REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

CRIMINAL APPEAL NO. 94 OF 2011

(An Appeal arising out of the conviction and sentence of E. H Keago, SRM delivered on 29th September 2011 and 5th October 2011 respectively in Busia CMCRC No. 667 of 2011)

ISACK OUNDO WANDERA.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant was charged with Burglary and stealing contrary to **Section 304(2)** as read with **Section 279 (b)** of the **Penal Code**. The particulars of the offence were that on the 8th June 2011 at Esikulu village within Busia County, the appellant broke into and entered the dwelling house of John Moi Anyembe with intent to steal therein and did steal one bicycle make Hero, one axe and a jembe all valued at Kshs.3,950/-, the property of the said John Moi Anyembe. After full trial, the Appellant was convicted on both counts and sentenced to serve seven (7) years imprisonment on each limb. The sentences were ordered to run concurrently.

The Appellant was aggrieved by both the conviction and sentence. In his petition of appeal, the appellant raised several grounds of appeal challenging his conviction and sentence. He was aggrieved that he had been convicted on the basis of recovery of stolen items which were in fact found in the possession of one the prosecution witnesses. He took issue with the fact that the bicycle that he was alleged to have stolen was in fact recovered elsewhere by the police and was at Sikulu Police Post. He faulted the trial magistrate for failing to consider the fact that the star witness of the prosecution had admitted that the store where the items were kept was unlocked and therefore the same could have been accessed by anyone. On sentence, the Appellant urged the court to take into consideration that he was suffering from epilepsy. He urged the court to exercise leniency on him. For the above reasons, the Appellant urged the court to allow the appeal, quash the conviction and set aside the sentence that was imposed on him.

This is the first appeal from conviction and sentence. This court is therefore guided by the principles enunciated in the case of **OKENO VS REPUBLIC [1972] E.A 32** where the Court of Appeal set out the duty of the first appellate court in the following terms:-

> ***"An appellant on first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (PADYA VS REPUBLIC (1957) E.A 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (SHANTILAL M. RUWALA VS. REPUBLIC (1957) E.A 570). It is not the function of the first appellate court merely to scrutinize the evidence to see if there was some evidence in support of the lower court's findings and conclusions; it must make***

its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses (See PETERS VS SUNDAY POST, (1958) E.A 424)."

In this case the prosecution called three (3) witnesses. After the close of the prosecution's case, the accused was put on his defence. The evidence before this court is that on the evening of 8th June 2011, PW1 John Moi Anyembe kept his bicycle, a jembe and an axe at a store within the compound of his employer. This is where he used to keep farm implements. He latched the door shut but did not lock it with a padlock. On the following morning, at about 6.30 a.m, he found the jembe, the bicycle and the axe missing. He notified PW2 Julius Wabwire Okello, his employer's relative of the incident. PW2 testified that he suspected that it was the appellant who had stolen the items as he (the Appellant) had previously stolen a goat from the said home. PW2 accompanied by PW1 proceeded to the appellant's home which is about 300 metres from PW1's house. The appellant was not present at home. PW1 peeped through a passage on the door and saw a jembe. He positively identified the jembe as the one which was stolen from his employer's store. PW1 then went to report the incident to the village elder and later to the police at Sikulu Administration Police Camp. He was given a police officer who accompanied him to look for the appellant.

They found the appellant splitting firewood at a neighbour's house. He was arrested. They escorted him to his house where they recovered the jembe, an axe, a baby shawl and a duster all of which were positively identified to belong to the complainant. The bicycle was however not recovered. The appellant was taken to Korinda Police Patrol Base together with the recovered items. PW1 identified the jembe as his by the markings on it. He had flattened the jembe's handle and put a rubber band on it. The jembe was produced into evidence by the prosecution (PEXH 1). He also identified the axe from a distinct piece of metal on its handle. The axe was produced into evidence by the prosecution (PEXH 2).

PW3 PC James Mutua of Korinda Police Patrol Base conducted investigations on the complaint and established that Administration Police Officers from Sikulu Administration Police camp had recovered the stolen items from the accused's house and that both the complainant and the appellant were present during the recovery. He also visited the scene and confirmed that entry into the house of the complainant was gained by opening the door of the store that the items were kept. He decided that there was sufficient evidence to charge the accused with the present offences.

In his defence, the appellant gave sworn evidence. He testified that on the material date he had woken up at 6.00 a.m and left for work at 7.00 a.m at a neighbour's home. That at about 9.30 a.m, PW1 came with two (2) police officers to the place he was working and arrested him. They escorted him to his home where they found PW2 with the jembe and the axe. He testified that the police officers then asked him for his house keys and opened the house but did not find anything connected with the theft.

The trial magistrate applied the doctrine of recent possession in finding the accused guilty. The accused was convicted on the basis that he did not give a reasonable account of how he got hold of PW1's property so soon after they had been stolen.

At the hearing of the appeal, the appellant presented written submission challenging that finding. This court has considered the said submission. It has also considered the oral submission made by Mr. Kelwon for the Prosecution. Mr. Kelwon urged the court to dismiss the appeal because the prosecution had established its case on the two (2) offences to the required standard of proof. He submitted that the stolen items were found in the Appellant's house the same day they were established to have been stolen from the complainant's house. He further submitted that the doctrine of recent possession pointed to the fact that the appellant was the perpetrator of the offence.

This court has re-evaluated the evidence adduced by the prosecution. The prosecution relied on the doctrine of recent possession to establish its case against the appellant. In his defence, the appellant denied committing the said offences. He denied the allegation the said stolen items had been found in his house. He testified that it was PW2 who was with the stolen item at the appellant's home when he was

escorted to open his house.

The presumption is that a person found with stolen goods soon after they have been stolen is the actual thief unless he gives a reasonable explanation of how he came to be in possession of the stolen goods. As was held in **MWANGI VS REPUBLIC [1989] KLR 225** at page 227 in applying the doctrine of recent possession,

> ***"The trial court has a duty to decide whether from the facts and the circumstances of the particular case under consideration the accused person either stole the item or was guilty or innocent receiver. By the application of the doctrine 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 had in his possession had been stolen; it had been stolen in 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 the circumstances of the case, recent; that there are no co- existing circumstances which point to any other person 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 a guilty receiver."***

In the present appeal, PW1 testified that in the evening of 8th June 2011 he kept a bicycle, a jembe and an axe at the store of his employer. He used to keep farm implements in the said store. On the following morning at about 6.30 a.m , he found the jembe, bicycle and axe missing. The stolen items, save for the bicycle, were recovered a few hours after they were discovered to be stolen. They were recovered in the house of the Appellant.This court has considered the defence offered by the appellant and find no merit with it. This court is satisfied that the appellant was found in possession of the stolen items. The appellant failed to displace the presumption placed upon him to explain the circumstances upon which he came to be in possession of the stolen items found in his house so soon after they had been stolen from the house of the complainant. This court holds that the prosecution proved its case on both counts of burglary and theft to the required standard of proof beyond any reasonable doubt. The appeal against conviction lacks merit and is hereby dismissed.

Matters of sentence are discretionary and unless it can be shown that in exercising the discretion the court imposing the sentence took into account extraneous matters or failed to take into account material factors, the appellate court would not interfere with the sentence that was imposed. The other consideration, of course, is where it is established that the sentence imposed was unlawful. Thirdly, if the sentence imposed is manifestly excessive in view of the circumstances of the case as to amount to a miscarriage of justice, the appellate court would interfere. ***(***See ***OGALO S/O OWUORA VS REPUBLIC (1954) 21 EACA 270, JAMES VS REPUBLIC (1950) EACA 147*** and ***STEPHEN ONDIEKI NYAKUNDI VS REPUBLIC, CRIMINAL APPEAL NO. 91 OF 2005).*** In the present appeal, the sentences that were imposed on the Appellant were lawful. Although the value of the stolen items appear on the face of it to be small, it was clear that the Appellant should be kept away from the society because he is a repeat offender. His rap sheet is as long as the arm. His appeal against the sentences is hereby dismissed.

The upshot of the above reasons is that the appeal filed by the Appellant lacks merit and hereby dismissed in its entirety. The conviction and the sentence of the trial court is hereby upheld.

L. KIMARU

JUDGE

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

F. TUIYOT

JUDGE