



REPUBLIC OF KENYA

IN THE HIGH COURT

AT BUNGOMA

CRIMINAL APPEAL NO.218 OF 2011

(Appeal from Resident Magistrate Hon. P. Achieng in Bungoma court in cr. no.1998 of 2010)

SIMON MODOI..... APPELLANT

~VRS~

REPUBLIC.....RESPONDENT

JUDGMENT

On the night of 27th/28th October 2010 at Dorofu Market in East Bukusu Location in Bungoma South District of the Western Province unknown person/people broke into the shops of PW1 Lambard Kasomoto Burudi, Aaron Nyongesa Okhala (PW2) and Erick Sifuna Wasike (PW3) and took various goods from therein. The theft was discovered on 28/10/10 morning and a report made to Dorofu AP Camp. The complainants were informed that some goods had been recovered by police at Sang'alo. They went to Sang'alo Police Patrol Base and were shown a number of recovered items.

What had happened was that during that night at 2.00a.m PW5 Corporal Ibrahim Yussuf was with two other officers when they found a person on a motorbike carrying goods and on seeing them he abandoned the motorbike and the goods and ran and disappeared in a sugar cane plantation. He was not identified or arrested. The goods were 3 generators make Tiger, 65 Kgs of sugar, 11 litres of top fry cooking oil, one dozen of Kiwi shoe polish, 5 litres of quencher, 4 pieces of Geisha soap, 18 pieces of shoe shine toney red, 100 pieces of Eveready cells and 12 pieces of kibuyu bar soap. They took the items to the Patrol Base. The items belonged to the complainants and were part of what had been stolen from their shops that night.

At about 5.00 a.m the same night PW5 and other officers were at Mwibale junction near Mwibale Primary School when they met two people carrying goods on the head. One of the people threw down the luggage and ran and disappeared in sugarcane plantation. One was left. He was the Appellant. Police recovered 3 DVD machines, amplifier, two packets of cigarettes (one sportsman and the other embassy) and two bottles of beer (one tusker and the other pilsner). The DVD machines and amplifier belonged to PW2 and PW3. The Appellant was charged with three counts of shop-breaking and theft contrary to section 306 (a) of the Penal Code and one alternative charge of handling stolen goods contrary to section 322 (2) of the Penal Code. He made an unsworn defence and did not call witnesses. His case was that he was a businessman who sells clothes and he also owned a motorbike. On this day at 5.00 a.m he went to Mwibale and on his way back a man approached him to ride him to town. The man had a yellow polythene bag in which were goods. The Appellant carried him for a fee. On the way they were stopped by police. The man jumped off the motorbike and ran and disappeared in the sugar cane plantation. He was arrested and the goods taken. He denied taking part in the breakages and theft. He denied knowing

that the property found with his customer were stolen goods.

On the doctrine of recent possession, the trial court found that the Appellant was guilty on each of the three counts. He was convicted and asked to serve 2 years imprisonment on each count. The sentences were ordered to run concurrently. He was aggrieved and filed this appeal to challenge both the conviction and sentence. He was represented on appeal by Mr. Situma. Mrs. Leting for the State opposed the appeal.

It is required of this court to subject all the evidence adduced before the trial court to fresh and exhaustive scrutiny to satisfy itself that the conviction was supported (**Okeno v R. [1972] EA 32**). It has to be borne in mind that the trial court had the advantage of seeing and hearing witnesses.

The complainants' shops were broken into and goods stolen from therein by unknown person/persons. It is also not in question that at about 2.a.m a person abandoned some of the stolen goods and ran away from the police. At 5.00 a.m the Appellant, was according to the prosecution, found with more of the stolen goods. The court accepted the prosecution case. It does not appear to be in dispute that what the police found at 5.00 a.m were some of the stolen goods. What is challenged on appeal is the finding that the Appellant was found with the items.

PW5 was the officer who made the recovery. He was with other officers but they did not testify before the trial court. His evidence was that they met with the Appellant with another person and that each was carrying the goods on the head. The Appellant's defence was that he had a motorbike and was carrying a man who had the goods. The trial court did not establish whether the Appellant was found carrying the goods on the head or that he was carrying a passenger who had the goods. I have looked at the evidence. There was a motorbike that was recovered that was not produced in evidence. PW5 stated that it was found with the man who abandoned it with goods and ran away. It is interesting that, if PW5's testimony is true, there was no effort to trace the owner of the motorbike, or to find out if it was stolen property. Motorbikes are registered by the Government. It should not be difficult to trace the owner. Secondly, PW5 was with other officers and also said there were other people on the road when he arrested the Appellant. Now that the Appellant denies the evidence of PW5 it was incumbent upon the prosecution to call the other officers in regard to the recovery. In short, there was insufficient evidence to find that the Appellant was found in possession of the goods as alleged by PW5. The possible, infact probable, scenario was that the Appellant was carrying a man who had the goods.

Recent possession proceeds on the basis that an accused is found with recently stolen property and offers no explanation regarding how he came by the property. He is deemed to be the thief or person who feloniously came by the same (**Maina & 3 Others v. R [1986] KLR 301**). The trial court did not discuss the issue of the explanation given by the Appellant, or whether the explanation was possible in the circumstances.

In conclusion, I find the Appellant was convicted on insufficient evidence. The appeal is allowed, the conviction quashed and the sentence set aside. The Appellant is set at liberty forthwith unless there are other reasons why he is being held.

Dated, signed and delivered at Bungoma this 28th day of March, 2012.

A. O. MUCHELULE

JUDGE