IN THE HIGH COURT AT HOMA-BAY

CRIMINAL APPEAL NO. 42 OF 2014

(FORMERLY KISII HCCR APPEAL NO. 266 OF 2011)

BETWEEN

DANIEL MWITA NYAKWARA..... APPELLANT

AND

REPUBLIC ……...…....……. RESPONDENT

(Being an appeal from the original conviction and sentence in Criminal Case No. 1349 of 2010 of the Senior Resident Magistrates Court at Kehancha, Hon. T.A Sitati, DM II dated 27th July 2011)

JUDGMENT

1. The appellant, **DANIEL MWITA NYAKWARA** faced three counts breaking into a building and committing a felony namely 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 each count were as follows:

Count 1

On 27th November 2010 at Komomwamu Market in Mabera Division, Kuria West District, he jointly with other not before the court broke and entered the barbershop of JOHN MOKAMI MUTATIRO and stole therein one solar panel, 2 radio speakers, 1 inverter, 1 battery, 5 mobile phones all valued at Kshs 50,850/=.

Count 2

On 27th November 2010 at Bugambero Village of Mabera Division, Kuria West District, he jointly with others not before the court, broke and entered into the dressmaking shop of PETER NYANGABO MATIKO and stole therefrom 2 sewing machines, 8 skirts and 8 tops all valued at Kshs. 22,000/=.

Count 3

On 27th November 2010 at Bugambero Village of Mabera Division, Kuria West District, he jointly with others not before the court, broke and entered into the dress-making shop of JACKLINE MARWA OTAIGO and stole 2 sewing machines, 4 pairs of vitenges, 5 vitenge skirts and tops and assorted clothes all valued at Kshs 12,800/=.

2. The prosecution called 3 witnesses and after the trial, the appellant was convicted and sentenced to 3 years imprisonment on each count for each offence with all sentences to running concurrently. The

appellant now appeals against the conviction and sentence on the grounds set out in the petition of appeal dated 16th November 2011 and which may be summarized as follows: that the learned magistrate convicted him on the basis of unreliable evidence which had glaring contradictions which could only be resolved in his favour, that the conviction was against the weight of evidence and the sentence was harsh and unconscionable in the circumstances. The appellant supported the ground of appeal with written submissions contained in supplementary grounds of appeal.

3. Ms Owenga, urged the court to dismiss, the appeal on the ground that the prosecution proved all the elements of the offence.

4. 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)**.

5. 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. 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"*

6. PW 1, Corporal Warema, testified that on 2nd December 2010, John Mokami Mutatiro (PW 2) called him at about 6 pm, and informed him that some items he had earlier reported as stolen were being sold in Nyamosense market. In the company of officers and members of the public, they began looking for the suspect. They went to appellant's shop which was closed. They then went to the appellant's girlfriend's house where JMO, the complainant in respect of the 3rd count, identified items of clothing as hers. They proceeded to the appellant's home where his step-brother, PW 3, led them to the house where PW 2's radio speaker was recovered. The group also went to appellant's shop later and recovered a mattress and empty radio cassettes which PW 2 identified as his. All the items were produced in evidence.

7. PW 2, testified that on 2nd December 2013 at about 7.30 pm, he met the appellant at Komomwamu Market where he saw him carrying a solar battery and 2 ordinary batteries. The solar battery looked like that had been stolen from his barbershop a week earlier. He dashed to the Police Post and made the report. He accompanied the police to the appellant's girlfriend's home and later his shop where recoveries were made. He confirmed that PW 3 led them to recover one speaker. He identified all his items in court.

8. PW 3, Nyakwara Maxwell Marwa, was the step-brother of the appellant. He testified that on 2nd December 2010 at about 6 pm, the appellant came where he was playing football with his friend and told him to take a speaker to a lady JM. Police came to their place that evening and asked him to show them where he had taken the speaker. He took them to JM's house where they found the speaker on the table.

9. When put on his defence, the appellant gave sworn testimony. He stated that on 27th November 2011 at about 11 am, PW 2 came to his shop accused him of stealing his goods. When he refuted the allegation, PW 2 told him he was going to pay. A few days later while he was in Kisii, his father called him and told him his shop had been broken into by police officer who had taken his radio, batteries, compacts and shoes from his shop. He stated that the police left one speaker and since he had no use for it he told PW 3 to take it to his friend JM to use it. He learnt that PW 3 had been arrested when he was in hospital on 1st December 2010 visiting his wife.

10. The issue then is whether the prosecution satisfied its burden of proof in respect of the offences for which the appellant was charged. From the foregoing evidence, it is clear that the complainants in respect of Count 2 and 3, Peter Nyangabo Matiko and Jackline Marwa Otaigo were never called by the prosecution to testify. In convicting them the learned magistrate held, *"Despite that omission the court is satisfied that in all circumstances of this case not prejudice was occasioned [to] the accused as these items were identified and simultaneously marked by Cpl Warema as Peter and Jackline picked them out at the time of recovery."*

11. I find and hold that failure to call the two complainants was fatal to the prosecution case. First, the complainants had to establish that their buildings were broken into and certain items stolen. Second, they had to prove ownership of the stolen items. Without the opportunity to test the claims by the two claimants, the prosecution cannot be said to have established the principal facts upon which the doctrine of recent possession could be applied. It was therefore prejudicial to even call upon the appellant to defend himself against a case that had not been established. Furthermore, the evidence of PW 1 regarding what the two complainants said and did was at best hearsay evidence and therefore inadmissible to prove the ingredients of the offence. Finally, the failure to call the complainants was not explained by the prosecution. Although Peter Nyangabo Matiko was called a witness, he was stood down and not called. The court is entitled to draw an adverse inference as to why they were not called. In the circumstances, the conviction in respect on Count 2 and 3 is quashed.

12. As regards the 1st Count, PW1 and PW 2 established that the PW 2's shop had been broken into to an assorted items stolen and the matter reported to the police. The burglary took place a week prior to the finding of the items and the arrest of the appellant. Among the items claimed by PW 1 were 2 radio speakers. A radio speaker claimed by PW 2 was found in the possession of JM where PW 3 had been requested by the appellant to take it to. Although he attempted to lay claim to it by producing a manual of his radio system which he claimed had been destroyed in a fire, the learned magistrate found that the manual had no relationship to the speaker the was recovered in JM's house and thus dismissed the claim. The speaker was recovered on 2nd December 2010 while the break-in was on 27th November 2010 hence the five day period was "recent" within the doctrine of recent possession. The prosecution thus proved its case and therefore the conviction on the Count 1 is affirmed.

13. I do not find any error in the sentence imposed on count 1. It is also affirmed. For the avoidance of doubt the appellant is sentenced to 3 years imprisonment each on the 1st limb under **section 306(a)** and on the 2nd limb under **section 279(b)** of ***Penal Code*** respectively. Both sentences to run concurrently from the date of conviction and sentence.

14. As the appellant has served the sentence, he is set free unless otherwise lawfully held.

DATED and DELIVERED at MIGORI this 21st day of November 2014.

D.S. MAJANJA

JUDGE

Appellant in person.

Ms Owenga, Senior Prosecuting Counsel, instructed by the Office of Director of Public Prosecutions for the respondent.