REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

H.C. CRIMINAL APPEAL NOs.9 OF 2010 & 17 OF 2012

(An Appeal arising out of the conviction & sentence of OBAGA –PM delivered on 20th January 2010 in Busia CMC.CR.C. No.617 of 2009)

BERNARD OTIENO OPONDO…….1ST APPELLANT

STANSLAUS MANGENI NDOBI……..…..…….....……2ND APPELLANT

VERSUS

REPUBLIC…….……..…….....RESPONDENT

J U D G M E N T

The Appellants, Bernard Otieno Opondo and Stanslaus Mangeni Ndobi, were charged with two (2) others, who were however acquitted by the trial court, with two (2) counts of Breaking into a building and Committing a Felony contrary to **Section 306(a)** of the **Penal Code**. The particulars of the first count were that on the nights of 23rd and 24th April 2009 at Bumala Township in Busia District, the Appellants jointly with others not before court, broke into and entered a building, namely a bar belonging to Roselyne Wandera and committed therein a felony namely theft of assorted property named in the charge sheet all valued at Kshs.36,000/-. In the second count, the particulars of the offence were that on the nights of 26th and 27th April 2009 at Murumba Trading Centre in Busia District, the Appellants, jointly with others not before the court, broke into and entered a building namely a posho mill belonging to Beatrice Atieno Ogutu and committed therein a felony namely theft of various items listed in the charge sheet. In both

Counts, the Appellants were charge with the Alternative Charge of Handling Stolen Property contrary to **Section 322(2)** of the **Penal Code**. The Appellants pleaded not guilty to the charge. After full trial, the Appellants were convicted as charged on the two main counts. They were sentenced to serve four (4) years imprisonment in respect of the each count. The sentences were ordered to run consecutively.

The Appellants were aggrieved by their conviction and sentence and duly filed their respective appeals to this court. For the purposes of this appeal, the two separate appeals were consolidated and heard together as one. They raised more or less similar grounds of appeal. They were aggrieved that they had been convicted on the basis of the recovery of the stolen items which were however not found in their possession. They took issue with the fact that the trial magistrate had failed to consider and weigh the totality of the evidence adduced and therefore reached the erroneous determination that the prosecution had proved its case to the required standard of the law. They faulted the trial magistrate for failing to consider their alibi defence which actually exonerated them from the crime. They complained that they were not present when the stolen goods were allegedly recovered from their respective houses. In the

circumstances, the Appellants urged the court to allow their respective appeals, quash their convictions, and acquit them of the charges.

During the hearing of the appeal, the 1st Appellant told the court that he had abandoned his appeal on conviction. He told the court that he admits committing the offence. He submitted that while at prison, he had reformed and had even learnt a craft. He urged the court to exercise leniency on him. He pleaded with the court to reduce his sentence. He promised never to commit a criminal offence again. On his part, the 2nd Appellant, apart from filing written submission in support of his appeal, made oral submission urging the court to allow his appeal on both conviction and sentence. He submitted that he was convicted on the basis of the evidence which was adduced by the prosecution witnesses which was to the effect that the stolen goods were found in his house. He told the court that his wife, a co-accused in the lower court, had testified that it was the 1st Appellant who had taken the said goods to his house. He submitted that there was no evidence linking him to the said stolen goods. He was emphatic that none of the prosecution witnesses adduced any evidence which connected him with the two offences. He therefore urged the court to acquit him of the two charges.

This being a first appeal, it is the duty of this court to reconsider and to reevaluate the evidence adduced before the trial court so as to arrive at its independent determination whether or not to uphold the conviction of the Appellants. In reaching its decision, this court must take into account the fact that it neither saw nor heard the witnesses as they testified and therefore cannot make any determination regarding the demeanour of the witnesses (see **Njoroge –Vs- Republic [1987] KLR 19**). The issue for determination by this court is whether the prosecution adduced sufficient evidence which established the guilt of the Appellants to the required standard of proof beyond any reasonable doubt on the charges of burglary and theft.

What are the facts of this case? PW1 Roseline Takaa worked as a bar maid in a bar known as Flora Bar at Bumala Trading Centre. She recalled that on 23rd April 2009 at about 6.30 p.m. she closed the bar and went home. On the following day in the morning, when she returned to the bar she found the door having been broken. The door was ajar. She entered the bar and discovered that the padlock had been broken and several items stolen. Among the items which were stolen were a briefcase belonging to PW2 Africanns Odhiambo Oyugi. PW2 had on the previous day left the briefcase under the custody of PW1. Also stolen were two crates of beer and one bag of maize. PW1 made a report of the break-in and the theft to Bumala Police Patrol Base. She also informed PW2 of the theft. According to PW2, upon learning of the theft, he informed PW6 Mohammed Abdi Juma, a local community policing officer who assisted him to investigate the matter. They were able to trace the stolen maize by following the maize drops to a house within the trading centre. The maize drops were from the bar to the house. They made inquiries and were informed that the house belonged to the 1st Appellant. The 1st Appellant had however relocated to another trading centre called Sega. PW2 and PW6 went to Sega and were able to track down the 1st Appellant. They found the stolen maize in the house of the 1st Appellant. The 1st Appellant led them to a thicket where they were able to recover the briefcase which PW2 positively recognized as his. The 1st Appellant then led PW2 and PW6 to the house of the 2nd Appellant where another bag of maize was recovered under his bed.

Meanwhile, on 26th April 2009 PW4 Lydia Obuya, testified that on that evening she locked up her business premises at Mulumba Trading Centre and went home for the night. On the following day, she discovered that the posho mill were she stored some of her trade wares had been broken into and the trade wares stolen. The trade wares included bar soaps, petroleum jelly, 10 kg of sugar, and milking jelly. These items were recovered in the house of the 2nd Appellant by the police accompanied by the community policing members of the public. It was clear from the decision of the trial magistrate that both appellants were convicted essentially on the evidence on the recovery of the stolen items soon after the robbery. These items were recovered in the house of the 2nd Appellant a day after the break-in and theft.

Since the 1st Appellant is not appealing against conviction, this court will deal with the defence of the 2nd Appellant when he was put on his defence. He denied the allegation that he had participated in the break-

in and theft. While conceding that some of the stolen items were found in his house, he explained that it was the 1st Appellant that left them in his house. He denied having any knowledge that the items were stolen.

This court has reevaluated the evidence adduced by the prosecution. The prosecution entire case was predicated on the fact that some of the stolen items were recovered in the possession of the Appellants. The prosecution was relying on the doctrine of recent possession to establish its case. This doctrine is well captured by Bosire J (as he was then) in **Malingi –Vs- Republic [1989] KLR 225** at Page 226:

> "***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 have proved certain basic facts. Firstly that the item he had in his possession had been stolen; it had been stolen a short period prior to the 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 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 item. The doctrine being a presumption of fact 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 it or was guilty receiver."***

In the present case, the prosecution established to the required standard of proof that indeed some of the stolen items were found in the possession of the Appellants a day or so after the break-in and theft. The Appellants did not claim the items. Indeed, they did not object to the said items being released to the complainants. As stated earlier, as the 1st Appellant is not challenging his conviction, the evidence adduced by the prosecution against the 2nd Appellant was overwhelming. The 2nd Appellant did not deny that some of the stolen items were found in his house. He however explained that it was the 1st Appellant who took the said items to his house. This explanation does not carry favour with this court. The stolen items, including the bag of maize, were found hidden under his bed. The 2nd Appellant obviously knew that the said items were stolen hence his decision to hide them under his bed.

It was evident that the prosecution established that the 2nd Appellant was an accomplice of 1st Appellant in the break-in and theft. This court was not persuaded by the 2nd Appellant's assertion that he was an innocent receiver of the said stolen items. The circumstances under which the said items were recovered clearly points to the fact that the 2nd Appellant knew that the said items were stolen. Indeed, the presumption is that he was the one who assisted the 1st Appellant to break into the two premises and steal therefrom the said items. This court therefore finds that the prosecution did prove the case against the 2nd Appellant on the two charges of breaking and committing a felony contrary to **Section 306(a)** of the **Penal Code**. The defence of the 2nd Appellant did not dent the otherwise strong evidence adduced against him by the prosecution.

In the premises therefore, the 2nd Appellant's appeal against conviction lacks merit and hereby dismissed. On sentence, this court has considered the plea by both Appellants in regard to reduction of sentence. The Appellants were sentenced to serve four (4) years imprisonment on each of the two counts. The sentences were ordered to run consecutively. This court is of the view that, being first offenders, there was no reason why the trial court did not order the sentences to run concurrently instead of consecutively. The court is of the opinion that the said custodial sentence was harsh in the circumstances. This court will set the same aside. It will substitute it with a sentence of this court sentencing the Appellants to serve four (4) years imprisonment. The sentence shall take effect from the date the Appellants were convicted by the trial court. It is so ordered.

L. KIMARU

JUDGE

DATED, COUNTERSIGNED AND DELIVERED AT BUSIA THIS 21ST DAY OF JUNE 2013.

F. TUIYOT

JUDGE