



**IN THE HIGH COURT AT HOMA-BAY**

**CRIMINAL APPEAL NO. 42 OF 2013**

**BETWEEN**

**MICHAEL STEPHEN OKINDA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

***(Being an appeal from the original conviction and sentence in Criminal Case No. 1243 of 2011 of the Chief Magistrates Court at Homa Bay, Hon. S. Ongeri, SRM dated 20<sup>th</sup> December 2012)***

**JUDGMENT**

1. The appellant, **MICHAEL STEPHEN OKINDA**, was charged together with two of his brothers with the offence of home breaking and stealing contrary to **section 304(1)(b)** and stealing contrary to **section 279(b)** of the **Penal Code (Chapter 63 of the Laws of Kenya)**. The particulars of the charge were as follows:

*On the 11<sup>th</sup> day of December 2012 at Homa Bay Township in Homa Bay district within Nyanza province jointly broke and entered the dwelling house of DAVID OTIENO with the intent to steal from therein and did steal from therein, two laptops, one plasma TV, LG DVD player, Assorted clothing, Assorted VCDs, DVDs, CDs, two Mobile phones, make Motorola and Alcatel, a pair of black shoes, a pair of sneakers, two tubes of Nivea lotion, laptop back up cables, assorted chargers, one speaker adapter, two modems (Safaricom and Orange), necklace and earrings, and extension cables all valued at Kshs. 298,075/= property of the said DAVID OTIENO.*

2. After a full trial, the appellant was convicted and sentenced to 5 years imprisonment for house breaking and 2 years imprisonment for stealing. Both sentences to run concurrently. He appealed against the conviction and sentence on the following grounds:

- 1. That the learned trial magistrate erred in law and in fact in failing to arrive at a finding that there was no direct evidence neither circumstantial evidence linking me with the offence herein.*
- 2. That the learned trial magistrate erred in law and in fact failing to observe that I had nothing to do with the alleged exhibits because the same was not found in my possession but in another person's house, who could have been charged with the alleged offence.*
- 3. That the trial court further erred in law in failing to find that it was very necessary for the prosecution to call as a witness the person who allegedly led the police to prefer the present charges on me.*
- 4. That the trial court further erred in law in shifting the burden of proof to me while failing to take into consideration my alibi defense that was believable.*

3. PW1, the complainant, testified that on 11<sup>th</sup> December 2011 while at church he was informed that his

house had been broken into. He went home and found that his laptops, a laptop bag, TV, home theater, CDs, DVD player, shoes and mobile phone had been stolen. He was later informed that some laptops had been seen in a house. In the company of police officers he proceeded to the house of the 2<sup>nd</sup> accused (DW2) where the two laptops, which he identified as his, were recovered. DW2 led them to the house of DW3. DW3 and the appellant were in the house. In the house, they recovered the Samsung TV, cables, DVD player, clothing, shoes and a suit case.

4. PW2 a young girl residing with PW1, testified that the house had been broken into on 11<sup>th</sup> December 2012 when she came back from church at 11.30am. She confirmed that several items were missing including the television set, clothes, laptops, mobile phone and clothes. When the items were recovered, she identified them as the items that had been stolen.

5. PW5, a police officer, produced photographs of the assorted items while PW6 the investigating officer gave an account of how the recoveries were made. He confirmed that PW1 made a complaint on 11<sup>th</sup> December 2011 and detailed the items that were stolen. He visited the scene and confirmed that the house had been broken into. He later received information that someone had been trying to sell a laptop. The inquiries led him to the house of DW2 where the laptops were recovered. DW2 led them to the house of DW3 where they found DW1 and DW2. They recovered the television and DVD player and other items in the house. The accused were charged as a result of the investigations.

6. When put on his defence, the appellant gave an unsworn statement where he denied knowledge of the break in and theft. DW2 gave sworn testimony. The tenor of his evidence was that while he was playing football on 11<sup>th</sup> December 2011, the appellant came to his house, while he was away, and left the two laptops in a bag which he informed DW 2's wife he had bought. He directed them to DW3's house where DW1 was sleeping and watching the television. DW4, the wife to DW2, confirmed that the appellant came to their house with the laptops in a paper bag while DW2 was away and asked her to keep them for him as he would pick them later.

7. DW3 denied the charges. He stated that on 11<sup>th</sup> December 2011, he found the appellant in his house when he came home at about 8.30 pm. Before he could ask why the properties were brought, the police came in and arrested them. DW5, a neighbor to DW3, confirmed that on that day he saw the appellant come with a television set and bag and entered DW3's house before DW3 came home. He saw DW3 came home after the appellant had arrived.

8. The learned trial magistrate found the appellant guilty of the main charge of breaking into the house and stealing. He concluded that the DW 2 and DW 3 did not participate in the criminal act and were merely used by the appellant to hide the stolen merchandise and as a result he acquitted them.

9. As this is a first appeal, the court is enjoined to conduct its own evaluation of the evidence and come up with an independent conclusion taking into account that it neither heard nor saw the witnesses testify (see **Okeno v Republic [1972] EA 32**).

10. The appellant's complaint is that he was convicted on the basis of circumstantial evidence. Indeed, no one saw the appellant break into the complainant's house and steal the assorted items. Although the learned magistrate did not allude to it, the prosecution case rested entirely on the doctrine of recent possession. The doctrine has been elucidated in various decisions of our courts. In **Malingi v Republic [1989] KLR 225**, the Court of Appeal observed that, "*By the application of the doctrine the burden shifts from the prosecution to the accused to explain his possession of the item complained about. He can only be asked to explain his possession after the prosecution has proved certain basic facts, firstly, that the item he has in his possession has been stolen; it has been stolen a short period prior to their possession; that the lapse of time from the time of its loss to the time the accused was found with it was ( from the nature of the item and the circumstances of the case) recent; that there are no co-existing circumstances which point to any other person as having been in possession of the items. The doctrine is a rebuttable presumption. That is why the accused is called upon to offer an explanation in rebuttal, which if he fails to do an inference is drawn, that he either stole or was a guilty receiver*"

11. The evidence of breaking into the complainant's house was established by the testimony of PW1, PW2 and PW4. The fact that items were stolen was established by the testimony of PW1 and PW2.

12. Under **section 4 (a)** of the **Penal Code**, possession is defined as follows, "*be in possession' or ' have in possession ' includes not only having one's 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*" The stolen items were found in the possession of appellant, DW2 and DW3 on the same day the offence was reported. Each of them was required to provide a reasonable explanation as to their possession. DW2 and DW3 gave evidence which pointed to the fact that the items were brought to their houses by the appellant. The evidence of DW2 and DW3 was supported by that of DW4 and DW5. The laptops were taken to the house of DW2 by the appellant who said he would collect them later. The appellant did not lay claim to the items found his possession nor could he explain how they came into his possession. Consequently, the appellant's defence of alibi could not withstand the hurricane of the prosecution evidence.

13. Taking the whole evidence, I am satisfied that the conviction was well-founded on the evidence and I affirm it. Likewise, the sentence is neither harsh nor excessive.

14. The appeal is therefore dismissed.

**DATED and DELIVERED at HOMA BAY this 1<sup>st</sup> August 2014**

**D.S. MAJANJA**

**JUDGE**

Appellant in person.

Mr Oluoch, Senior Assistant Director of Public Prosecutions, instructed by the Office of Director of Public Prosecutions for the respondent.