REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL APPEAL NO. 168 OF 2010

CONSOLIDATED WITH HCRA NO. 169 OF 2010

BONIFACE GITONGA MUCHIRA.....1ST APPELLANT

BERNARD MBUGUA NGARI.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal from the Sentence and Conviction of E.K. NYUTU Resident Magistrate Embu in Criminal Case No. 1925 of 2010 on 9th November 2010)

J U D G M E N T

BONIFACE GITONGA MUCHIRA & BERNARD MBUGUA NGARI the 1st and 2nd appellants herein were charged with the following offences.

COUNT 1

Burglary Contrary to Section 304(2) and Stealing Contrary to Section 279(b) of the Penal Code.

The particulars as stated in the charge sheet were as follows:-

1. **BONIFACE GITONGA MUCHIRA 2. BERNARD MBUGUA NGARI**: ***On the night of the 9th day of October 2010 at Mbuchi Auto Spares in Embu Township within Embu County, broke and entered the shop of SAMUEL MUCHANGI MBUCHI with intent to steal therein and did steal from therein 10 pcs motor vehicle shocks, 28 pcs motor cycle side mirrors, 20 pcs of motor vehicle side mirrors, 5 packets of silicon, one Radio make Sanyo, one DVD and one Tiger Generator all being the value of Kshs.200,000/=.***

COUNT 2

Burglary Contrary to Section 304(2) and Stealing Contrary to Section 279(b) of the Penal Code.

The particulars as stated in the charge sheet were as follows:-

BONIFACE GITONGA MUCHIRA 2. BERNARD MBUGUA NGARI: ***On the night of the 9th day of October 2010 in Embu Town within Embu County broke and entered the shop of***

BETTY WANJA with intent to steal therein and did steal from therein some Safaricom, Zain, Yu, Orange scratch cards, one crate of soda and cash 16,000 the property of the said BETTY WANJA all valued at Kshs.39,200/=

ALTERNATIVE COUNT

Handling stolen goods contrary to Section 322(2) of the Penal Code

BONIFACE GITONGA MUCHIRA 2. BERNARD MBUGUA NGARI: ***On the night of the 11th day of October 2010 in Grogon Estate Embu Township in Embu County, otherwise than in the cause of stealing dishonestly assisted in the retention of 12 motorcycle tyres and 5 packets of silicon knowing them to be stolen goods or unlawfully obtained.***

The matter proceeded to full hearing and both appellants were convicted on both counts and sentenced to 7 years each on each count. There was an order that the sentences run concurrently. Both appellants were dissatisfied with the judgment and filed these appeals raising the following similar grounds:-

1. ***The learned trial magistrate erred in both law and fact when he convicted them in this case whole relying on the evidence adduced by W3 without considering that the evidence was inconsistence.***
2. ***The learned trial magistrate gravely in points of law and fact when he convicted them while relying on insufficient recovery of stolen goods by PW3 who did not supported his evidence by producing inventory form as the provision of law has provided.***
3. ***The learned trial magistrate further erred in law and fact when he convicted them in this case while relying on circumstantial evidence adduced by PW3 which was weak and had no proper basis to base conviction as there was no search warrant was produced in support to his evidence.***
4. ***The learned trial magistrate erred in law and fact when he convicted him without considering that the prosecution failed to prove its case beyond reasonable doubt.***
5. ***The learned trial magistrate erred in both law and fact when he rejected their defence without properly explaining any good reason for its rejection and this violated the law provision under Section 169(1) of the Criminal Procedure Code.***

The Prosecution case is that PW1 and PW2 run retail shops within Embu Township. On 10/10/10 which was a Sunday PW1 passed through his shop and noticed that his goods as stated in the charge sheet had been stolen. Entry was gained through the ceiling which had been cut together with the iron sheets. PW2's shop which also neighbours that of PW1 had been broken into in the same style. A report was made at Embu Police Station. The police visited the scene and took photos and dusted for finger prints.

PW3 (an Administration Police officer) was on duty on 10/10/2010 4 p.m. when he received a report of some items hidden in a bush in Grogon. He went to the place with some officers and they laid an ambush which was not successful. They collected the items which were 12 motorbike tyres and an empty generator box EXB1-2 and took them to the police station. That night they went to lay another ambush at the suspects house. They were led by an informer. The suspects arrived and entered their house. They got to them and commenced their work. From that house were recovered five cartons of silicon from under the bed. They also recovered three (3) safety belts (EXB3&4). The house belonged to the 2nd appellant. The appellants were taken to the police station. PW4 received the exhibits together with the suspects who were then brought to court. The 1st appellant in his unsworn defence denied the charges. He also denied any knowledge of the exhibits before the court. He said he was arrested together with the 2nd appellant as they were going home. The 2nd appellant also unsworn gave similar evidence.

When the matter came before me for hearing both the appellants presented the court with written submissions which basically expound on their grounds of appeal. Ms. Ing'ahizu for the state opposed both appeals. She submitted that the appellants were found in possession of the stolen items within days of the burglaries. Other items were found in a bush near 2nd appellant's house. The appellants did not

explain their possession in their defences. She further submitted that the sentence of 7 years was lawful and lenient. I have considered all the submissions by the appellants and by the learned state counsel. I have equally considered the grounds of appeal and the evidence on record.

It is the duty of this court as a first appeal court to re-evaluate and re-consider all the evidence on record and come to its own conclusion. I am also bearing in mind that I did not see nor hear the witnesses. In the case of ***CHARO & ANOTHER VS REPUBLIC [2007] EA 43*** held thus:-

"This being a first appeal, the Court had a duty to re-evaluate the evidence, draw its own conclusions without of course ignoring the findings and conclusions of the trial court".

The evidence on record is clear that there was a burglary that occurred at the shops of PW1 and PW2. However nobody witnessed the burglary. Therefore the evidence against the appellants is the recovery of certain items allegedly identified by PW1. And the learned trial magistrate found that since PW1 identified them it followed that those who stole them were the same people who stole from PW2's shop.

I have condensed all the grounds of appeal and would wish to deal with the issue of identification of the stolen items and the appellants as the thieves. In the case of ***ISAAC NANGA KAHIGA alias PETER NGANGA KAHIGA VS REPUBLIC Criminal Appeal No. 272/05 UR*** the Court of Appeal had this to say about the doctrine of recent possession of goods.

> ***"It is trite law that before a court of law can rely on the doctrine of recent possession as a basis of conviction in a criminal case, the possession must be positively proved. In other words, there must be positive proof, first that the property was found with the suspect, and secondly that, the property is positively the property of the complainant, thirdly that the property was recently stolen from the complainant. The proof as to time, as has been stated over and over again, will depend on th easiness with which the stolen properties can move from one person to another. In order to prove possession, there must be acceptable evidence as to the alleged stolen property, and in our view any discredited evidence on the same cannot suffice no matter how many witnesses."***

The holding was also followed in the case of ***MORRIS MUTHIANI SAMMY VS REPUBLIC in Criminal Appeal No. 14/2006 UR.*** This holding brings out a few things to be established before recent possession is established. There must be positive proof that:-

I. ***The property was found with the suspect.***
II. ***The property is positively the property of the complainant.***
III. ***The property was recently stolen from the complainant.***

I wish first to deal with the element of the property being identified positively as the property of the complainants. Apparently none of PW2's items were recovered. This is what PW1 told the court as he identified his items at page 7 lines 9 -15

> ***"Two days later I was informed that some items had been recovered. I went to see 12 piki piki tyres and 5 packets of silicon gum which had been stolen. The generator was not recovered. Here are the 12 motor bike tyres, (PMFI1) 5 boxes of silicon each containing 12 pairs (PMFI2). These are my items. I had bought them shortly before the burglary. The police told me they were recovered from Grogon".***

PW2 did not identify these exhibits by any marks or by a receipts or deliveries. That was all he said. Even PW3 and PW4 had nothing to show to the court as proof that these items belonged to the complainant (PW2).

The next element I will deal with is that of whether the property was found with the suspects. The key evidence here is that of PW3. He said him and others were led by an informer to a bush, where EXB1-2 were recovered. These items were not recovered from the suspects herein. In the 2nd operation they

were again led by an informer and went to lay ambush at the house of the 2nd appellant. Where on earth was this house of the 2nd appellant? The alleged informer did not testify. How did PW3 and his team know that the house belonged to the 2nd appellant? The items (EXB.3-4) were found under the bed. If indeed it was the house of the 2nd appellant then why was the 1st appellant arrested. What evidence did PW3 have against him? In fact in his judgment the learned trial magistrate states that the house from which recoveries were made belonged to the 1st appellant. This was not the evidence by PW3! The appellants in their defence said they had been arrested on their way home at night. It was important for the prosecution to prove the ownership of the house where they allegedly recovered these items. There could be a possibility that these items were all recovered from the bush. The learned trial magistrate in his judgment at page 19 lines 12-18 states as follows;-

> ***"Given that the accused's house was but yards away from the bush where other items were found and once all these items were positively identified as having been stolen in the same transaction from the same shop, I find that the two accused are the ones who had the items in the bush and I find them to have been therefore in constructive possession of the same."***

With all due respect to the learned trial magistrate I have gone through the evidence of all the witnesses and in particular that of PW3 and I find nowhere indicated that the appellants house was but yards from the bush where other items were found. In fact there is no reference about the distance from the house to the bush. My evaluation of this evidence clearly reveals that the learned trial magistrate overlooked essential elements of establishing recent possession. And that being the basis of their conviction the same cannot be allowed to stand. I allow the appeal. The convictions on both counts are quashed. The sentence of 7

years is also set aside. The appellants to be set free unless otherwise lawfully held under separate warrants.

Orders accordingly.

DELIVERED, SIGNED AND DATED IN OPEN COURT AT EMBU THIS 11TH DAY OF SEPTEMBER, 2013.

H.I. ONG'UDI

JUDGE

In the presence of:-

M/s Ingahizu for State

Kirong/Mutero C/c