



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CRIMINAL APPEAL NO. 303 OF 2010

BENJAMIN OTIENO APPELLANT

VERSUS

REPUBLICRESPONDENT

(From original Conviction and Sentence in Criminal Case No. 331 of 2009 of the Principal Magistrate's Court at Taveta – **Hon. C.N. Ndegwa - SRM**)

JUDGMENT

The Appellant was Convicted and Sentenced to seven (7) years imprisonment for the offence of Kiosk breaking and committing a felony contrary to section 306(a) of the Penal Code.

The particulars are that on the 30th day of May, 2009 at Taveta he broke and entered a Kiosk of Berita Zawadi and stole therein assorted clothes, CD/DVD s, 5 Jean trousers, two cordray trouser, two jean shirts, three pairs of shoes, a blouse and three pairs of shoes, a blouse and three pairs of Baby clothes of the value of Ksh. 71,000/= the property of Berita Zawadi.

The appeal is conceded on the grounds that nobody saw the appellant break into the kiosk in question. Nothing was recovered from the Appellant. There was no alternative Count of handling stolen property. I have perused the record of proceedings and I am satisfied there was sufficient evidence that the Complainants Kiosk was broken into as alleged and items stolen.

There is ample evidence to the effect that the Appellant had taken a bag containing clothes, CDS, Vitenges to PW 2 one John Musyoki on 1st June, 2009 . He had told the witness to sell the clothes for him. He gave the luggage to Nicholas Musyimi to sell them. When he did not sell them he gave them to his sister. The sister later went and informed him police were looking for the luggage because it was stolen property. This was corroborated by Beatrice Muthai PW 4 who testified to have been given clothes to sell by her brother one Nicholas. These were two materials two of which were vitenges. PW 5 Ali Shaban also testified to have met the appellant on 8th June, 2009 who took to him some luggage to keet stating that he had been given same by Zawadi, the Complainant in this case. That he did sent for Zawadi to inform her about the luggage. PW 6 too testified to have been handed over 10 materials including vitenges to sell by one Nicholas Musyimi. PW 7 testified to have been given CDS by the appellant who was his boyfriend. Later police went and arrested her.

I am satisfied that there is overwhelming evidence to the effect that the appellant had distributed

stolen items to the prosecution witnesses. These items were positively identified by the Complainant as the ones stolen from her kiosk. The Accused did not contest ownership of the same. He took some of them to PW 2 John Musyoki on 1st June, 2009 which was one day after the kiosk breaking. The doctrine of recent possession is applicable in the circumstances of this case. The trial magistrate correctly analysed the evidence adduced before him and found that the Conviction was safe.

On sentence the Accused was treated as a first offender.

I find the Sentence of seven (7) years to have been harsh. It is reduced to four years imprisonment.

The appellant will serve an imprisonment term of four (4) years from the time of Conviction. If the term has been

served to be set at liberty.

Judgment delivered dated and signed in open Court this **19th** day of **November, 2013**.

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M. MUYA

JUDGE

19TH NOVEMBER, 2013

In the presence of:-

Learned State Counsel Mr. Mungai

Thee Appellant present

Court clerk Mr. Musundi