



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL APPEAL NO. 7 OF 2014

TARASISIO MUGENDI NYAGA.....APPELLANT

VERSUS

REPUBLIC.....PROSECUTION

(Being an Appeal from the Conviction and Sentence by J.P. NANDI Ag. Senior Resident Magistrate Runyenjes in Criminal Case No. 578 of 2014 on 10th February, 2014)

J U D G M E N T

1. **TARASISIO MUGENDI NYAGA** the appellant herein was charged with the offence of **Burglary contrary to Section 304(2) and Stealing contrary to Section 279(b) of the Penal Code.**
2. The particulars were that the appellant **on the night of 5th day of November 2013 at Kathungui village, Kanja South sub-location in Embu County broke and entered the dwelling house of JOHNSON NJERU KARIUKI with intent to steal therein and did steal there in one television make JVC, one DVD player make Sony, one radio make Sony, and one grey handbag all valued at Kshs.21,495/= the property of the said JOHNSON NJERU KARIUKI.**
3. He faced an alternative count of **Handling stolen goods, contrary to Section 322(1)(2) of the Penal Code** whose particulars were that the appellant **on the night of 5th day of November 2013 at Kanja market, Kanja sub-location, in Embu County, otherwise than in the course of stealing, jointly dishonestly received or retained one television make JVC knowing or having reason to believe them to be stolen goods.**
4. He pleaded not guilty to both counts and the matter proceeded to full hearing. He was eventually convicted of the principal count and sentenced to 3 years imprisonment on the 1st limb and 4 years on the 2nd limb, with an order that the sentences run concurrently. The appellant was aggrieved with the judgment and has appealed against both conviction and sentence.
5. He raised several repealed grounds of appeal. A broad summary of them would be as follows:-

- (i) His constitutional rights were violated when he was arraigned in Court after 24 hours of his arrest.
 - (ii) The evidence of the recovery of the exhibits was contradictory and the person who allegedly saw him with the exhibits did not testify.
6. The prosecution relied on the evidence of four (4) witnesses. PW1 Johnson Njeru Kariuki, the complainant was on 5th November 2013 called by his mother and was informed that his house had been broken into. He rushed home and found the padlock to the door of his house broken and the door was open. Missing there from were a Sony radio, DVD, TV JVC and bag.
 7. On 10th November 2013 4.30 pm he was at Kanja Starehe bar when he went out to relieve himself. While there he saw the appellant carrying luggage in a sack. He followed him and saw

- him place his luggage behind a certain shop and leave. He went to where the luggage was left and uncovered it and found it to be his stolen JVC TV. The appellant came and attacked him. Joseph Kamwara raised an alarm and people came to his rescue and arrested the appellant whom they took to Kanja AP Camp. Police from Runyenjes were called and they re-arrested the appellant who later on managed to escape.
8. The appellant was re-arrested on 11th November 2013 and brought to the station with the complainant's DVD. He was then charged.
 9. In his unsworn defence he denied the charges and explained how he had spent the day of 10th November 2013. He stated that on this day he had gone to Kanja and went to relax under a shade but slept as he was drunk. He was woken up by PW1 and they started struggling. He then saw PW2 who was asking him why he was beating PW1. He was arrested and escorted to the APs Camp and booked in the cells then later he was taken to Runyenjes police station. He was released and went home.
 10. On 11th November 2013 he was harvesting coffee up to 2 pm when he was arrested by APs who informed him that a TV was recovered where he had been sleeping. He further stated that PW2 hates him because he said he found a dead body in his nappier grass.
 11. The learned trial Magistrate identified the issues for determination as two:-

- (i) *Whether PW1's house was broken into.*
- (ii) *whether the appellant was found in possession of PW1's stolen items.*

He answered both issues in the affirmative.

12. When the appeal came before me for hearing the appellant presented the Court with his written submissions in which he merely expounded on his grounds of appeal. On the other hand Mr. Miiri the learned State Counsel opposed the appeal saying the offence of burglary was proved and the appellant was found in possession of the stolen items five (5) days after the said burglary. He also submitted that PW1 proved ownership.
13. This is a first Appeal and this Court has the duty to reconsider and re-evaluate the evidence and arrive at its own conclusion.

Ref.

- (i) ***OKENO VS REPUBLIC [1972]EA 32***
- (ii) ***SIMIYU & ANOTHER VS REPUBLIC [2005] 1 KLR 192***

14. I have considered the submissions by the appellant and the State plus the grounds of appeal. I have equally considered the evidence on record and the findings by the trial Court. I do find that the learned trial Magistrate correctly identified the two issues for determination. However, before I evaluate the evidence, I wish to deal with the alleged violation of the appellant's rights. He was brought to Court 24 hours late. This is not a violation that would go to the root of the charges facing him to cause his release. He is at liberty to follow it up at the right forum.
15. The evidence by PW1 that his house was broken into and his properties stolen was not controverted. He also identified the JVC TV and the DVD as among the stolen items. On the JVC TV he identified a mark on the switch button. And on the DVD he identified a spot where he had used glue to repair it. He produced a receipt for the TV (EXB.3) and another for the missing Sony Radio (EXB4). I therefore agree with the learned trial Magistrate's finding on the 1st issue.
16. On the 2nd issue, the complainant (PW1) testified that he personally saw the appellant carrying something in a sack. This was on 10th November 2013. He then followed him and saw where he hid it, and after the appellant left, PW1 went to check to see what it was and found it was his missing TV (EXB1). PW2 was one of the members of public who had escorted the appellant to Kanja AP Camp as he carried the TV.
17. PW3 PC Musa Nderitu while at Runyenjes police station on 10th November 2013 received the appellant together with the TV set (EXB1) from AP officers from Kanja. The appellant escaped

- from the station but was re-arrested the next day by PW4 Sgt. Josphat Sakwa and others from a coffee plantation at his home. From his hiding was also recovered PW1's DVD (EXB2).
18. It is therefore clear from the evidence of these witnesses that the appellant was found in possession of the TV and DVD which did not belong to him. The said TV and DVD were very well identified as belonging to the complainant. In his defence the appellant denied possession claiming he was drunk and woke up to find himself struggling with PW1. Further that PW2 hates him. Infact PW2 saw the appellant only after his arrest as he carried the TV and so did cause his arrest as claimed by the appellant. The appellant himself did not offer any explanation for being in possession of stolen property.
19. The TV (EXB1) and DVD (EXB2) were recovered five (5) and six (6) days respectively after the burglary at the house of PW1. The circumstances under which the items were recovered were very suspicious. Infact when the appellant found PW1 checking on the luggage in the sack he started beating up PW1.
20. After my own re-evaluation of the evidence, I agree with the findings of the learned trial Magistrate on issue No.2. He correctly applied the doctrine of recent possession and I have no reason to make me interfere with the conviction. The sentence meted out on him is not harsh nor excessive and it is lawful. Only some of the stolen items were recovered. I therefore uphold the sentence too.
21. The upshot is that the appeal is dismissed for being without merit. The conviction and sentence are confirmed.

Right of appeal explained.

DATED, SIGNED AND DELIVERED AT EMBU THIS 30TH DAY OF JULY, 2014.

H.I. ONG'UDI

J U D G E

In the presence of:-

Mr. Miiri for State

Appellant

Njue/Kirong CC