JOHN KIOKO MWAU …….....……APPELLANT
VERSUS
REPUBLIC……..…….....……..RESPONDENT

(Being an appeal from the original conviction and sentence in Tawa Resident Magistrate's Court Criminal Case No. 133 of 2009 by B.M. Mararo – R.M. on 23/2/2010)

JUDGMENT

The Appellant, **John Kioko Mwau** was initially charged with one, **David Mbithi Kathungu** and **Mutua Kimolo** before the Resident Magistrate's Court, **Tawa** with the offence of office breaking and committing a felony contrary to **section 306 (c)** of the **Penal Code**. Particulars being that, the Appellant and Co-accused during the night of **31st March, 2009** and **1st April, 2009** at **Kikima** market **Mbooni** location in **Mbooni West** District within the **Eastern Province** jointly broke and entered the office of **David Kinyumu Mutuku** with intent to steal from there and did steal one Generator make "*Kubota'*" valued at **Kshs. 80,000/=** the property of **David Kinyumu Mutuku.** In the alternative, **Mutua Kimolo** was charged with handling stolen goods contrary to **section 322(2**) of the **Penal Code** in that on **3rd April, 2009** at **Tawa** market of **Kileta** Location in **Mbooni East** District within Eastern Province otherwise than in the course of stealing, dishonestly retained one generator make "*Kubot*a" valued at Kshs. **80,000/=** the property of **David Kinyumu Mutuku** knowingly or having reason to believe it to be stolen property.

The Appellant and his Co-accused all entered a plea of not guilty and the case was fixed for hearing. However, before their trial could commence, **David Mbithi Kathungu** passed on. Accordingly his case abated and he was discharged. The case then proceeded against the remaining two. The prosecution called a total of 4 witnesses and their evidence in brief was that;

PW1, **David Kinyumu Mutuku** "*the complainant*" was a carpenter at **Kikima** market. On **31st March, 2009** he closed his business premises at the Market and left for home. The next morning when he came to open the same he found that it had been broken into and his Generator make "**Kubota**" **3500IX** stolen. He had bought it in **1997** at **Kshs. 80,000/=.** He commenced investigations by reporting the incident at **Mbooni** Police Station. Later that day a watchman from the market, PW3, **Benard Kioko Mbaluka** approached him and asked him if he had lost something. He informed him that he had lost a generator. PW3 then informed him that he had seen a generator being loaded into a matatu by a person he knew and that the said generator was offloaded at **Kalawani.** Later that evening the same watchman called him again and told him that the person whom he had seen with the generator was in a bar at **Kibandini** Market drinking beer**.** The witness immediately contacted the police and they proceeded there and had him arrested. The next day the complainant was called by the conductor of the matatu that had ferried the generator and the appellant and told him that the generator had been transferred to a motorcycle (*boda boda*) at **Kalawani**. He proceeded to **Kalawani** market and was introduced to the boda boda operator. The operator informed him that he had delivered the generator to **David Mbithi Kithungu** (*deceased),* initially 2nd accused, who in turn informed him that he had taken it to the Appellants 3rd accused (*David Mutua Kimolo).* Appellant's Co-accused, when confronted confirmed that indeed he had the generator at his home where he had kept it.

PW2, **Safari Mutisya** was the boda boda operator. He confirmed that in the morning of **1st April, 2009** he was hired by the Appellant, whom he positively identified in court to transport a generator which he offloaded from a matatu christened "*Exodus*" to **Tawa** market. He ferried the generator plus the appellant to the deceased accused's house at **Tawa.**

PW3, **Benson Kioko Mbaluka** the watchman at **Kikima** market on his part added that on **1st April, 2009** he was travelling in motor vehicle registration **KAS 933T** christened "*Exodus*" at about 4 a.m when someone stopped the same and loaded a generator into it claiming that it was for service. That person alighted at **Kalawani** and transferred the same onto a motorcycle. That person was the appellant whom he knew very well from previous business encounters. He knew him as **Nguyo**. The witness got back to **Kikima** market late that day and learnt that a generator belonging to PW1 had been stolen. He immediately informed PW1 on what he had seen. Later on he received information that the Appellant was seen in a bar at **Kibandini**. He relayed this information to PW1 which culminated in his arrest.

PW4, **PC Julius Kariuki** the investigating officer of the case whilst at his office in **Mbooni Police Station** received a report from PW1 regarding his office which had been broken into and his generator stolen. He visited the scene and confirmed break-in. He commenced investigations and in the course of which he established that the Appellant had taken a generator to **Kalawani** and later to **Tawa**. He had used a matatu christened "*Exodus*" to **Kalawani** where he transferred the generator on to a motorcycle which took him to **Tawa**. Following those leads he proceeded and recovered from the appellants, 3rd co-accused the generator. However the appellants 3rd co-accused claimed that he had purchased it from the Appellant and the deceased co-accused. The witness had all of them arrested and later charged them with the offences.

The Appellant was placed on his defence. He elected to give unsworn statement and called no witness. He simply stated what he had done during the day prior to his arrest and that he was arrested while having a beer on **1st April, 2009** He maintained that he was innocent and was charged for an offence he knew nothing about. In the meantime, the Appellant's Co-accused had been acquitted under **section 210** of the **Criminal Procedure Code** for want of evidence.

Having heard the prosecution and defence case respectively, the learned magistrate ended up convicting the appellant. Upon conviction, he sentenced him to 5 years imprisonment. Aggrieved by the conviction and sentence, the appellant lodged the instant appeal on the grounds that nothing belonging to the complainant was found on him, that the person in whose possession the generator was found was acquitted, there was no corroboration in the prosecution evidence and finally that his defence was not given due consideration.

When the Appeal came up for hearing before me on **2nd May 2012** the Appellant elected to urge the same by way of written submissions. I have carefully read and considered the same.

Mr.Mukofu, learned State Counsel opposed the appeal. He submitted that the evidence of PW1, PW2 and PW3 in totality was overwhelming against the appellant. His conviction could not therefore be faulted. He urged me to dismiss the appeal in the premises.

As a first appellate court, it is my duty to rehear the whole case with a view to reaching my own independent conclusions on the case. Indeed the appellant expects a first appellate court to exhaustively examine the evidence afresh, remembering though that it does not have the privilege of hearing and seeing witnesses who testified before the trial court. In so doing however, such court should be reminded that it should not ignore the judgment of the trial court, but should carefully weigh and consider it as well. No doubt I will bear in mind the above injunctions as I consider this appeal.

It is common ground that the complaint's business offices were broken into. It is also common ground that following the break in, a generator make "*Kubota*" was stolen. It is also common ground that the said generator was recovered 4 days later in the possession of appellant's 3rd co-accused; it is common ground that the generator was subsequently positively identified by the complainant as belonging to him and the

one which had been stolen in the recent past. Finally it is common ground that nobody saw the complainant's office being broken into. Accordingly, nobody saw the appellant brake into the office and commit the offence alleged.

The conviction of the appellant as correctly observed by the learned magistrate could only have turned therefore on circumstantial evidence. For circumstantial evidence to find a conviction however, such evidence must point irresistibly to the accused. And in order to justify the inference, the exculpatory facts must be incompatible with the innocence of the accused and incapable of any other rational explanation or reasonable hypothesis than that of the accused's guilt. See **Kariuki Karanja vs Republic Cr.App. No. 62 of 1985 [UR].** What then is the circumstantial evidence in this case?

The starting point must be the evidence of PW3, a watchman at **Kikima** Market. He was a board motor vehicle registration number **KAS 933T** christened "*Exodus"* at about 4 a.m when it was flagged down by a would be passenger. That passenger turned out to be the appellant. He knew the appellant very well from their previous encounters. The headlights of that motor vehicle were on and he saw the appellant apparently very well. It would appear that PW3 even engaged the appellant in a discussion. How else would the appellant have volunteered the information to PW3 that the generator which he carried in a gunny bag was infact going for service? Prior to this, PW3 had seen the appellant with the generator in a gunny bag. The witness described what transpired until the appellant dropped off at **Kalawani** with the generator. The evidence of this witness flows well such that it is practically impossible to assume that he must have been coached on what to say so as to falsely implicate the appellant in the crime. That is what the appellant wanted the trial court and this court to believe. There is no basis upon which this witness would have falsely implicated the appellant in the crime. He stood to gain nothing for so doing. There was no history of any animosity or misunderstanding between him and the appellant. The fact that the appellant was well known to the witness was not the subject of any dispute; nor did the appellant raise such issue in his cross-examination of the witness. Indeed under cross-examination, by the appellant, the witness was emphatic that he recognised the appellant as he flagged down the motor vehicle and entered the same as there was sufficient light. The witness had sat in the front cabin of the motor vehicle and its headlights were on. There was no evidence that the appellant had disguised himself as to make his recognition difficult. Given the prevailing circumstances, I am satisfied that PW3 was well placed to recognize the appellant and what he was carrying to wit, a generator in a gunny bag. The generator though in a gunny bag, it was raised on the left side. This enabled him to see it.

The other circumstantial evidence which ties the appellant to the crime is that of PW2. He was a boda boda operator. His evidence which was hardly challenged by the appellant was that on **1st April, 2009** at about **7 a.m** whilst at **Kalawani** stage, a matatu christened "*Exodus*" came by. A customer disembarked therefrom and asked him to ferry him and a generator to **Tawa**. It is instructive to note that PW3 had stated in his testimony that he was a passenger in the said motor vehicle and the appellant who was in the same vehicle arrived at **Kalawani** stage at 7 a.m. whereupon he saw the appellant take a ride on a motor bike (*boda boda*) with generator towards **Tawa.** According to PW2, on reaching **Tawa**, he took the appellant and the generator to a plot. Later the witness was arrested in connection with the generator, and took the police to the plot where he had left the generator. Apparently, the plot belonged to the deceased co-accused who in turn led the police to the house of the appellant's 3rd co-accused whereat the generator was recovered. It should be noted that all these happened in a span of 1 to 2 days. This witness ferried the appellant at 7 a.m. It has not been suggested that it was so dark at that time as to make the identification of the appellant and or generator by this witness difficult. Further the time between this witness ferrying the appellant and the generator to **Tawa** and recovery of the same by PW1 and PW4 was so short such that it is unlikely that this witness would easily have forgotten the appearance of the appellant. His appearance was still ingrained in his mind. Finally, the evidence of this witness is not the kind of evidence that one could easily dismiss as the work of his fertile imagination, concocted specifically to fix the appellant. The witness had nothing personal to benefit by undertaking such an endeavour. There was nothing between the appellant and the witness in all these.

Finally, there is the evidence of PW1, (the complainant) and PW4, the arresting officer. PW1 owned the generator, which he used at his work station. He left it intact the previous evening when he closed the work station for the day. On re-opening the following day, on **1st April, 2009**, he found it missing, the

office door showing signs of having been forced open. The break-in was reported to the police who immediately swung in to action. At about 5 p.m. PW3 informed him that he had seen the appellant offload a generator at **Kalawani**. Later the same day, the appellant was sighted at **Kibandini** bar where he was arrested by PW4 amongst other police officers. The conductor of "*Exodus*" contacted PW1 and confirmed that a generator was ferried in his motor vehicle up to **Kalawani** where it was transferred to a motor cycle. At **Kalawani** they were able to get PW2 who had ferried the generator and the appellant to **Tawa**. PW2 took them to the spot where he had dropped the generator and the appellant. This was the deceased's co-accused's house. In turn the deceased co-accused took them to the house of the appellant's 3rd Co –accused where the generator was eventually recovered. According to PW4, on interrogating the Appellant's 3rd Co- accused, it transpired that the appellant and the deceased co-accused wanted to sell the generator to him. He asked for the purchase receipt for the generator. They did not have it but promised to avail the same later. Nonetheless he paid them **Kshs. 800/=** for that purpose. However, before the deal could be concluded they were all arrested and charged. The evidence of these witnesses confirms the break in, theft of the generator and its subsequent recovery in the possession of the appellant's 3rd co-accused hardly four days after the break-in. It also confirms the fact that the appellant was the main actor.

Why then did the trial court acquit the appellant's 3rd Co-accused for lack of evidence, when he was found in possession of a stolen item positively identified as belonging to PW1? Indeed this is the main bone of contention by the appellant. He submits that the learned magistrate erred in acquitting the persons who were arrested with the stolen generator belonging to the complainant. That he was arrested without anything belonging to the complainant. That at the time of his arrest no recovery was made from him.

In acquitting the appellant's 3rd co-accused, the trial magistrate delivered himself thus;

"After careful analysis of all the evidence adduced by the prosecution witness in support of the charge, it is this court's view that the prosecution has established a prima facie case sufficiently to warrant the 1st accused to be placed on his defence. In regards to accused 3 there is no evidence linking him to the commission of the offence and I proceed to acquit him under section 210 of the Criminal Procedure Code. In regards to the alternative count it emerged from the evidence that the accused 3 was yet to take full possession of the generator as he was yet to pay for it. He had asked accused 1 and accused 2 (deceased) to avail ownership documents and before they did they were arrested.

For one to succeed in proving a charge of handling stolen property the element of knowledge that the goods in question are stolen is critical and subsequent retention in the present case this was not done. As such the alternative charge must of necessity fall and I proceed to acquit accused 3 under section 210 of the Criminal Procedure Code".

Of course, the trial magistrate grossly misdirected himself in acquitting the appellant's 3rd co-accused. He ought to have given reasons for the acquittal on the main charge. It was not sufficient for him to simply gloss over the issue by merely stating that there was no evidence linking him to the commission of the offence. The evidence was galore. A generator which had been recently stolen from the complainant was found in his possession in a matter of days. He was bound to explain his possession. At least he ought to have been put on his defence so as to explain the possession. Further, the learned magistrate should not have used the evidence of PW4 with regard to whether or not the property in the generator had legally passed on to the Appellant's 3rd Co-accused to acquit him. That evidence could only have come from the 3rd co-accused in his defence. Anyhow, the state did not appeal against his acquittal. I will therefore say no more.

However, the Appellant cannot pick a ride on the acquittal of his co-accused to secure his own freedom. He was seen in possession of stolen goods shortly after the same had been stolen. He was positively identified by PW2 and PW3. He later disposed of the goods to his co-accused. In law a person found in possession of stolen goods shortly after they have been stolen and proffers no explanation for his possession is deemed to be the thief or a handler of stolen goods. Essentially, this is the doctrine of recent possession. However, is it applicable in the circumstances of this case? I think so. A person can either be

in direct or constructive possession of stolen items. Direct possession is where a person is found in physical and actual possession of the stolen goods. Constructive possession on the other hand applies where though a person is not in direct and physical possession of the stolen goods, nonetheless retains control over it wherever it is. For instance in this case, the appellant transmitted the stolen generator to his co-accused under unclear circumstances. PW4 took the view that the appellant had offered to sell the same to him but the transaction fell through following their arrest. That may well be true. To the extent that the appellant still retained possession of the stolen generator not though by way of physical or actual possession but by remote control, the doctrine of the recent possession would still apply. It matters not therefore that he was not upon arrest found in possession of the generator and or that the person who was found in physical possession thereof was actually acquitted.

On the whole, I am satisfied that the Appellant was convicted on sound evidence. This appeal therefore lacks merit. It is dismissed in its entirety.

JUDGEMENT DATED, SIGNED and **DELIVERED** at **MACHAKOS** this **15TH** day of **JUNE 2012.**

ASIKE - MAKHANDIA
JUDGE