REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 395 OF 2010 & 413 OF 2010

(From original conviction and sentence in Criminal Case No. 1388 of 2010 of the Principal Magistrate\'s Court at Nyahururu, A. B. Mongare, SRM)

PETER LEPENYOK…….....…….……1ST APPELLANT

JAMES EROT ENKAI…….....……2ND APPELLANT

VERSUS

REPUBLIC…….....…….…… RESPONDENT

JUDGMENT

The Appellants were charged with the following offences -

(1) **Count I** - Bar breaking and stealing contrary to Section 306(a) of the Penal Code (Cap. 63, Laws of Kenya).

Alternative to Count I

Handling stolen goods contrary to Section 322(2) of the Penal Code.

Count II

Shop breaking and stealing contrary to Section 306(a) of the Penal Code.

On the evidence of six witnesses, the trial court found the 1st appellant guilty of the offence of shop breaking contrary to Section 306(a) of the Penal Code. But the 2nd Appellant was acquitted of that Count I offence. The 2nd appellant was fined guilty on alternate charge of handling stolen goods contrary to Section 322(2) of the Penal Code and was convicted accordingly.

The 1st appellant was sentenced to 14 years imprisonment while the 2nd appellant was sentenced to 5 years.

Aggrieved with their conviction, the appellants appealed to this court against both their conviction and sentence.

It is my duty as the first appellate court to re-examine and re-evaluate the evidence before the lower court and make my own findings and draw my own conclusions always keeping the caveat that, I did not see any of the witnesses testify.

I have accordingly examined the 6 witnesses evidence, and drawn the conclusion that there was sufficient evidence to convict each of the appellants on the alternative charges of handling stolen property for which they had no explanation.

To re-cap the evidence particularly of PW4, that the appellants first visited her house on 22nd May 2010, and stayed there between 6.00 p.m. to 9.00 p.m. They pretended that they were going to sleep. They did not, for the following morning they came to house carrying an assortment of goods, including a T. V., long trousers, belt, 2 braziers, one T-shirt, top, padlock and beer. She did not see a sewing machine. They asked her to keep the goods and they would collect the goods. They never did. On 23.05.2010, she was visited by the Police and was arrested until investigations found her unconnected with the theft of the goods. The 1st appellant was brother-in-law to PW4, and knew him for 2 years. PW4 did not the 2nd appellant.

PW5 arrested the 1st appellant with an assortment of suspected stolen goods, clothes, 31 pieces of them. PW5 did not know 2nd Appellant and did not arrest him.

PW6 was the investigating officer. He interviewed PW4 who informed him that the goods had been brought to her house by the 1st appellant. He established that a shop belonging to PW1 had been broken into and assortment of goods stolen. He also established that the bar owned by PW2 at Muthengira had been broken into. She had lost her TV which she identified at the Rumuruti Police Station. PW3\'s Bar was also broken and she had lost beer.

PW6 testified and PW1, PW2 and PW3 identified their goods including PW3\'s sewing machine which 2nd appellant had hidden along a fence.

When put to their defence, 1st Appellant made an unsworn statement that he lives in Ol Kalou, and that he is a carpenter, and that he was at home on material day, and was taken to some house where the Police showed him some clothes which he had allegedly stolen and he was charged.

The 2nd appellant too gave an unsworn statement. He stays in Rumuruti, and that he is a cobbler, and that he was at his place of work when he was arrested by the Police on 2.06.2010 and he was detained and charged the next day. He denied committing the offence.

I have considered the prosecution evidence, as well as the unsworn statements by the Appellants. The evidence of PW4 and PW6 shows that the appellants were found with stolen goods for which they had no plausible explanation. The appellants\' unsworn statements made reference to what amounts to alibi that they were not at the scene of the crime at Muthangaru, the 1st appellant was at Ol kalou and the 2nd Appellant at Rumuruti. The recovery of a sewing machine by PW6 upon information, which clearly convicted the 2nd Appellant to the handling of those stolen goods. The 1st Appellant is the person who delivered the goods to the house of PW4 for safekeeping. He never refused that evidence. I am therefore satisfied that the learned came to the correct decision in finding the both appellants guilty of handling stolen, and convicting them I confirm that conviction.

The first appellant was handed a sentence of 14 years, principally because he had had two previous convictions for which he was sentenced to four years, and a fine of shs 6,000/= or 6 months imprisonment in default. The 2nd appellant was sentenced to 5 years imprisonment.

The punishment for the offence of handling stolen goods contrary to Section 322(a) is a term of imprisonment not exceeding 14 years. The 1st appellant was sentenced to this term, as noted on the ground that he is a recidivist and note the circumstances of the offence for which he was now

charged. The 2nd Appellant was sentenced to 5 years for essentially the same or similar offences and circumstances. I think the sentence of 14 years imposed upon the 1st appellant is excessive.

The first appellant pleaded that this sentence was excessive. The goods stolen were recovered. No one was injured, other than for economic loss suffered by PW1, PW2 and PW3. I would reduce the term from 14 years to 5 years like the sentence imposed upon the 2nd Appellant.

The 2nd Appellant is now deceased. His appeal abates in terms of Section 360 of the Criminal Procedure Code.

Save as aforesaid, the appeal by the 1st appellant succeeds only on the question of sentence. His conviction is confirmed, will serve the balance of term of 5 years in prison.

It is so ordered.

Dated, delivered and signed at Nakuru this 3rd day of February, 2012

M. J. ANYARA EMUKULE

JUDGE