REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL APPEAL NO. 71 OF 2012

CONSOLIDATED WITH

CRIMINAL APPEAL NOS. 72 & 73 OF 2012

BETWEEN

JOSEPH MURIITHI NYAGA .....……..... 1ST APPELLANT

JAMES NYAGA MAIRANI ……..... 2ND APPELLANT

SIMON MAINA NJOROGE ……... 3RD APPELLANT

AND

REPUBLIC …….....…. RESPONDENT

(Being an appeal from the original conviction and sentence in Embu Criminal Case 1810 of 2010 by Hon. L. Mbugua SPM on 3rd May 2012)

JUDGMENT

1.The three criminal appeals herein were consolidated and heard together as they relate to the same case. In the amended charge sheet of 21st July 2011, the appellants were jointly charged in the trial court with the offence of shop breaking and stealing contrary to **section 306(a)** of the ***Penal Code***. The charge sheet also included alternative charges of handling stolen goods contrary to **section 322(1)(2)** of the ***Penal Code*** and neglect to prevent a felony under **section 392** of the ***Penal Code***.

2. The particulars of the first count were that on the night of 26th and 27th July 2010 at Embu Township in Embu County all the accused jointly broke and entered a hardware shop of Lucy Njoki Gachoka and stole therein Ksh 17,000/= the property of the said Lucy Njoki Gachoka.

3. In the second count, all the accused were also jointly charged with shop breaking and stealing contrary to **section 306(a)** of the ***Penal Code***. The particulars are that between the nights of 28th and 30th day of August 2010 at Embu Township in Embu county, jointly broke and entered a hardware shop of Lucy Njoki Gachoka and stole therein cash Ksh 13,000/= the property of the said Lucy Njoki Gachoka.

4. As an alternative charge to the 1st and 2nd counts, the 2nd appellant, Joseph Muriithi Nyaga was

charged with two separate charges of neglecting to prevent a felony contrary to **section 392** of the **Penal Code**. The particulars being that on the night of 26th and 27th day of July 2010 and 28th and 30th days of August 2010 at Embu Township in Embu County, being a night watchman at Ganjo hardware shop failed to use all reasonable cause to prevent a felony namely breaking and stealing from the said Ganjo Hardware shop.

5. The third count was also the offence of shop breaking and stealing contrary to **section 306(a)** of the ***Penal Code*** whose particulars read that on the night of 12th and 13th days of September 2010, at Embu Township in Embu County, jointly broke and entered a hard ware shop of Lucy Njoki Gachoka and stole therein 20 litres bucket of Emulco paint valued at Ksh 1,650 the property of the said Lucy Njoki Gachoka. As an alternative to this count, the 2nd appellant was charged with the offence of handling stolen goods contrary to **section 322(1)(2)** of the **Penal Code**. The particulars were that on the 13th day of September 2010 at Dalla estate in Embu County otherwise than in the course of stealing, arranged the retention of a 20 litre bucket of Emulco paint knowing or having reasons to believe it to be stolen goods.

6. The fourth count facing the three appellants jointly was that of shop breaking and stealing contrary to **section 306(a)** of the **Penal Code**, the particulars being that between the months of June and August 2010 at Embu Township in Embu County, jointly broke and entered a hardware shop of Lucy Njoki Gachoka and stole therein 5 pangas, a hammer, 10 1-litres tin of super gross paint, 4 4-litre tins of super gross paint, 12 wire brushes, 15 kgs of nails, 12 harris brushes and a shear all valued at ksh 16,000/= the property of the said Lucy Njoki Gachoka. As an alternative to this fourth count, the 1st appellant, Simon Maina Njoroge was charged with handling stolen goods contrary to **section 322(1)(2)** of the **Penal Code**, the particulars of which were that on the night of 14th day September, 2010 at Majengo estate in Embu County, otherwise than in the course of stealing, dishonestly retained 1 litre tin of red Oxide Elmuco paint knowing or having reasons to believe it to be stolen.

7. The appellants all pleaded not guilty to all the charges. Upon considering the evidence presented, the trial court concluded that the 1st appellant was guilty of all the four counts of shop breaking and entering. He was convicted and sentenced to 5 years imprisonment for each count with the sentences running concurrently. The 2nd appellant was found to be guilty of the third count of shop breaking and entering and alternative charges to counts 1, 2 relating to neglecting to prevent a felony and count 4 for handling stolen goods. He was sentenced to one year imprisonment for the alternative counts and five years imprisonment for count 3 with all sentences to run concurrently. The third appellant was sentenced to four years imprisonment, having been found guilty of shop breaking and entering under count 4. He was acquitted of all other charges. The appellants now appeal against both the conviction and sentence.

8. The case for the prosecution was as follows. PW1, Lucy Njoki Gachoka, who owns a Ganjo Hardware shop in Embu town was away on safari when, on 27th July 2010, she received a call from her son Lucas. He informed her that the day's proceeds amounting to Kshs 17,000/= had been stolen from the shop and that there was no breakage in the shop. On 30th August 2010 when she visited the shop, she found Kshs 13,000/= missing. This amount was the sale proceeds for 28th August 2010. She also realized goods were disappearing from the shop bit by bit. These goods included paints, pangas, nails, brushes and sheets. On 13th September 2010, she learnt from her son that some goods including paints were missing.

9. PWI suspected that the 1st appellant, a former employee at the shop, was stealing from the shop using an extra key. She therefore reported the matter to Embu Police station. PW1 testified that she led the police to the 1st appellant's house whereupon conducting a search recovered 1 litre tin of red oxide Elmuco under the bed. PW1 also identified a key which she identified as her original key. On trying the keys on the padlock to her shop, they all worked. The following day, PW1 was summoned to the police station where she found her watchman, the 2nd appellant under arrest. The 3rd appellant who was also her plumber at the material time was also arrested. Upon conducting a search at the 2nd appellant's home, several hardware items were discovered which PW1 identified as hers. Nothing was however recovered from the 3rd appellant.

10. Grace Muthoni Mwaniki, PW2, an employee working in PW1's hardware shop testified that she worked with the 1st appellant who kept the shop keys. She testified that on 26th July 2010 she computed the day's sales and gave PW1's son, Lucas the proceeds. The following day, she learnt that the money was found missing. On 28th August 2010, PW2 was alone at work. She kept Kshs 13,000/= inside a box but on Monday found it missing. She informed Lucas and PW1. The third incident was on 11th September 2010 when PW2 opened the shop and discovered a container of paint missing. The shop hadn't been forced open. She alerted PW1 who reported the matter to the police.

11. Lucas Gachoka, PW1's son, testified as PW3. He stated that he supervised his mother's shop. On 26th July 2010, he computed the day's proceeds using the day's entries which totaled Kshs 17,000/= which he kept in a box. When he opened the shop the following day, the amount was missing. He testified that the shop had not been forced open. He stated that he never suspected PW2 since he was the last to close shop and the first to open it. He inquired from the watchman, the 2nd appellant who denied having seen anything. Later on 30th August 2010, PW2 informed him that Kshs 13,000/= had been missing from where she kept it. The shop was still unbroken and alerted PW1. On 11th September 2010, they found a tin of 20 litres paint on display also missing. It is then that PW1 reported the matter to the police. On 15th September 2010, PW3, PW1 and the police proceeded to the 1st appellant's house. Upon search, several hardware items were discovered and a bunch of keys amongst which he saw one original key which he positively identified. The rest were in duplicate form.

12. PW5, Fredrick Muthomi, owns a hard ware shop in Embu. He testified that on the 13th September 2010, he was outside his shop at day time when the 1st and 3rd appellants came. The 3rd appellant told him that they had some goods that they were selling. They told PW5 that the 1st appellant used to operate a business which he had since closed and was thus selling old stocks. He told them they could take to him what they were selling. They gave to him three tins paint each ¼ litres, Elmuco paints ¼ litres and Rexus Glue. He paid them 400/=. The next day, police officers came calling accompanied by the 1st and 3rd appellants and asked what he had bought from the two. He gave the police the items that had been given to him by the appellants.

13. Martin Njagi, PW5, testified to that on 13th September 2010 at about 7.00 pm, the 2nd appellant, who he knew as a watchman, came carrying something in a sack and requested him to keep the sack for him to collect on the following day but he failed to come for it. On 15th September 2010, the 2nd appellant came accompanied by police men who inquired about the 2nd appellant's luggage which he produced and the 2nd appellant identified it to the police. The sack contained part IV yellow bucket which was identified together with the sack before court.

14. PC Eustace Mugambi of Embu CID, PW7, was the investigating officer. He testified about his investigations leading to the arrest of the appellants. He received a complaint on 14th September 2010 about missing cash and goods from a hard ware shop. He visited the scene and confirmed that the padlock was intact and there was no breakage. Upon visiting the 1st appellant's home in the company of PW1 and PW2, he searched and recovered four duplicate keys and an original key all which PW1 identified as copies of her keys for the shop. The original key was also identified by PW1. He also recovered a tin of red oxide. Interrogation of the 1st appellant led them to the 2nd and 3rd appellants. It was PW7's testimony that upon conducting a search in the 2nd appellant's house in Dallas Embu, they recovered several named hard ware items under the bed which were new. The 3rd appellant, a plumber, was thereafter also arrested and he led the police to PW5 where they recovered the sack containing a yellow bucket with litre paint which PW1 identified as hers. Further interrogation of the 3rd appellant led them to Gateway Hardware shop where the owner, PW4 had purchased some hard ware goods from the appellants. The goods were later identified by PW1 as hers. Nothing was recovered from the 3rd appellant's house upon search.

15. When put to their defence, the appellants all elected to testify. In his unsworn testimony, the 1st

appellant, Joseph Muriithi Nyaga stated that he had worked for the complainant, PW1 for two years after which he left for Thika. While at Thika, he purchased what was produced before court by the prosecution. His family lived in Embu and he was arrested by the police who came in the company of PW1 and her son. He produced the receipt of the goods before court which was marked as defence exhibit 1.

16. The 2nd appellant's sworn testimony was that on 5th September 2010, he was home after work when he received a call from PW1 and asked him to return to work which he did. He was arrested by police officers and driven to his home where his house was searched. Some paint, nails, pangas and brushes were carried away by the police. His testimony was that what was removed from his home belonged to him. He wanted to start building a house and was making early preparations. The 3 pangas were for working on his leased land at Don Bosco and the hammer and shears were for casual work. It was his testimony that he had bought these items on various occasions in Nairobi. Although he knew PW4, he denied delivering the bucket of paint to him. He produced, as defence exhibit 2, a receipt for the items which were recovered. He stated that he did not produce the receipt to the police at the time of his arrest because he was not accorded time to trace them.

17. The 3rd appellant, James Nyaga Mairani, gave unsworn testimony. He stated that he was a plumber in Embu and that he had no knowledge of the allegations made against him.

18. In their petitions of appeal the appellants have raised several issues concerning the appreciation of facts by the learned magistrate. They contend that they were not involved in the offences, that there was no proof of ownership of the items that were allegedly recovered from them, that PW1 did not lodge any complaint or accuse them of the offences for which they were charged and that the complainant reflected in the charge sheet, one Carolyne Njeru did not testify. All these grounds call for evaluation of the evidence which is the duty of the first appellate court. This court is mandated to re-evaluate the evidence afresh and arrive at an independent decision bearing in mind that it neither saw nor heard the witnesses as they testified. (See ***Okeno v Republic*** **[1972] EA 32**).

19. This case is largely one based on circumstantial evidence. The courts have warned on relying on purely circumstantial evidence. In the case of ***Nzivo v Republic*** **[2005] 1 KLR 699** the Court of Appeal had this to say, *"In a case dependent on circumstantial evidence in order to justify the inference of guilt to the incriminating facts must be incompatible with the innocence of the accused or the guilt of any other person and incapable of explanation upon any other reasonable hypothesis than that of his guilt. It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other coexisting circumstances which would weaken or destroy the inference."*

20. The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution. This burden always remains with the prosecution and never shifts to the accused **(**See ***Sawe v Republic*** **[2003] KLR 364**). In this case was there a possibility that someone may have broken into the shop, using the keys and stolen the goods found in the accused person's custody?

21.Upon assessing the 1st appellant's culpability, the trial court observed thus, *"Although there is absence of direct evidence linking 1st accused with the offence contained on the 1st count, 2nd count, 3rd and 4th counts, there is overwhelmingly circumstantial evidence which has clearly and convincingly tendered to link the 1st accused with the said allegation. The presence of the said keys with him and which opened the complainant's premises the presence of red oxide with him which complainant positively identified as hers, the fact that 1st accused while in the company of 3rd accused sold complainant's stolen goods to PWIV Muthomi on 13th September 2010 and which complainant positively identified as hers and stolen at the time relevant to this case well all a pointer that 1st accused committed the offences as charged on the 1st, 2nd, 3rd and 4th counts."*

22. Likewise and having reviewed the evidence, I am satisfied that on the basis of the evidence presented by the prosecution, PW1's shop was broken into. The evidence of the PW1, PW2 and PW3 regarding the loss of cash as evidenced by the sales book, stock book, purchase receipts all demonstrated that cash and

goods which were in the shop were indeed stolen. Although there was no direct evidence of breaking and entering, the irresistible conclusion to be drawn was that access to the shop was through a person who had keys to the premises. PWI, PW2, PW3 and PW7 all confirmed that the door of the premises was intact. The original key and other duplicate keys were recovered from the 1st appellant who previously worked with the PW1 leading to an irresistible inference that he was involved in the breaking and entering into the shop. In his defence the 1st appellant did not give any reasonable explanation as to why he had an original and duplicate keys to PW1's premises.

23. The 1st and 2nd appellants in their respective defences produced receipts as evidence that they had purchased the items which they were found with. The appellants were not able to provide receipts at the time of the arrest or so soon thereafter and taking into account the entire evidence their explanation as to how they came to be in possession of the items cannot be reasonable. These goods were more so positively identified by PW1 and corroborated by receipts belonging to PW1. Like the trial court, this court doubts the validity of the receipts furnished by the 2nd appellant, a year after being charged.

24. There was no direct evidence linking any of the 1st appellant to the shop breaking and stealing. The prosecution relied on circumstantial evidence, the fact that the 1st and 2nd appellants were the complainant's former employees, the fact that keys were found in the possession of the 1st appellant which keys opened the padlock at the complainant's shop and which both PW1 and PW2 were able to identify as theirs and finally, the fact that the hardware goods were found in the 1st and 2nd appellants' possession prove the offence of breaking and entering the shop. The same facts also prove the alternative count of handling stolen goods by the 2nd appellant.

25. The 3rd appellant was convicted on one count of shop breaking. Having reviewed the evidence, I find that he was connected to the felony. He was in the company of the 1st appellant when he approached PW4 to sell him the stolen items. PW4 confirmed that he did not know the 1st appellant and would not have gone ahead with the transaction but for the fact that he knew the 3rd appellant. Upon cross-examination by the 3rd appellant, PW4 confirmed that he is the one who received the Kshs. 400. These facts, I find and hold implicates him in the primary offence of breaking and entering.

26. I am also satisfied that the evidence presented meets the test of the doctrine of recent possession elucidated in the case of ***Isaac Ng'ang'a Kahiga alias Peter Ng'ang'a Kahiga v Republic*** **Criminal Appeal No. 272 of 2005 (unreported)**. The Court of Appeal held, *"….It is trite that before a court of law can rely on the doctrine of recent possession as a basis for 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, secondly that the property is positively the property of the complainant; thirdly, that the property was stolen from the complainant and lastly, 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 the easiness with which the stolen property can move from one person to the other."*

27. I now turn to the offence of neglect to prevent a felony under **section 392** of the Penal Code for which the 2nd appellant was convicted on the 1st and 2nd alternative counts. The offence is defined in the following words, *"Every person who, knowing that a person designs to commit or is committing a felony, fails to use all reasonable means to prevent the commission or completion thereof is guilty of a misdemeanour."* In order to sustain a conviction, the prosecution must prove "knowledge" of the design to commit or commission of the felony. Thus, the test is not akin to one in negligence cases; it is not enough to show that the accused, 'ought to have known'. But that the person actually knew of the design to commit a felony and failed to prevent it. The fact of knowledge is a question of fact.

28. I find that knowledge by the second appellant can be inferred from the fact that he was the watchman who was supposed to guard the premises. PW5 testified that he left a sack at his place which was later shown to contain a bucket of yellow paint which was positively identified as belonging to PW1's shop. Further, when his house was searched, the items identified by PW1 were recovered. On this evidence, I conclude that 3rd appellant knew of the felony committed and the only way he would have gained access

to the shop was through the 1st appellant. I find the charges proven in the circumstances.

29. Before I finalise the matter, I will deal with two technical issues raised by the appellants. The 3rd appellant states that the learned magistrate erred when he failed to read the judgment despite the fact that she was not the magistrate which conducted the trial and that the magistrate ignored the request for him to be provided with the judgment. This issue is answered by **section 200(1)(a)** of the ***Criminal Procedure Code*** which allows a magistrate who has not heard the case to deliver the judgment written and signed by the predecessor and thereafter under **section 200(2)** pass sentence even it he or she had not heard the case. I have studied the original record and it is clear that the magistrate who heard and recorded the evidence wrote and signed the judgment which was read in open court by the successor in presence of the appellants.

30. The appellants contend that the complainant shown in the charge sheet, one Carolyne Njeru was not called to testify. In their view, the absence of a complaint entitled them to an acquittal. This issue was dealt with in the case of ***Kamau Kinyanjui v Republic*** **Nairobi Criminal Appeal No. 295 of 2005 [2010]eKLR**. In the case the Court of Appeal expressed itself as follows, *"Our conclusion on this issue is that in cases being conducted by the Attorney-General on behalf of the Republic, the complainant is the Republic itself and not the victim of the crime. Of course the Republic as complaint would not go far in a prosecution if the victim of the crime does not co-operate and is unwilling to come and testify, but in such a case, the acquittal of the accused will not be on the basis that the complainant is absent; it will be on the basis that no evidence or no sufficient has been called to support the charge. … We repeat that except in those rare cases where the court has allowed a private prosecution, the complainant envisaged in the various provision of the Criminal Procedure Code is always the Republic."*

31. In my view, the trial was grounded on the charges admitted by the learned magistrate and evidence of witnesses led by the prosecution. The appellants were able to challenge the witnesses. They were convicted on the facts and I am unable to detect any prejudice as a result.

32. Having evaluated the entire evidence, I conclude that the conviction of the appellants on all the charges was sound and I affirm the judgment of the subordinate court.

33. The sentences imposed on the appellants were lawful, they were neither harsh nor excessive and I find no reason to interfere with them.

34. In the result the appeal is dismissed.

DATED and **DELIVERED** at **EMBU** this 16th December 2013.

D.S. MAJANJA

JUDGE