REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANG'A

CRIMINAL APPEAL NO. 6 OF 2012

LAWRENCE GITAU MUTHONI……..APPELLANT

-VERSUS-

REPUBLIC……..…RESPONDENT

(Being an appeal against conviction and sentence in the judgment delivered by Hon. Mutuku on 26th January, 2010 in Thika Senior Resident Magistrates Court Criminal Case No. 678 of 2009)

JUDGMENT

The appellant was charged with two counts of burglary contrary to **section 304 (2)** of the Penal Code and stealing contrary to **section 279(b)** of the **Penal Code**. In the first count, it was alleged that on the night of 18th day of May, 2009 at Saba Saba Township in Murang'a South District, within Central Province, the appellant broke and entered the stall of Samuel Murigi Gitau, with intent to steal therein and did steal therein one water pump, valued at Kshs. 18,000/= the property of Samuel Murigi. In the alternative, the appellant was charged with handling stolen goods contrary to **section 322(2) of the Penal Code** the particulars of which were that on the 28th day of May, 2009, at Saba Saba Township in Murang'a South District of the Central Province otherwise in the course of stealing, the appellant dishonestly retained one water pump knowing or having reason to believe it to be stolen goods.

In the second count, it was alleged that on the night of 27th day of May, 2009, at Saba Saba Township in Murang'a South District within Central Province, the appellant broke and entered the stall of Ephraim Wachira Kabiru, with intent to steal therein and did steal therein 25 Kilogrammes of onions, valued at Kshs. 2000/=, the property of Leah Wairimu Mwaura. In the alternative, the appellant was charged with handling stolen property contrary to **section 322 (2) of the Penal Code**. It was alleged that on the 27th day of May, 2009 at Maragua Township, Murang'a South District of the Central Province, otherwise in the course of stealing, the appellant dishonestly retained 25 Kilogrammes of onions, knowing or having reasons to believe them to be stolen goods.

Upon conclusion of the trial, the learned magistrate found the appellant guilty of the alternative count to the first count and convicted him of handling stolen property contrary to section **322(2) of the Penal Code**. The learned magistrate also found the appellant guilty of the main charge in the second count and convicted him accordingly. The appellant was sentenced to seven years imprisonment on the first count and one year imprisonment on the second count with both sentences running concurrently.

On 8th February, 2010, the appellant filed his appeal against conviction and sentence and in his petition of appeal the appellant raised the following main grounds:

1. He pleaded not guilty to the charges;

2. The learned magistrate erred in both law and fact by failing to consider the booking and the recovery of the exhibits;
3. The learned magistrate erred in both law and fact by failing to consider the way the recovery of exhibits was done in view of the contradictory evidence of how the police accessed the appellant's house;
4. The learned magistrate erred in law and in fact for failing to consider the water pump before court was not the one that the appellant was booked with;
5. The learned magistrate erred in both law and fact for failing to consider the appellant's defence;
6. The learned magistrate failed to consider the corroboration of evidence between the complainant and the arresting officers;
7. The sentence against the appellant was manifestly harsh and excessive.

The first ground of the appellant's appeal can quickly be disposed of at this stage. The appellant was convicted after a full trial and not on a plea of guilty; an argument that the appellant entered a plea of not guilty as a basis for appeal as if he was convicted on the erroneous presumption that he entered a plea of guilty is hollow and misplaced and has neither factual nor legal basis.

The second, third and fourth grounds of appeal relate to the recovery and admission of exhibits in evidence; to the extent that they relate to the same subject, those grounds can and will conveniently be disposed of together bearing in mind the issues raised in all of them.

It is necessary, as a matter of law, to evaluate the evidence on record afresh in order for this court to not only arrive at its own conclusions but also to appreciate the appellant's case and determine whether indeed the learned magistrate came to the wrong decision as the appellant wants this honourable court to believe.

From the evidence on record, it is clear that three persons complained and testified against the appellant, though the charges against him were based on two of those complaints. The first complainant, Mr Samuel Murigi Gitau (PW1) owned an agrovet shop at Saba Saba centre. He testified that his water pump model GX 160 Honda SU0103054 was intact and secure in his shop when he closed the shop for the day on 18th May, 2009. When he arrived at his shop the following day, the 19th May, 2009, he found that it had been broken into and amongst the items missing were the padlock with which he had locked the door to his shop and the water pump. He made a report of this break-in and theft to the police at Saba Saba police post, in Murang'a County.

The second complainant was Leah Wairimu Mwaura (PW2), who at the material time was a businesswoman trading in onions at Maragua, also in Murang'a county. According to Leah, on 27th May, 2009 she was told that her onions had been stolen. It is not clear from the record who it was that gave her this information but when she was told of this theft, she called and alerted her colleagues in this business to assist her trace the stolen merchandise. At some point later, she was informed that her stolen onions had been recovered; it is then that she proceeded to Maragua Police station where she found the onions and the appellant, who apparently had been arrested for theft of these onions. This witness was able to identify her onions because, according to her, they were packed in what she described as plastic sack which had been marked with initials **"HWM".** The bag or sack of onions was later produced and admitted in evidence as one of the prosecution exhibits.

The third complainant who was also engaged in the business of selling onions was Mr Ephraim Wachira (PW3). Mr Wachira had a store at Maragua and it is in his store that Leah Wairimu Mwaura (PW2) had kept her onions before they were stolen. According to this witness, although he had locked his store on 26th May, 2009, he found it opened on 27th May, 2009. He said that one Mburu called him from Maragua and told him that a man had been spotted at that centre selling onions at a half price. The witness later came to learn that this man was the appellant. Mr Wachira proceeded to Maragua Police station where he identified Leah Wairimu Mwaura's (PW2's) onions that had been stolen from his store.

Police Constable Joshua Musoti (PW4) from Maragua Police Station is the officer who initially arrested the appellant after he received information that the appellant was selling onions suspected to have been

stolen; he handed the appellant to the police from Saba Saba police post where the report of the stolen onions had been made. Corporal Peter Mutua (PW5) from Saba Saba police post corroborated this evidence and confirmed to have received information from the police at Maragua on 27th May, 2009 to the effect that the appellant had been arrested at Maragua market for having stolen onions at Saba Saba. Since the offence had been committed within the jurisdiction of Saba Saba police post he caused the appellant to be brought to Saba Saba. As part of his investigations this officer was led by the appellant to his rented house at Saba Saba centre where, together with his colleagues, they conducted a search and recovered a water pump and a bunch of 47 pieces of keys in the appellant's house. In cross-examination, the witness testified that though the appellant opened the main door to his rented house, the police had to force their way into the bedroom; it is in this bedroom that the pump was recovered.

According to this witness, on the 19th May, 2009 a report had been made at his station to the effect that a store had been broken into and a water pump stolen. This evidence corroborated the evidence of Mr Samuel Murigi Gitau (PW1), who reported the theft of his pump to the police on 19th May, 2009; Mr Gitau himself was later to identify the pump that had been recovered from the appellant's house as his pump. The pump together with the bunch of keys recovered from the appellant's house were also admitted in evidence as exhibits.

Police constable David Kyalo (PW6) from Saba Saba police post was the officer who investigated the case against the appellant; he confirmed that on 27th May, 2009 at around 3pm he received a report from Leah Wairimu Mwaura (PW2) and Ephraim Wachira (PW3) that Leah Wairimu's onions weighing 25 Kilogrammes had been stolen from Ephraim Wachira's store. When the two complainants received a report that someone at Maragua was selling onions suspected to have been stolen they proceeded to Maragua where they found the appellant in the custody of police. Since the bag in which the onions were kept had unique features, Leah Wairimu was able to identify it as hers. The investigating officer confirmed that when the appellant was brought to Saba Saba he led him and his colleagues to the appellant's house where the stolen water pump and a bunch of 47 keys were recovered. The owner of the pump, Samuel Murigi Gitau (PW1) identified the pump as his as it matched the description he had given to the police when he reported the theft on 18th May, 2009.

Up to this point, there is nothing to suggest as the appellant argues, that there was no corroboration on the part of the prosecution witnesses; I am unable to see any inconsistency between the complainants' evidence and that of the arresting officers as the appellant seems to suggest in the 6th ground of his appeal. In a nutshell, this ground has no basis.

The appellant cross-examined all the prosecution witness; what came out from the cross-examination and his defence is clear as is also clear from the evidence given in chief by the prosecution witnesses, that there was no direct evidence linking the appellant to the breaking into the 1st and 3rd prosecution witnesses' stores. I agree with the learned magistrate's finding that though there was no such evidence, the evidence that he was found in the possession of a stolen water pump and a stolen bag of onions was neither displaced by his defence nor challenged during cross-examination.

As regards the water pump, the appellant never claimed its ownership or explained how it came to his possession. There is nothing in the appellant's defence that suggests otherwise. On the issue of onions, he adopted, in his sworn evidence, the argument that he was a businessman who sold onions and pineapples. According to his testimony, one of his customers bought 3 dozens of pineapples and 28 kilogrammes of onions. He was arrested at Maragua where he had gone to collect payments for the sales he had made. According to the appellant, it was while he was waiting in his customer's stall that the purported customer came back with the police and had him arrested; the police took him away together with the onions. The appellant confirmed that indeed the police searched his house and took away his clothes. Interestingly, and as the learned magistrate correctly noted the appellant neither named his purported customer nor cross-examined any of the witnesses particularly the police or the investigating officer on this subject. While it is appreciated that it is up to the prosecution to prove its case beyond reasonable doubt, I am not satisfied that the explanation given by the appellant is sufficient to create doubt in the prosecution's case. The learned magistrate who saw and heard the appellant could not find any reason to believe the

appellant; there is nothing on record to suggest that the learned magistrate made a wrong finding on this issue. It is clear from the record that the learned magistrate duly considered the appellant's evidence but chose, as she was entitled to, not to believe him for reasons she recorded in her judgment. It is not true, as argued by the appellant in the fifth ground of his appeal, that the learned magistrate did not consider his defence.

The exhibits comprising the water pump, the onions and a bunch of keys were properly identified, presented in court and admitted in evidence as exhibits. The exhibits were recovered from the appellant and their owners not only identified them as their property but they also testified in court. Except for the bunch of keys the rest of the exhibits were released back to them.

As far as the water pump is concerned, it is appreciated that the police admitted breaking into the appellant's bedroom where they recovered the pump but there was no other alternative means available to the police if the appellant could not open the door voluntarily. Having found the pump in the appellant's house, the appellant was no less culpable for the offence for which he was charged and convicted in respect of this item simply because the police had to force their way into the appellant's bedroom where the pump was hidden. It is noted that the appellant never claimed ownership of the water pump and offered no explanation as to how he obtained it; in the absence of this explanation the only inference that could possibly be made, in view of the prosecution evidence before court, was that the water pump was stolen property and since it was found in possession of the appellant no person other than the appellant himself could be tried for the offence for which he was charged and convicted.

In the case of **R versus Thomas Henry Curnok (1914), 10 Cr. Appeal Rep.207** cited in the judgment of the court in **Zus versus Uganda (1967) E.A. 420**, a prisoner was convicted of feloniously receiving stolen property. He was sentenced to fifteen months in prison. It was held that he was properly convicted because the burden of giving a reasonable explanation was on the prisoner. In that case when the prisoner was questioned by the police, he had said that he knew nothing about the hose pipe. The next day he said that he found it by the Feeder Bridge. At his trial before court he said he had picked it up at Brislington, which was a long way from Feeder Bridge. It was held that in view of the contradictory explanations, it could not be said that the prisoner had given any reasonable explanation as to how he had come to be in possession of the hose pipe.

From the evidence laid before the court, I have no doubt that the prosecution proved beyond doubt that the appellant could possibly have been the thief of the water pump or he knew or ought to have known that the pump had been stolen. In the circumstances of this case, the learned magistrate was right in convicting the appellant on the alternative count of handling. I find this conviction consistent with the decision of the Court of Appeal for East Africa in the case of **Ratilal & Another versus Republic (1971) E.A at 577 where** the court said:

"First the handling must be of stolen goods and done otherwise than in the course of stealing. We agree that this is a necessary element which must be proved by the prosecution. The prosecution must prove that the goods are stolen and must further satisfy the court that the handling of the goods was "otherwise in the course of stealing". This altered element can, however, be proved by circumstances from which the court can infer and decide whether the offence was theft or handling of stolen goods. The prosecution should therefore always, except where the evidence positively establishes either that the act was theft or was one of handling stolen goods, lay alternative counts to cover both offences. This was done in this case."

It was also done in the present case and the appellant was properly convicted, in my view, of the alternative count of handling stolen goods.

As far as the second count was concerned, the learned magistrate correctly applied herself to the doctrine of recent possession in convicting the appellant of the offence of burglary contrary to **section 304(2)** of the **Penal Code** and stealing contrary to **section 279(b)** of **the Penal Code**. The subject in issue in this count was sack of onions packed in a particular sack or bag; it was of a particular make and had certain identification marks. The owner of this property quickly identified it when she saw it and her evidence

was corroborated by the person who had kept it for her. While it may be, as he explained, that the appellant was also engaged in onions trade, he did not explain how he came into possession of the second complainant's merchandise soon after it had been stolen. The learned magistrate was correct to apply the doctrine of recent possession and to conclude, that based on the evidence by the prosecution, the only inference that could be made is that it is the appellant had broken into Ephraim Wachira's store and stolen the sack of onions. This doctrine of recent possession has been explained in the case of **Chaama Hassan Hasa versus Republic (1976) KLR** at page 10 where the High Court (Trevelyan and Hancox JJ) explained it as follows:

"Where an accused person has been found in possession of property very recently stolen, in the absence of an explanation by him to account for his possession, a presumption arises that he was either the thief or a handler by way of receiving (though not by way of retaining)."

The appellant was found in possession of property that had been stolen the previous night and, in my view, his explanation that he was also in the business of selling onions could not rebut the presumption that indeed he had stolen the onions. In the case of **Chaama Hassan Hasa versus Republic** (supra), the court said of the conviction based on this doctrine of recent possession;

"Whether the accused should or should not be convicted, depends not simply on his possession, but on all the facts since such possession is but one aspect of the circumstantial evidence the sum total of which must be unexplainable upon any reasonable hypothesis other than that of guilt of the person charged, before a conviction can be recorded."

The facts which comprise the circumstantial evidence in this case, upon any reasonable hypothesis point to the appellant's guilt rather than his innocence.

On the question of sentence, I see no reason to interfere with the sentence meted out by the learned magistrate since it was within the law. In sentencing the appellant the learned magistrate rightly considered that the appellant was not a first offender; he had previously been convicted in **Kigumo Senior Resident Magistrates Court Criminal Case No. 1392 of 2008** for the offence of being in possession cannabis sativa and committed to probation for one year. In fact he was serving his probation sentence when he was charged with the offences for which he was convicted. All in all, the sentence was lawful, reasonable and proportional to the offences for which the appellant was convicted; it was neither harsh nor excessive.

For the reasons I have given, I find no merit in the appellant's appeal; it is, therefore, dismissed and I uphold the conviction and sentence of the subordinate court.

Signed, dated and delivered in open court at Murang'a this 29th day of November, 2013.

Ngaah Jairus

JUDGE