REPUBLIC OF KENYA

IN THE HIGH COURT AT BUNGOMA

CRA NO.78 OF 2010

(From Senior Resident Magistrate Hon. F. Kyambia in cr. Case no.2877 of 2009)

EVANS WANJALA SITUMA.....APPELLANT

VS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant was convicted of stealing contrary to section 275 of the Penal Code whose particulars were that on the night of 14th/15th November 2009 at Ndengelwa village in Bukembe location of Bungoma South District in Western Province he stole one battery make Chloride Exide, one DVD make LG and one Power Park Antennae all valued at Ksh.98,000/= for the property of Alice Naliaka Kituyi (PW1). He was sentenced to 5 years in jail. He was further convicted of having suspected stolen goods contrary to section 323 of the Penal Code whose particulars were that on 18/11/2009 at Kimoi village of Ndengelwa sub-location of Bukembe location in Bungoma South District of the Western Province having been detained by no.35465 P. C. Ezekiel Abe as a result of the powers conferred by section 26 of the Criminal Procedure Code he had in his possession one gas cylinder s/no.23022, one television set make Sanyo and one radio make Sony all reasonably suspected to be stolen or unlawfully obtained. He was jailed for one year for the offence. The prison terms were ordered to run concurrently.

The Appellant was aggrieved by the conviction and sentence and filed this appeal. He complained that the evidence on which he was convicted was contradictory, his defence had not been considered, the charges were defective and the sentence was harsh in the circumstances. The appeal was opposed by Mrs Leting for the State.

The evidence on which the Appellant was convicted was as follows. On 14/11/2009 at about 6.00 p.m PW1 was at home and her husband Nathan Kituyi (PW3) was away. She has a sister who is married in Kakamega but she had not met her husband. The Appellant came and introduced himself as the husband. She welcomed him and gave him a meal. This evening PW2 Charles Omari Barasa, brother to PW3, passed by and found the Appellant. PW1 prepared the Appellant a place in the sitting room to sleep. He slept in the sitting room. At about 2.00 a.m. she woke up to go for a call. She found he had left. In the house her T.V., DVD, aerial booster and battery were missing. She went and informed PW2 and a report was made at Ndengelwa Police Patrol Base. After 4 days PW2 found the Appellant at Ndengelwa. He called people and they went to the Appellant's house after his arrest. They recovered PW1's battery make Chloride Exide. They took him to the patrol base. Police took him back to the house where a search was conducted by P.C. Ezekiel Abe (PW4). PW1's DVD player and aerial booster were recovered. In the house they also recovered a gas cylinder, radio cassette and a TV (exhibits 5, 6 and 7 respectively) whose owner was not known. These three items are the subject of count 2.

The Appellant gave unsworn defence to say he left home to go to the shamba when he met three people including PW2 who demanded a battery which they said he had stolen. They beat him. He went to the police to report but he was instead arrested and charged. He found the battery at the police station.

The trial court accepted the evidence of PW1, PW2, PW3 and PW4 that the Appellant had been welcome in the house of PW1 for the night but he had sneaked away with her property which four days later were found at his house. I have independently considered and evaluated that evidence and the denial by the Appellant and confirm the finding. The Appellant was properly convicted of theft contrary to section 275 of the Penal Code in regard to the property of PW1.

However, although it is evident that exhibits 5 and 7 were found in the Applicant's house and he could not explain how he had come by them, it is clear that the arrest and recovery were not after Pw4 had stopped, searched and detained him. One can only be charged under section 323 of the Penal Code if he is found with suspected stolen property, but the finding has to be following the exercise of the powers conferred under section 26 of the Criminal Procedure Code. The finding has to be after the police officer has stopped, searched and detained the accused (**Charo v. Republic [1982] KLR 308).** Further, the accused has to be shown that he was arrested while in course of a journey and found with the suspected property. In this case he was found with the property in his house. The evidence called did not establish the offence charged. The conviction in respect of count 2 is quashed and the sentence set aside.

The sentence in count 1 was illegal. This is because under section 275 of the Penal Code the maximum penalty is 3 years jail. Secondly, the trial court did not consider the value of the stolen goods and the fact that they had been recovered. The Appellant informed the court that he was HIV positive. That was not considered. These are the reasons why the long custodial sentence was harsh and excessive. The Appellant has been in jail since 30/6/2010. He has suffered enough for the offence in count 1.

I set aside the sentence in count 1 and substitute it with a term for the period he has been in jail. This means that he will be released forthwith unless he is otherwise being lawfully held.

Dated and delivered at Bungoma this 19th day of March, 2012.

A. O. MUCHELULE

JUDGE