



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CRIMINAL APPEAL NO. 189 OF 2011

1. **DICKSON KIOKO KITUKU**
2. **DULLA HAMISI**
3. **MATHEW BARASA IMBWAKA**
4. **GADAFI SALIM MWANYUNGA..... APPELLANTS**

VERSUS

REPUBLICRESPONDENT

(From original Conviction and Sentence in Criminal Case No.345 of 2010 of the Senior Resident Magistrate's Court at Taveta – Hon. Ndegwa - SRM)

JUDGMENT

The appellants were Convicted and Sentenced to five (5) years imprisonment in respect of Counts No., 1 and 3. In addition the 1st, 2nd and 3rd appellants were each Sentence to three years imprisonment on Count No. 2. The prisons term on the second count to run consecutively to Counts 1 and 3.

The Conviction on the first Count was for burglary and stealing.

2nd Count was for possession of Cannabis Sativa contrary to section 3(1) as read with section 3(2) of the Narcotic and Psychotropic substances Act No. 4 of 1994 and this was in respect of 1st, 2nd and 3rd Accused.

On the 3rd Count the 4 of them had been Convicted for the offence of burglary and stealing contrary to section 304(2) and 279 (b) of the Penal Code.

The particulars on the first Count are that on the night of 25th August, 2010 and 26th August, 2010 at unknown time at California Estate Taveta County, jointly with others not before the Court broke and entered the dwelling house of **JULIUS KIRIGHA MWALOZI** with intent to steal therein and did steal one bicycle, one Deck make sony, a T.v. Make Sony “14”, a mattress, assorted shirts, trousers, T-shirts, ties, mosquito nets, curtain, cooking utensils, coats, jackets, a night dress and a belt all of the value of Ksh. 80,000/= the property of Julius Kirigha Mwalози.

Accused 1, 2 and 3 were charged with handling stolen goods.

The same three were Convicted for having been in possession of one stone of Cannabis Sativa with a street value of Ksh. 1,000/=

The brief facts of this case are that the complainant who works as a security guard, securely locked his house at 6:00 p.m. on 25th August, 2010 and proceeded to night duty returning home at 7:00 a.m. The following day, only to find the door to his house open and upon entering found the items mentioned in the charge sheet missing. These included a DVD player make sony, Sony T.V "14", Bicycle, 4 shirts, 2 trousers, 2 hot pots, one night dress, half coat, 1 jacket, 1 black jeans trouser, 1 tie, 1 coat, 1 bicycle dynamo, 1 leather belt, 10 shirts, 1 black jeans trouser, 1 curtain, 1 mosquito net.

In order to gain access a padlock had been damaged. He observed bicycle tyres marks at the scene. He reported the matter to police and together in their company they proceeded to St. Michael High School at about 3:00 p.m. and in the store they found the 1st, 2nd and 3rd Accused. They recovered from therein one black suit case and one stone of bhang. The 1st Accused led them to the house of the 4th Appellant where they recovered another black suit case. Also recovered 4 black shirts, 2 bedsheets, 4 sufurias, one lantern lamp. 1 red and 1 white bed sheets were also recovered in the schools store.

The first Accused was found wearing the complainant's jeans jacket.

The 2nd complainant's house was broken into on the night of 5th August, 2011 after she had traveled to Nairobi. In her house what went missing were utensils, mattresses, 2 hand bags, mobile phone, maize flour, wheat, water jerricans and bedsheets. She later got information that some suspects had been arrested and were at the nearby police station. She proceeded there and managed to identify her 3 sufurias, one lantern lamp, 2 bed sheets, one red and the other white. She was also shown the 4 people from whom the items were recovered.

I have perused the Judgment of the trial magistrate and observed that he has appreciated that the case stands or falls on the issue of the doctrine of recent possession and to that end he has placed reliance in the case of **Matu- Vs- Republic (2004) /KLR 510** whereby the Court of Appeal held that,

“ Where is proved that the premises had been broken into and that certain property has been stolen therefrom and that very shortly afterwards, a person is found in possession of that property that is certainly evidence from which it can be informed that, that person is the housebreaker or the shop breaker”.

In the present case the burglary and stealing took place on the night of 25th and 26th August, 2010 in respect of the 3rd Count.

The goods were recovered on the 26th day of August, 2010 at about 3:00 p.m. in a house where the 1st, 2nd and 3rd Accused were found. The 1st Accused was found wearing a jacket belonging to the first complainant. The rest of the items were recovered in the house of the 4th Accused. These items were identified by the complainants as theirs.

I am satisfied that the trial magistrate applied the doctrine of recent possession correctly. The burglary took place on the 25th August, 2010 and the recovery was on the following day. There was no time for the items to change hands and they, were found in the same state as they were when they left the complainant's premises. As to the issue of ownership I find also that the trial magistrate did carefully analyse the issue of receipts produced before the Court. The Conviction was based on solid evidence. As for the Sentence I find that it has interchangeably been held to have been concurrently and consecutively hence ambiguous and unclear and there is therefore need to interfere. For avoidance of doubt therefore all the Sentences will run concurrently. The upshot is that the Appellants will serve a term of five (5) years imprisonment each. The appeal succeeds to that extent only.

Judgment delivered dated and signed this **16th** day of **December, 2013**.

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M. MUYA

JUDGE

16TH DECEMBER, 2013

In the presence of:-

Learned State Counsel Mr. Mureithi

The Appellant's present

Court clerk Badru