



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT EMBU**  
**CRIMINAL APPEAL NO. 78 OF 2013**

JOSEPH MURIITHI NJIRU .....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

**From original conviction and sentence in Cr. Case No. 628 of 2012 at the Principal Magistrate's Court Runyenjes by HON. J.P. NANDI – SRM on 27/11/2012**

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

JOSEPH MURIITHI NJIRU the Appellant herein was charged with the offence of House Breaking contrary to section 304(1) and stealing contrary to section 279(b) of the Penal Code. The particulars of the charge as stated in the charge sheet were as follows;

***“On the 14<sup>th</sup> day of May 2011 at Kiaragana village in Embu County, jointly with others not before Court, broke and entered the dwelling house of JOSEPH IRERI NJUE with intent to steal therein, and did steal therein one bicycle, 100 kilograms of beans and two scientific calculators all valued at kshs.15,600/= the property of the said JOSEPH IRERI NJUE”.***

1. The Appellant pleaded not guilty and the matter proceeded to full hearing and he was eventually convicted and sentenced to three (3) years imprisonment on the 1<sup>st</sup> limb and two (2) years on the 2<sup>nd</sup> limb. The sentences were to run concurrently.
2. He was dissatisfied with the Judgment and filed this appeal against the conviction and sentence raising the following grounds.
  1. ***That the pundit trial Magistrate erred in both law and facts when he failed to consider that the alleged exhibit was not found in the Appellant's possession.***
  2. ***That the pundit trial Magistrate still erred in both points of law and facts when he failed to consider that NO inventory form was produced before the Court to support the police on the said recovered exhibit.***
  3. ***Still, the pundit trial Magistrate erred in both points of law and facts when he failed to consider that the accused was not found at the scene of crime.***
  4. ***That the pundit trial Magistrate still erred in both points of law and facts when he failed to consider that the accused was not found at the scene of crime.***
  5. ***That the pundit trial Magistrate still erred in both points of law and facts when he failed to consider that vital witnesses in this case were not summoned to give their evidence.***

6. ***That the pundit trial Magistrate finally rejected the Appellant's defence on weak reasons leaving section 169(1) being violated.***
3. The Prosecution case is premised on the evidence of three witnesses. PW1 (Joseph Ileri Njue) arrived home on 13/5/2011 and found the padlock of his door having been removed. Missing from his house were 1½ kgs of beans, 2 calculators and his bicycle. He reported the matter to the Assistant chief (PW2).
4. On 11/7/2012 PW2 (Emily Wangari Kanyua) mobilized a group of about 20 people to comb the village as there had been some theft. She went with this group to the Appellant's home where they found him with his mother.
5. The Appellant's mother broke the door to the house and found therein several bicycles. PW1 identified one of them as his stolen one (EXB1). PW1 was able to identify his bicycle by the welded rear supporter.
6. The Appellant was arrested and escorted to the police station where he was received by PW3 (PC Chogo Serem). PW3 also received the bicycle (EXB1).
7. The Appellant in his unsworn defence denied the charges saying his house was searched on 11/7/2012 morning but nothing was recovered. Later they came to his home when those he was with told him he had PW1's bicycle, and they even threatened to lynch him. He told them he found the bicycle with Mwenda, but it was planted on him.
8. The learned trial Magistrate found that the Appellant had been found in possession of the stolen bicycle and his explanation was wanting and unreasonable. He therefore presumed that it was the Appellant who had broken and entered into PW1's house and stole therefrom.
9. In his written submissions the Appellant abandoned his appeal on conviction and he only pursued his appeal on sentence. He asked the Court to release him as he has served 17 months which has sufficiently reformed him.
10. On behalf of the State M/s Mbae opposed the appeal. She submitted that there was evidence of a breakage into PW1's house. His stolen bicycle was found in the Appellant's house. He did not explain the possession. PW1 identified his bicycle.
11. This is a first appeal and this Court is enjoined to re-evaluate and re-consider the evidence afresh and arrive at its own conclusion while bearing in mind that it did not hear nor see the witnesses. Even though the Appellant has withdrawn his appeal on conviction I will want to satisfy myself that he was properly convicted.
12. I am guided by the case of ***SOKI –V- REPUBLIC [2004]2 KLR 21*** where the Court of appeal stated thus;

***“It is the duty of a first appellate Court to remember that parties are entitled to demand of it a decision on both questions of fact and of law, and the Court is required to weigh conflicting evidence and draw its own inference and conclusions bearing in mind always that it has neither seen nor heard the witnesses and make due allowance for this”.***

13. I have considered the submissions by both the Appellant and the State together with the grounds of appeal. I have equally considered the evidence on record, and now proceed to deal with the appeal.
14. There was no one who saw the Appellant breaking into and stealing from PW1's house. The evidence linking him to this incident is the recovery of PW1's bicycle.
15. In order to rely on the doctrine of recent possession the Court must be satisfied that;
  - i. The property was found with the suspect
  - ii. The complainant properly identified the property as his/hers
  - iii. The property was stolen from the complainant
  - iv. The property was recently stolen from the complainant.

I relied on the case of ***ARUM –V- REPUBLIC [2006]1 KLR 233*** in framing up what the Court must be satisfied with. The issue for determination is therefore whether the Appellant was found in possession of PW1's recently stolen bicycle.

16. From the evidence, it's clear that PW1's house was broken into in his absence. He reported the incident to the assistant chief (PW2) the same day i.e. 14/5/2011. This was confirmed by PW2.
17. It was not until 11/7/2011 when PW2 took action. Some theft had occurred in the village again. A number of villagers including PW1 were involved in the exercise of searching people's houses for stolen items.
18. PW2 was involved in this exercise. Recovered from the home of the Appellant were four bicycles. PW1 only identified one of them as his. He explained that its rear supporter had been welded.
19. The same was identified in Court by PW1. The bicycle was recovered after two months which was "**recent**"
20. In as much as the Appellant in his defence said he told those who had wanted to lynch him that he found the bicycle with Mwenda and that it was not true that he had stolen it.
21. It is true that some witnesses who witnessed the recovery were not called as witnesses but that does not shake the testimony of PW1 and PW2. They are clear that the bicycle was recovered in a house at the Appellant's home and it was his mother who broke the door for them.
22. At that point of recovery it was now the Appellant to explain his possession of PW1's bicycle. He did not. The Mwenda he mentioned was unknown. I do find that the conditions to be satisfied as per the case of **ARUM –V- REPUBLIC (supra)** were satisfied. Grounds 1-4 must therefore fail.
23. As for grounds 5 the learned trial Magistrate's Judgment shows why the Appellant's defence was rejected. It identified the issue for determination and indeed determined it. Ground 5 also fails.
24. For the reasons stated above I find that the Appellant was found in possession of PW1's recently stolen bicycle. He did not offer any satisfactory explanation for the possession. The learned trial Magistrate properly directed himself on this and made a correct presumption that the Appellant was the person who broke into PW1's house and stole therefore. I therefore find that he was properly convicted.
25. On sentence I would only state that the stolen bicycle and beans were erroneously valued at shs.15,600/=. The reason is that though the charge sheet shows that the stolen beans were 100kg, PW1 himself said the beans stolen were 1½ kgs and this Court takes that to have been the position. Considering what was stolen and what was recovered I think the sentence was a bit too harsh. The Appellant was also a 1<sup>st</sup> offender. The Appellant has been in Prison since 27/11/2012 i.e. 17 months. He has served sufficient punishment to teach him a lesson, which I believe he has learnt. I uphold the conviction but set aside the sentence. The sentence is substituted with that of "**the period already served**". To that extent only does the appeal succeed.

**DATED & SIGNED AT EMBU THIS 29<sup>TH</sup> DAY OF APRIL 2014**

**H.I. ONG'UDI**

**J U D G E**

**DELIVERED IN OPEN COURT AT EMBU ON 30<sup>TH</sup> APRIL 2014 ON BEHALF OF JUSTICE H.I. ONG'UDI BY;**

**D.S. MAJANJA**

**JUDGE**