



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL APPEAL NO. 50 OF 2013

BETWEEN

PATRICK KIRIMI KATHURI APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the original conviction and sentence in Runyenjes Criminal Case No. 434 of 2010 by Hon. J.P. Nandi, Ag. SRM on 11th December 2012)

JUDGMENT

1. The appellant together with two other accused were charged with the offence of burglary contrary to **section 204(3)** of the **Penal Code (Chapter 63 of the Laws of Kenya)** and stealing contrary to **section 279(g)** of the **Penal Code**. The particulars of the offence were that on 2nd June 2010 at Runyenjes Location, Embu East District within Embu County, the appellant and two others jointly broke and entered into the dwelling house of one TGM with the intent to steal and did steal therein one LG TV Set, one DVD machine, one Meko gas cooker, three Samsung handsets and cash Kshs 13,400 all valued at Kshs 102, 798 the property of TGM.
2. The other two accused were charged with having suspected stolen property contrary to **section 323** of the **Penal Code** and handling stolen property contrary to **section 322(2)** of the **Penal Code**. After trial the appellant two co-accused were acquitted and the appellant was convicted of burglary and stealing. He was sentenced to serve four year on the offence of burglary and three years on the offence of stealing. Both sentences were to serve concurrently. He now appeals against both the conviction and sentence.
3. The prosecution called 4 witnesses to prove its case. The material facts relating to the appellant were as follows. The prosecution case was that the complainant's house was broken into on the night of 1st June 2010. The complainant, PW 1, testified that his goods were missing. The house had been accessed through a glass window pane that had been removed and access gained to unlock the kitchen door. He also stated that his Samsung D900 phone had a tracker which had been activated and could be used to trace a person using it. He reported the incident to the police. PW 2 confirmed the incident when he visited PW 1's residence. When the Samsung phone was recovered, PW 1 identified it and further testified that he called his wife who told him that the phone had been used by someone. He gave the details to PW4, the investigating officer. PW3, an officer from the Department of Registration of Persons, confirmed that he received an inquiry to investigate the identity card details of the person who had used PW 1's phone. The inquiry revealed that the number used to call belonged to the 1st accused.
4. PW 4, the investigating officer, testified that after it was discovered that PW 1's phone was used by the 1st accused he proceeded to trace him. He was located and had in his possession a sim card

- plate bearing the same number which had been used to on PW 1's phone. His house was searched but he phone was not found. PW 1's mobile phone was recovered at the 2nd accused shop where she had employed the 1st accused. The 1st accused explained that he was given the phone by the appellant. The appellant was thereafter arrested based on information given by the 1st accused.
5. The accused were put on their defence. The appellant gave sworn testimony. The appellant denied committing the offence. He stated that he was not in good terms with the 1st accused who had implicated him as he had destroyed his kiosk. He stated that he did not take any phone to the 1st and 2nd accused's shop.
 6. The 1st accused, DW2, also gave sworn evidence. He stated that he worked in a shop selling phone accessories and charging phones. He knew the appellant as a regular customer who used to charge his phone and buy items. He denied that he destroyed the appellant kiosk. As regard the PW 1's phone, he testified that on 4th June 2010, the appellant came to the shop to charge the phone. The phone did not have one key pad. In order to see if it was working he inserted his sim card and concluded that it was working. He gave the phone to the 2nd accused to charge. He never used the phone again and the appellant never came back for the phone. He only came to the shop on 7th June 2010 in the company of police men.
 7. The 3rd accused, DW 3, is the wife of the owner of the shop where DW 2 was employed. Her husband was the owner of the shop. She testified that PW 1's Samsung phone was brought to the shop for charging. She was arrested when the police came to the shop to arrest the 1st accused.
 8. The learned magistrate concluded that on examination of the evidence, there was no direct evidence linking the accused with the burglary and stealing other than possession of the Samsung phone. DW2 and DW 3 were found with the phone which had been brought by the appellant for charging. The learned magistrate held that both DW 2 and DW 3 had furnished a reasonable explanation as how they came into possession with phone as they had proved that they were in the business of charging phones. He held that appellant has not offered any explanation as to how he came into possession of the mobile phone. He was thus convicted.
 9. The appellant in his petition of appeal attacks the judgment on the basis that the learned magistrate relied on the uncorroborated evidence. That he failed to consider the fact that the key exhibit was not recovered from the appellant but from other accused who were acquitted and that he failed to consider the appellant's defence. The appellant relied on written submission to support his appeal. The State supports the conviction on the ground that there was sufficient evidence to connect the appellant to the offence for which he was convicted.
 10. The duty of the court on the first appeal is to conduct an independent review of the evidence and reach its own conclusion bearing in mind that it neither saw nor heard the witnesses. It is not in doubt that there was no direct evidence linking the appellant to the burglary and theft that occurred at PW 1's residence. The case for the prosecution in the subordinate court was grounded on the doctrine of recent possession.
 11. Citing the celebrated case of ***Republic v Loughlin 35 Criminal Appeals R 69 in David Langat Kipkoech & Others v Republic Nairobi CA Criminal Appeal No. 169 of 2004 (Unreported)***, the Court of Appeal stated that the doctrine of recent possession is simply one of circumstantial evidence and that, "*if it is proved that the premises had been broken into and that certain property had been stolen from the premises and that very shortly afterwards, a man is found in possession of that property, that is certainly evidence from which the jury can infer that he is the house breaker or shop breaker.*" The facts satisfy the doctrine of recent possession which was outlined by the Court of Appeal in ***Isaac Ng'ang'a Kahiga alias Peter Ng'ang'a Kahiga v Republic CA Criminal Appeal No. 272 of 2005 (unreported)*** as follows, "*...It is trite that before a court of law can rely on the doctrine of recent possession as a basis for 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, secondly that the property is positively the property of the complainant; thirdly, that the property was stolen from the complainant and lastly, 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 property can move from one person to the other.*"
 12. The evidence of PW 1 and PW 2 is clear PW 1's house was broken into and several items, among them PW 1's phone, were stolen. The Samsung D 900 phone was recovered a week later at the

shop of DW 2 and DW 3 where it had been taken to be charged. DW2 confirms that the phone was brought to the shop on 4th June 2010. DW 3 confirmed that the phone was brought to the shop for charging. Both DW 2 and DW 3 are clear that the appellant brought the phone to their business. It was in doubt that the business of DW 2 and DW 3 was that of selling phone accessories and charging phone and the fact that phone which had been stolen was found in shop provides a direct link between the appellant and burglary and theft.

13. The appellant has argued that he was not in possession of the phone when it was recovered. In ***Gacheru v Republic* [2005] 1 KLR 688**, the Court of Appeal adopted the definition of possession in **section 4** of the ***Penal Code*** to mean that, *“being in possession of or to have in possession, includes not only having in own personal possession, but also knowingly having anything in the actual possession or custody of any other person or having anything in any place (whether belonging to or occupied by oneself or not) for the use or benefit of oneself or of any other person, and If there are one or more persons and any one or more of them with the knowledge and consent of the rest has or have anything in his or their custody or possession, it shall be deemed and taken to be in the custody and possession of each of them and further that when an accused person is found in possession of items which had been stolen a short while back the doctrine of recent possession applies.”* In this case the appellant has delivered the phone to DW 2 and DW 3 for charging and even though it was not in his physical possession, it was in the possession of another party for the appellant’s own benefit. He was therefore in possession of the phone.
14. When called upon to give a reasonable explanation why he had in his possession the stolen phone, the appellant stated he was not in good terms with DW 2. He said nothing about how the PW 1’s phone came into his possession. His defence was properly dismissed by the learned magistrate.
15. Having re-evaluated the entire evidence, I am satisfied that the conviction was properly founded on the evidence that pointed to the appellant having been involved in the offences for which he was convicted.
16. The appeal lacks merit and is dismissed.

DATED, SIGNED and DELIVERED at EMBU this 30th day of April 2014

D. S. MAJANJA

JUDGE

Appellant in person.

Ms Ing’ahidzu, State Counsel, instructed by the Directorate of Public Prosecutions for the Respondent.