



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT KAKAMEGA**  
**CRIMINAL APPEAL 64 OF 2009**

*(Appeal arising from the Senior Resident Magistrate's Court at Butali In Criminal Case No. 709 of 2007 [S. N. ABUYA, AG. S RM])*

**CHESEMBE MMASI ..... APPELLANT**

**VERSUS**

**REPUBLIC..... RESPONDENT**

**JUDGMENT**

The Appellant, **CHESEMBE MMASI** was charged as follows:-

**BURGLARY CONTRARY TO SECTION 304 (2) AND STEALING CONTRARY TO SECTION 279 (B) OF THE PENAL CODE.**

The particulars of the offence were that on the nights of 24<sup>th</sup> and 25<sup>th</sup> day January, 2007 at Chemuche village, Chemuche Sub-location East Kabras Location in Kakamega North District within the Western Province jointly with others not before court broke and entered the dwelling house of PETER WEKESA with intent to steal therein and did steal from therein one water drum, two sufurias, two jericans, two iron bars and a panga the property of Peter Wekesa all valued at Kshs.15,000/=.

In the alternative, the appellant was charged with the offence of handling stolen property contrary to Section 322 (2) of the Penal Code.

The particulars of the offence were that on 2<sup>nd</sup> day May, 2007 at Chemuche village, Chemuche Sub-location East Kabras Location in Kakamega North District within the Western Province otherwise than in the course of stealing dishonestly received or retained one panga knowing or having knowledge to believe it to be a stolen property.

The Appellant was convicted and sentenced of the offence of burglary and stealing. Aggrieved by the sentence in the main count, he appealed to this court on the following grounds:-

1. That the learned magistrate erred in law and fact in holding that the prosecution had proved the case against the appellant beyond reasonable doubt.

2. That the learned magistrate erred in law and fact in dismissing the evidence of the appellant.
3. That the learned magistrate erred in law and fact in putting the appellant on his defence.
4. That the learned magistrate erred in law and fact in analyzing the evidence before herself and reaching an erroneous finding.
5. The court erred in law by giving an excessive sentence to the appellant.

Mr. Manyoni advocate appeared for the appellant while Mr. Limo appeared for the State.

Mr. Manyoni submitted on the grounds of appeal. The State Counsel stated that he supported the conviction. He relied on the evidence on the record.

The Prosecution case before the lower court was that on 5.12.06, PW1, PETER WEKESA, a retired army driver locked his house and travelled to Nairobi. When the complainant travelled back on 25.1.07, he found his house had been broken into and two sufurias, two jericans, two iron bars and a panga were missing. He made a report to the village elder, the Assistant Chief and to the Police.

On 2.5.2007, the complainant found the appellant cutting grass with the stolen panga. The panga had No.551155 embossed on it when it was given to him by the army upon retirement. The complainant took the panga from the appellant who was a minor and asked him to call his father. The father did not turn up and the complainant took the panga to the village elder. The appellant's father was summoned by the assistant Chief but failed to turn up. The matter was reported to the police station. The appellant was arrested.

In his defence, the appellant stated that he was a Standard six pupil. He stated that the panga produced in court was not the one he was arrested with. He further stated that it was established through the inquiries carried out by the Chief that the panga he was arrested with belonged to one Namisi.

There is no direct evidence of stealing. PW1, the complainant found his properties missing. About three months later he found one of the stolen properties to wit a panga with the accused. This cannot be termed as recent possession. The charge of burglary and stealing was not proved.

The panga was identified by the complainant by the number embossed on the same. There was no doubt that the panga belonged to the complainant. However, the appellant who was a minor aged about 14 years then gave the explanation when he was arrested that he got the panga from his father's bed according to the evidence of the complainant. In court during his defence, the appellant denied having been arrested with the panga in question and talked of a different panga belonging to one Namisi.

The father to the appellant, MMASI CHISEMBE testified. His evidence was that one William Karani had borrowed some money from him and left the panga with him as security. That before the said William Karani was taken to the police station. One policeman called Luka Namisi claimed that the panga was his and took it away.

The appellant's father was arrested but later released and his son the appellant charged. According to the appellant's father, the panga that was in his house and the one the appellant was using at the time of arrest had No.74127 embossed on it.

The assistant Chief DW2 BROWN JUMA MANYONI of Shihaya sublocation assisted in the arrest but his evidence is that he never saw the panga. It is not clear whether the assistant chief came from the same sublocation with the village elder (PW2) who testified that the panga taken to him was No.151155. The panga with No.151155 was the one produced in court by PW3, PC ELPHAS GATIMU.

The evidence of the appellant and that of his father in respect of another panga with a different number was not convincing. The issue of this other panga was not raised when the prosecution witnesses talked

about the pang produced in court. The issue of the second panga may have come up as an afterthought. Witnesses linked by the defence to the second panga were not called to testify. It's rather unusual to have pangas with numbers embossed on them. At least the complainant had an explanation why his panga had a number. However between the appellant and his father, it is difficult to tell who the culprit was.

The defence raised by the appellant raised doubts on the prosecution case. One cannot draw any inference from the proceedings whether the appellant knew that he was handling stolen property.

The sentence of two years Probation was not excessive.

The conviction and sentence are set aside. The appellant is at liberty unless otherwise lawfully held.

***Delivered, dated and signed in open court at Kakamega this 28<sup>th</sup> day of June, 2012.***

**B. THURANIRA JADEN**  
**J U D G E**