

IN THE HIGH COURT OF KENYA AT MURANG'A

CRIMINAL APPEAL NO 457 OF 2013

GEORGE MACHARIA KURIA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from original conviction and sentence in Kigumo SPM Criminal Case No 1420 of 2011- B Khaemba, Ag SRM)

J U D G E M E N T

1. The Appellant was convicted after trial of **breaking into a building and committing a felony therein** contrary to **section 306** as read with **section 279 (b)** of the *Penal Code*. The particulars of offence alleged that on the night of 12th and 13th December 2011 at Mukoma village, Kinyona location in Murang'a County, he broke into and entered the house of one **Paul Ndirangu Wahome**, and from therein stole 5 bags of fertilizer, 3 blankets, one jembe, one Panasonic radio, 3 sufurias, 3 shirts and one jacket, all valued at KShs 18,456/00, the property of the said Paul Ndirangu Wahome. He was sentenced to serve 5 years imprisonment on each limb, the sentences to run concurrently. He has appealed against both conviction and sentence.

2. The main complaint by the Appellant in his petition of appeal and in his written submissions which he tendered to court at the hearing of the appeal (he was unrepresented) is that the evidence laid before the trial court by the prosecution was not sufficient to support the conviction. He has pointed out that there was no evidence that the complainant's house had been broken into; that the arresting officers, who also allegedly recovered the stolen items, did not testify.

3. Learned State Counsel for the Respondent supported the conviction and sentence. She submitted that the evidence laid by the prosecution before the trial court was credible; that the stolen goods were found in the Appellant's house, notwithstanding that the evidence did not place him at the scene of the crime; that there was proper identification of the stolen goods; and that the Appellant's explanation for his possession of the stolen items was properly rejected by the trial court.

4. I have carefully read through the record of the trial court, including its judgment. It is my duty as the first appellate court to evaluate the evidence on my own and arrive at my own conclusions regarding the same. I must bear in mind though, that I neither heard nor observed the witnesses testify, and give due allowance for that fact.

5. All of two witnesses testified for the prosecution. PW1 was the complainant. His testimony was that when he returned to his house after being away for a day and night he found an inner door open and noted that various household and personal items had been stolen. He however found no evidence of his house having been broken into. He then heard that a thief had been arrested with some stolen items and was being held at the local Administration Police (AP) post. He proceeded there and he and the police, as well as the suspect (the Appellant), proceeded to the Appellant's house where he saw several items which he identified as his.

6. PW2 was a police officer from **Kigumo Police Station**. He introduced himself as the investigating officer of the case. His testimony was that he and another officer from his police station went to Gicharage AP post where he had been told that a suspect had been arrested and kept in the cells in connection with breaking into and stealing from the house of the complainant. He and his colleague

escorted the suspect to Kigumo Police Station where he was charged. PW2 further stated that the stolen items were recovered by AP officers from Gicharage AP post. He then produced in evidence the stolen items. In cross examination he stated that the information he had was that the Appellant was arrested by the AP officers while in possession of the stolen items. He (PW2) recorded those officers' statements.

7. The Appellant was convicted upon the doctrine of *recent possession* of stolen goods. Proper evidence of his connection to the stolen items should thus have been placed before the trial court. That evidence was lacking. The arresting officers who also allegedly recovered the stolen items from the Appellant never testified. No reasons were given why they did not testify. There was no evidence of the Appellant's arrest and recovery from him of the stolen items. PW2's statement that he had heard that the stolen items had been recovered from the Appellant was simply that – hearsay. PW1's alleged presence at the recovery of the stolen items, without the evidence of the police officers who allegedly made the recovery, is not sufficient.

8. In any criminal trial a proper chain of evidence is absolutely necessary. Such proper chain was glaringly lacking in the present case. There was no proper evidence of arrest and recovery.

9. In these circumstances, the conviction is unsafe and cannot be upheld. I will allow the Appellant's appeal in its entirety. The conviction is hereby quashed and the sentence set aside. The Appellant shall be set at liberty forthwith unless otherwise lawfully held. It is so ordered.

**DATED SIGNED AND DELIVERED AT MURANG'A THIS 21ST DAY OF NOVEMBER
2014**

H.P.G.WAWERU

JUDGE