REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT KITALE.

CRIMINAL APPEAL NO. 110 OF 2011.

JOSEPH LOSIRU)

LOSURU LORE) :: APPELLANTS.

VERSUS

REPUBLIC :: RESPONDENT.

((*Being an appeal from the original conviction and sentence of T. Nzioki– SRM in Criminal Case No. 39/2011 delivered on 29th July, 2011 at Lodwar.)*

J U D G M E N T.

Joseph Losiru (appellant one) and **Losuru Lore (appellant two),** appeared before the Senior Resident Magistrate at Kakuma charged with burglary and stealing contrary to section 304 (2) and section 279 (b) of the penal code. Alternatively, they faced a charge of handling stolen property contrary to section 322 (2) of the penal code.

It was alleged that on the 16th January, 2011 at Kakuma Refugee Camp in Turkana West District, the appellants jointly with others not before the court broke and entered a store belonging to Emmanuel Korikei and stole from therein several items valued at Ksh. 167,000/= the property of the said Emmanuel Korikel.

Alternatively, otherwise than in the case of stealing, the appellants retained several items belonging to Emmanuel Korikel, knowing them to be stolen.

Both counts were denied by the appellants but after trial, they were both convicted on the main count of burglary and stealing and sentenced to serve seven (7) years for burglary and three (3) years imprisonment for stealing.

Both sentences were to run concurrently.

Being dissatisfied with the conviction and sentence, the appellants filed separate appeals which were consolidated and heard together.

At the hearing of the appeals, the appellants represented themselves and relied on their grounds of appeal contained in their respective petitions of appeal. The second appellant presented written

submissions to fortify his grounds.

Basically, the grounds of appeal by each of the appellants are more or less similar.

The Learned Prosecution Counsel, **M/s. Limo**, opposed the appeals on behalf of the state/respondent by submitting that the prosecution case remained unchallenged as the appellants chose not to cross-examine the prosecution witnesses. That, there was no defect in the charge as it was shown that the offence occurred in the night and that the stolen items were found in possession of the two appellants thereby putting into effect the doctrine of recent possession.

The learned prosecution counsel further submitted that any disparity in time was cured by section 382 of the Criminal Procedure code and contended that the present appeals lack merit.

The duty of this court at this juncture, is to re-consider the evidence and draw its own conclusion bearing in mind that the trial court had the advantage of seeing and hearing all the witnesses.

Briefly, the prosecution case was that the complainant **Emmanuel Korikel (PW1)**, closed his business premises/store within the Kakuma Refugee Camp on the 15th January, 2011 at 6.00 p.m. and retired home. He returned to the store on the following day 16th January, 2011 at 6.00 a.m. and found that the store had been broken into and several items including clothes, shoes, belts, torches etc stolen from therein. He reported to the police and on the following day (17th January, 2011) the two appellants were separately found in possession of some of the stolen goods. The first to be arrested was the first appellant. He then pointed out the second appellant who was also arrested.

James Lokaale (PW2), also a trader at Kakuma Refugee Camp confirmed that the complainant's store was broken into and items stolen from therein. He was present when the two appellants were arrested and confirmed that they were each found in possession of some of the stolen items.

P.C. Keah Rono (PW3), of Kakuma Police Station investigated the case and in the process established that some of the stolen goods were found in possession of the two appellants. He confirmed that the police were led to the second appellant by the first appellant and that the second appellant in turn led the police and others into an unoccupied house where additional stolen items were recovered.

After completion of the investigations, P.C. Keah (PW3) preferred the present charge against the appellants.

When placed on his defence, the first appellant elected his right of remaining silent while the second appellant in denying the offence indicated that he was arrested on 16th January, 2011 while riding his bicycle and after using it to carry a person who left without paying the required fare of 20/=. It was then that police officers arrested him after asking him about the person he had carried.

The second appellant contended that he did not know the first appellant and implied that he was arrested and charged without good reason. He further implied that he was not found in possession of the property allegedly stolen from the complainant.

From all the foregoing evidence as presented by the prosecution and the second appellant, it was clear that the fact that the complainant's store was burgled and items stolen from therein was not disputed and that the dispute was with regard to the identification of the person or persons involved in the burglary and theft of property.

The first appellant said nothing in his defence but he had no obligation to establish his innocence. Instead, the obligation lies with the prosecution to prove his guilt.

The second appellant expressly denied the offence and alluded to the police arresting and charging him for nothing.

However, even though there was no direct evidence against the two appellants, the circumstantial evidence adduced against them by way of recent possession of the complainant's stolen goods was sufficient and credible enough to leave no doubt in the mind of the trial court as well as this court that they were very much responsible for breaking into the complainant's store and stealing from therein. Some of the stolen items were initially found in the possession of the first appellant. He implicated the second appellant and led the police and others to him. The second appellant was found in possession of additional stolen goods. He assisted in the recovery of other goods in an abandoned or unoccupied house. Clearly, the fact of possession and recovery of some of the stolen goods from the two appellant was undisputed and was clear circumstantial evidence establishing that they were involved in the offence. They were found in possession of the stolen items and arrested a few hours after the offence. As it were, they were "caught up" by the doctrine of recent possession.

Consequently, their conviction by the learned trial magistrate was proper and lawful.

The sentence imposed against the two appellants was lawful but rather excessive on a first offender with regard to the first limb of the offence i.e. burglary.

The sentence of seven (7) years imprisonment with regard to the first limb of the offence is therefore reduced to four (4) years imprisonment for both appellants to run concurrently with the three (3) years imposed on the second limb of the offence i.e. stealing.

Save that alteration in the sentence, the two appeals are dismissed.

[Delivered and signed this 2nd day of October, 2013].

J.R. KARANJA.

JUDGE.