



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KAKAMEGA**

**CRIMINAL APPEAL NO. 110 OF 2010**

- 1. **ERICK INGANGA CHRISTOPHER**
- 2. **PETER MAKOKHA WESONGA** alias **MAYOR** ..... **APPELLANTS**

**VERSUS**

**REPUBLIC** ..... **RESPONDENT**

*(Being an appeal from the conviction and sentence of B.O Ochieng SRM delivered on 28/05/2010 in Butere Senior Resident Magistrate Criminal Case No. 682 of 2008)*

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*(Before B. Thurania Jaden J)*

**J U D G M E N T**

The 1<sup>st</sup> Appellant **Erick Inganga Christopher** and the second appellant, **Peter Wesonga Makhoha** alias **Mayor** were each convicted of the offence of handling stolen goods contrary to **section 322 (2)** of the **Penal Code**.

The 1<sup>st</sup> appellant was charged together with others of the offence of breaking into a building and committing a felony contrary to section 306 (a) of the Penal Code.

The particulars of the offence were that on the 25<sup>th</sup> day of June 2008 at **Sabatia** Market, **Ibokolo** Sub-location, **Marama** Central Location, in **Butere** District within **Western** province jointly with others not before court broke and entered a building namely shop of **Edwin Eshituku Omwaka** and committed a felony therein namely theft and stole two sewing machines, make Swan and one make Emodely and one Sewing machine make South China, four men suits, women skirt suit, 3 pairs of school uniforms, assorted suits materials all valued at Kshs.124,350/= the property of the said **Edwin Eshituku Omwaka**.

In the alternative, the 1<sup>st</sup> appellant was charged with the offence of handling stolen goods contrary to **section 322 (2)** of the **Penal Code**.

The particulars of the offence were that on the 5<sup>th</sup> day of August 2008 at **Ogalo** Market in **Lukongo** Sub-location, **Lukongo Location** in **Busia** District within **Western** Province, otherwise than in the course of stealing dishonestly retained one sewing machine make South china knowing or having reason to believe it to be stolen goods.

The 2<sup>nd</sup> appellant was charged with others of the offence of breaking into a building and committing a felony contrary to section 306 (a) of the Penal Code.

The particulars of the offence were that on the 25<sup>th</sup> day of June 2008 at **Sabatia** Market, **Ibokolo** Sub-location, **Marama** Central location in **Butere** District within **Western** Province jointly with others not before the court broke and entered into a building namely shaving kiosk of **Julius Omini Omumia** and committed a felony therein namely theft and did steal therein six shaving machines, one phone battery charger, VCD Deck, make Samsung, one car radio cassette, four mobile phones Nokia one Siemen one and two Motorola, 10 charge for phones, sixteen compact cassettes all valued Kshs. 63,500 the property of the said **Julius Omini Omumia**.

In the alternative, the 2<sup>nd</sup> appellant was charged with others with the offence of handling stolen goods contrary to **section 322 (2)** of the **Penal Code**.

The particulars of the offence were that on the 5<sup>th</sup> day of August 2008 at **Makale** village in **Mayoni** Sub-Location in **Mayoni** Location in **Mumias** District within **Western** Province otherwise than in the course of stealing dishonestly jointly retained three shaving machines, one mobile battery charger knowing or having reason to believe them to be stolen.

When they were arraigned before the lower court, each of the appellant pleaded not guilty. After a full trial, 1<sup>st</sup> and 2<sup>nd</sup> appellants were convicted in the alternative count of handling stolen goods and sentenced to **ten (10)** years imprisonment each. The appellants were aggrieved by the conviction and sentence and appealed to this court. Their separate appeals were consolidated and heard together as one. This judgment is in respect of both appeals.

The prosecution case was that on the night of 25/6/2008, there was a spate of robberies at **Sabatia** market.

The shop of PW8, **Edwin Eshikutu** was broken into and goods valued at **Kshs.120,000/=** stolen. Among the stolen goods were two sewing machines. The barber shop belonging to PW3 **Julius Omini Omumia** was also broken into and assorted goods stolen including shaving machines and a phone charging machine.

A report was made to the police. The scene was visited and investigations commenced. Following a tip off, police officers proceeded to the house of the 1<sup>st</sup> appellant. A sewing machine was recovered from the house and the 1<sup>st</sup> appellant arrested. The police officers also carried out a search in the house of the 2<sup>nd</sup> appellant and recovered three shaving machines and one phone charging machine. The 2<sup>nd</sup> appellant escaped but was later arrested and charged.

In his defence, the 1<sup>st</sup> appellant stated that police officers went in his house and carried out a search but recovered nothing. He was arrested and an identification parade carried out but nobody identified him. He was then arraigned in court with the present charges which he denied.

The 2<sup>nd</sup> appellant on his defence case stated that he was arrested from his house by a police officer and escorted him to **Mumias** Police Station. He was then taken to **Butere** Police Station then charged. He denied having been found with any stolen property.

The grounds of appeal raised by the appellants can be summarized as follows:-

- **None of the exhibits were recovered from the appellant.**
- **The Trial magistrate relied on hearsay evidence.**
- **Crucial witnesses were not called by the prosecution to testify.**
- **The prosecution case was not proved beyond reasonable doubts.**
- **The trial magistrate erred in rejecting the defence case.**
- **The sentence meted out was harsh.**

During the hearing of the appeal, the 1<sup>st</sup> appellant submitted orally. He essentially reiterated the grounds of appeal.

The 2<sup>nd</sup> appellant relied on his written submissions.

Mr Oroni for the State opposed the appeal. He relied on the record.

This being a first appeal, it is the duty of the court to re-evaluate and to re-consider the evidence adduced before the trial magistrate's court so as to reach its own independent determination whether or not to uphold the conviction of the appellant. In reaching its decision, this court is required to put in mind the fact that it neither saw nor heard the witnesses as they testified and therefore cannot be expected to make any determination regarding the demeanour of the witness – See *Okeno –vs - Republic (1972) EA 32*.

The evidence of PW8 **Eshituku** and PW3 **Oruni** clearly shows that three shops were broken into and the properties stolen among them the one sewing machine, the three shaving machines and one mobile charging machine that were recovered. The recovered goods were produced in court as exhibits (Exh. 1a – d and Exh. 6). PW3 and PW8 did not know who the thieves were.

However, the evidence of PW5 **P.C. Ouma Wangala** was that following a tip off from a police informer, a sewing machine was recovered from the house of the 1<sup>st</sup> appellant while the shaving machines and a phone charging machine were recovered from the house of the 2<sup>nd</sup> appellant. PW3 the barber identified his machines by pointing out his initials “**J.O**” which he had inscribed on the same. PW8 (**Eshituku**) identified the recovered sewing machine as his property but did not point out any special features that helped him identify the same.

However, none of the appellants have laid any claim on the properties in question as theirs. Each of the appellants denied being found in possession of the recovered goods. There are however no reasons why the police officers would plant the goods in question on them. According to the evidence of the police officer (PW5), the 2<sup>nd</sup> appellant ran away from his house during the recovery exercise. This is a sign of guilt. PW10 **Cpl. David Andena Samuel** gave evidence that shows the 2<sup>nd</sup> appellant was arrested in April 2009.

Having evaluated the evidence from both the prosecution and the defence case, I am satisfied that the appellants were convicted on sound evidence. I therefore uphold the conviction.

The appellants were sentenced to **ten (10)** years imprisonment each on 28/5/2010. It is observed that the appellants were in custody during the trial before the lower court. The sentence of ten years was therefore harsh in the circumstances taking into account the value of the recovered stolen goods.

In the premises, I reduce the sentence for each of the appellants to the period already served. Each of the appellant is at liberty unless otherwise lawfully held.

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**B. THURANIRA JADEN**

**JUDGE**

Dated and delivered at Kakamega this **18<sup>th</sup>** day of **April** 2013.

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**SAID J. CHITEMBWE**

**JUDGE**

