REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 275 OF 2010

(From Original Conviction and Sentence in Criminal Case No. 408 of 2009 of the Senior Resident Magistrate's Court at Taveta – C. N. Ndegwa, SRM)

HALELI YUSUF ……..……. APPELLANT

V E R S U S

REPUBLIC ……. RESPONDENT

JUDGMENT

1. The Appellant was convicted for the offences of house breaking contrary to Section 304(1) of the Penal Code and of the offence of stealing contrary to Section 279 of the Penal Code. He was sentenced to 8 years on each limb of the offences which sentence was to run concurrently.

2. That conviction and sentence aggrieved the Appellant who has filed the present appeal.

3. The prosecution called four witnesses. PW1 Purity Joseph Mkandoo the complainant in this matter stated that on 29th July 2009 she had gone to fetch water when a neighbour by the name Mark Odhiambo informed her that her house had been broken into. As she rushed back home, she met the Appellant who was carrying her television in a basket. The Appellant was arrested by two people. She later was to find her house had a hole which had been cut into the mud wall. She found her television and generator were missing. She identified the television by the make of Talstar which was before the Court. She said that that was the television that was recovered from the Appellant. The generator was not recovered. She confirmed that she knew the Appellant before that incident.

4. On being cross examined she stated that the Appellant had been seen by a neighbour entering into her house and was later seen carrying away the television. That was when the neighbour went to her and informed her what he had seen. PW1 also stated that PW3 Charo saw the Appellant carrying the television away and he in turn informed other neighbours. On further being cross examined she stated that when she went to the place where the Appellant had been arrested she found two other people by the name Musa and John.

5. PW2 Patrick Mwirigi said that on the material date at 11.00am he was at his home when Charo arrived at his home and informed him that he saw somebody leaving his neighbours house and that he suspected that the person was a thief. The neighbours house where that person was seen leaving was the house of Joseph Mkandoo. PW2 then proceeded to state as follows-

"He was carrying a basket. I stopped him. That person is the accused in the dock. I arrested him. Inside the basket there was a T.V. Charo arrived where I was struggling with the accused and together we took the accused to Taveta Police Station."

6. On being cross examined he stated that a person called John only came to the place where the Appellant was arrested after that arrest.

7. PW3 was on his way fetching water when he met the Appellant leaving the compound of Joseph Mkandoo. He saw the Appellant carrying something in a basket which was covered with a shirt. He then stated-

"On seeing me, accused was uneasy and I suspected that he was a thief. I went to my neighbours home and informed them. We followed the suspect and caught up with him. Patrick is the one who first got hold of the accused and arrested him."

8. He further stated that he told both John and PW2 that he had seen the Appellant carrying something which he suspected was stolen. This witness confirmed that the television before the Court was the only item of property recovered from the Appellant.

9. On cross examination this witness confirmed that he knew the Appellant before the incident only by appearance.

10. PW4 was a Police Officer attached to Taveta Police Station on the

material date at 1.30pm. While at the Police Station with other Police Officers the Appellant was brought to the Police Station under arrest. He was taken to the police station by the complainant in company of others. The Appellant was suspected to have broken into the house of the complainant and had stolen the television by the make of Talstar and generator the make of Tiger. The television was recovered and brought to the police station in a basket. The generator however was not recovered. This officer confirmed that he visited the home of the complainant and confirmed that the home had been broken into. He confirmed that there was a hole in the wall near the door by which means the Appellant gained access into the house.

11. At the conclusion of the prosecution's case the trial Court found that

the Appellant had a case to answer. The Appellant chose to give an unsworn testimony in his defence. He said that he woke up on the material date at 6.00am and he attended the Mosque. He returned home and took his breakfast in the company of his mother. Thereafter he went to his place of work where he worked as a carpenter. It was later when he went to his farm that a man approached him who wished to buy maize from him. Later on he went to have lunch at home and it was at that time when he met two young men who called him a thief. In his defence he further stated-

"I then saw the complainant in this case (Purity) come out of a house. The two young men then asked me about a generator saying that I had it. I told them that I knew nothing about the generator. An old man came to where we were and Purity told him that she was suspecting that I am the one who had stolen her generator. There was a T.V on a bicycle which was brought by the young man called John. I was arrested and taken to the bus stage where the husband to Purity was working. The husband asked me where the generator was I told him I did not know anything about the generator. The T.V was brought on a bicycle to the stage. John then left. I was then taken to Taveta Police Station where I was charged with the offence."

12. The learned Trial Magistrate in his considered judgment summarized

the evidence as follows-

"I have carefully considered the evidence on record. The accused was arrested while carrying the complainant's T.V in a basket. The TV and the basket were produced in court as exhibit 1 and 2 respectively. He was seen leaving the complainant's compound with the T.V by PW2 and PW3. It cannot therefore be true that he did not commit the offence since he was found in possession of property which had been stolen from the complainant's house a few minutes after the house had been broken into and the items listed in the charge sheet stolen from therein. It is therefore my finding that the accused is the one who broke into the complainant's house. On 29/7/2009 and after entering into the house, he stole the T.V and the generator mentioned in the particulars of the charge. I found (sic) him guilty as charged and convict him accordingly."

13. This is the first appellant Court and accordingly I will be guided by the

case **ACHIRA -VS- REPUBLIC [2003] KLR 707** where the Court of Appeal stated –

"This is a first appeal. This Court as the first appellate Court is required to reconsider the evidence, re-evaluate the same and draw its own conclusions and in doing so it should make allowance for the fact that the trial court has the advantage of hearing and seeing the witnesses see Okeno v Republic [1972] EA 32 and Ngui v Republic [1984] KLR 729)"

14. The only comment I wish to first make is that the generator was not

recovered nor was it produced before Court. That being so the

Appellant cannot be said to be the one who stole the generator. More importantly there was no evidence adduced before court to prove that the complainant did indeed own such a generator. That fact however is not material to the conviction or the sentence of the Appellant.

15. The Appellant in his grounds of appeal has submitted that the charge

he faced was defective. He submitted that the proper charge that should have been brought against him was one of house breaking contrary to Section 304 as read with Section 305 of the Penal Code.

16. The Appellant was charged with the offence of house breaking

contrary to Section 304 and the offence of stealing contrary to Section 279 of the Penal Code. The particulars of that offence are as follows-

"HARELI YUSSUF MAORO: On the 29th day of July 2009 at about 11.00am at Malukloriti B Village in Taveta District within the Coast Province broke and entered the dwelling house of PURITY JOSEPH MKANDOO with intent to steal therein and did steal T.V set make Talstar and generator machine make Tiger all valued at Kshs. 15,100/- the property of the said PURITY JOSEPH MKANDOO."

17. Bearing in mind those particulars and evidence adduced before Court

I beg to defer with the Appellants submission. As rightly submitted by the learned Counsel for the Republic Mr. Murithi the charge was clear and the particulars of the offence supported the charge. Indeed the charge complied with the provisions of Section 214 of the Criminal Procedure Code. That ground is therefore rejected.

18. The Appellant also submitted that the lower Court judgment having

not been signed by the trial Magistrate the lower Court conviction could not stand. I confirm that

I have perused the handwritten judgment of the lower Court and can confirm that the said judgment was indeed signed on being delivered by the learned Magistrate. That ground is also rejected.

19. The Appellant submitted in another ground that the evidence obtained

in his case violated his rights and was contrary to the provisions of Article 50(4) of the Constitution of Kenya, 2010. It is on that basis that the Appellant submitted that such evidence should have been excluded from his trial. The Appellant however failed to elaborate what violation he suffered. It is because of that failure that this Court finds it is unable to make a determination whether indeed there was such violation. It should however be noted that the Appellant fully participated in his trial before the lower Court and there is no one time that he raised an objection to the submission of the prosecutions evidence.

20. The Appellant submitted that the learned trial Magistrate erred in

sentencing him to eight(8) years imprisonment on each limb. Section 304 provides that the offence of house breaking on conviction would attract a maximum sentence of seven (7) years. Section 279 provides that where the things stolen is from a dwelling house and is valued in excess of Kshs. 100/- on conviction one is liable to a maximum sentence of fourteen (14) years. The lower Court in sentencing for the offence of house breaking because the offence was committed during the day, should not have sentenced the Appellant to a period in excess of seven (7) years. The other sentence of eight (8) years imprisonment for stealing was not in excess of the sentence provided by law because the maximum is fourteen (14) years imprisonment.

21. I reject the Appellant's submission that the trial Court erred by failing

to compel the witness by the name of John to appear before it. In the

Court's view the witnesses that witnessed the offence were called by the prosecution. PW3 was the one who saw the Appellant leaving the complainant's compound carrying a basket whose content was covered by a cloth. He later was to learn that the cloth was a shirt. He informed PW2 and they together apprehended the Appellant. The witness John was amongst the people that gathered after the Appellant was arrested. Such a person therefore could not have provided material evidence in this case.

22. The complainant although she did not produce a receipt of the

television that was recovered she was in the Court's view able to sufficiently identify the television. For that reason the Appellant's submission in that regard is rejected.

23. This Court finds that the recovery of the television was a proximate to

the time of the theft. The complainant went out of her house to fetch water and as she did so she was informed that her house had been broken into and on her return to her house she was able to confirm the breaking in and theft. In all the circumstances of the case this Court is satisfied that the charges of house breaking and stealing were proved beyond reasonable doubt. Indeed as was submitted by the learned Counsel for the Republic the doctrine of recent possession was relevant to this case. Lord CJ of England in the case **R -VS- LOUGHLIN 35 CR. APP. R69**. On that doctrine stated-

> ***"If it is proved that the premises had been broken into and that certain property had been stolen from the premises and that shortly afterwards a man is found in possession of that property that is certainly evidence from which the jury can infer that he is the housebreaker or shopbreaker."***

24. This decision was quoted with approval in the Kenya Court of Appeal

in the case **SAMUEL MUNENE MATU -VS- R. CRIMINAL APPEAL NO. 108 OF 2003.**

25. The trial Court was justified to infer the Appellant's guilt of the

offences that he faced. In order to justify the inference of guilt it has been held in many decisions that the culpatory facts must be incompatible with the innocence of the Accused and incapable of explanation upon any other reasonable hypothesis than that of the accused guilt. See the case **JOHN NDEGWA -VS- R MBSA CRIMINAL APPEAL NO. 88 OF 2003**. In this Court's view the prosecution's evidence of house breaking and stealing is congent and watertight. In making my own assessment of the evidence, I find that the Appellant was correctly and properly convicted of the offences. The doctrine of recent possession places the Appellant at the scene.

26. In the end the Appellant's appeal on conviction is rejected. On

sentence, the Court does hereby set aside the sentence of eight(8) years

on the offence of house breaking contrary to Section 304 and the Appellant is hereby sentenced to serve imprisonment of six(6) years for that offence. That sentence of six(6) years shall run concurrently with the sentence of stealing as per the sentence of the trial Court. For the avoidance of doubt, the trial Court's sentence of eight (8) years on the offence of stealing remains undisturbed by this appeal. It is so ordered.

Dated and delivered at Mombasa this 26th day of November, 2013.

MARY KASANGO

JUDGE