



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 109 OF 2013**

**BENSON SECHERE ..... APPELLANT**

**V E R S U S**

**REPUBLIC ..... RESPONDENT**

*(Appeal against the judgment of [J. K. NG'ENO, CM] dated 10.2.12 in the Chief Magistrate's Court at Kakamega in Criminal Case NO. 56 of 2012)*

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

The appellant is charged with the offence of breaking into a building and committing a felony contrary to **section 306 (a)** of the **Penal Code**. The particulars of the offence were that the appellant and another on the night of 30/31 of December 2011 at Mathioli village of Kakamega East District he broke into the shop of one **CHARLES ODHIAMBO AMBAYE** and stole two shaving machines, mobile phones Techno T 331, Nokia 6070, Nokia 2310, ZTE S 305, Vodafone, two blankets and two chargeable torches of KShs.1500/= all valued at KShs.30,000/= the property of **CHARLES ODHIAMBO**.

The appellant also faced an alternative charge of handling stolen property contrary to **section 322 (2)** of the **Penal Code**. The appellant was convicted and sentenced to serve 5 years imprisonment. The grounds of appeal are that he pleaded not guilty to the charge, that relevant materials were not provided to him before the hearing started, his Constitutional rights were violated and he was not arraigned in court within 24 hours after arrest, there was no eye witness, the mode of recovery of the exhibits was not explained and that his alibi defence was rejected. The appellant relied on his grounds of appeal and did not make any submissions.

Miss Opiyo, State Counsel, opposed the appeal. Counsel submitted that the appellant was found in possession of recently stolen items. He tried to sell a phone to PW5 which phone had been stolen. The prosecution evidence was corroborated and stolen items were produced in court.

The record of the trial court shows that 5 witnesses testified for the prosecution. **PW1, CHARLES ODHIAMBO AMBALE**, was the complainant. He closed his barber shop on 30.12.2011 and went home. The following day he found the padlock to the back door had been removed and items were stolen from the shop. PW1 used to charge mobile phones for customers and five mobile phones were missing together with two shaving machines, two blankets and two torches. On the 4.1.2012 at around 9.00 a.m. a customer who had lost his phone informed him that he had seen his phone with somebody else. They went to Matioli market and found the appellant with a phone belonging to another customer. The appellant told them that he had bought the phones from his co-accused who was charged and jailed. The appellant was found with two phones that were identified by other customers. He was later charged with the offence.

**PW2, KENNEDY MATIBA** was sold a Nokia phone by the appellant for KShs.1,600/= on 2.1.2012. On 3.1.2012 the appellant took away the Nokia phone and gave him another phone. The police later went to him and asked for the phone and he told them he had bought the phone from the appellant. PW3, SGT JOSPHAT SAGERO, was attached to the Kakamega police station. He investigated the matter and charged the appellant. He recorded statements from witnesses. **PW4, FLORENCE MUCHIRU** took her phone for charging at PW1's shop. The next day she sent her son to go and collect but was told the phone had been stolen. The police arrested the suspects and her Vodafone phone was recovered. **PW5, APC LEONARD OBONYO**, was based at the Matioli AP post. On the 4.1.2012 the complainant

informed him that he had found a suspect. He went with the complainant to the suspect and the suspect (PW2) told them that he had bought the phone from the appellant. They went and arrested the appellant's co-accused and recovered two phones from him. One was Kabambe make while the other one was Nokia 110. The appellant's co-accused led them to the appellant and they recovered two phones from the appellant. One was Techno and the other one a Vodafone. The owners of the phones identified them.

The appellant was put on his defence and he gave sworn evidence. He stated that on the 4.1.2012 he was at home and police went to arrest him without informing him of his charges. While in custody a police officer planted two phones on him alleging that he had broken into some places and stolen the phones.

The prosecution evidence does establish that the shop of PW1 was broken into and some items including 5 mobile phones were stolen. The main issue for determination is whether it is the appellant who broke into the premises and stole the phones. According to the prosecution evidence the incident occurred on the night of 30/31 December 2011. The phones were recovered four days later. PW2 testified that he bought his phone from the appellant. The phone was later replaced with another one. According to PW5 the appellant was found with 2 phones. PW4 identified her Vodafone phone which was recovered from the appellant. From the evidence on record it is established that the appellant was found with the stolen items. The trial court applied the doctrine of recent possession and convicted the appellant on the main count. According to PW1 he used to work with the appellant before and it is clear the appellant knew that there were phones being charged in PW1's shop.

The phones were recovered 4 days later. The defence evidence did not raise any doubt on the prosecution case. The trial court found it to be a mere denial and I agree with the finding of the trial court. The doctrine of recent possession does apply as the appellant did not provide any satisfactory explanation as to how he came into possession of those phones. The appeal lacks merit and same is disallowed. The sentence is not harsh.

**Delivered, dated and signed at Kakamega this 18<sup>th</sup> day of February 2014**

**SAID J. CHITEMBWE**

**J U D G E**