upon checking the luggage, he found the same contained the complainant's stolen property.

According to the Investigating Officer he made an inventory of the recovered goods. The recovered property was produced in court as an exhibit together with document bearing the names of the Appellant which were also found to the same luggage. The complainant identified the recovered property as hers. It is noted that the recovered properties are personal effects and there could be no mistake in the identification of the same. The evidence of the Investigating Officer is that there were security lights at the bus stage and moonlight and that he was only about 15 metres from the Appellant and could see the Appellant clearly and hear the conversation between the Appellant and the conductor of the public service motor vehicle.

15. The evidence of the Investigating Officer (PW5) is corroborated by that of **PW6 Mayabani Kioli** whose evidence was that he saw the Appellant loading some luggage into the motor vehicle and also witnessed the arrest. The evidence of PW6 is that there was light and he saw the Appellant as both of them were in the same motor vehicle. Although PW6 did not state the source of light, the evidence of PW5 established that there were security lights at the bus stage.
16. Although the Appellant denied the offence and stated that he was not the one loaded the luggage into the motor vehicle, his position cannot be believed in view of the strong evidence adduced by PW5 and PW6. Even the books and other documents found inside the luggage and produced as exhibits bore the name of the appellant.
17. Although the Appellant was found with the goods on the night of 30/9/2012 at 1.00 a.m., it is not clear from the prosecution's evidence whether the break in was during the night or during the day. The theft took place on diverse dates between 22<sup>nd</sup> and 29<sup>th</sup> September 2012. The goods could have easily changed hands during the said period. The doctrine of recent possession is therefore not applicable in this case. However, the circumstances of the arrest and the personal nature of the goods stolen leave no doubt that the Appellant must have known that the same were unlawfully obtained. The Appellant was therefore guilty of handling stolen property.
18. Consequently, I substitute the conviction by the lower court with the conviction in the alternative court of handling stolen goods contrary to **section 322 (1) (2)** of the **Penal Code**. The sentence of eight (8) years is harsh and excessive. I substitute the same with a sentence of three years imprisonment. Orders accordingly.

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**B. THURANIRA JADEN**

**JUDGE**

**Dated and delivered at Machakos this 20<sup>th</sup> day of February 2014.**

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**B. THURANIRA JADEN**

**JUDGE**