



REPUBLIC OF KENYA

High Court at Kakamega

Criminal Appeal 191 of 2011

WILLIAM KIPKEMBO MUTAI 1ST APPELLANT

CAROLYNE ODHIAMBO 2ND APPELLANT

V E R S U S

REPUBLIC RESPONDENT

(Appeal arising from the judgment of [MR. L. O. ONYINA, SRM])

in Vihiga Senior Resident Magistrate's Court in Criminal Case No.280 of 2009

JUDGMENT

The two appellants were convicted of two Counts of Burglary and Stealing before the trial court. In the first Count that was Count II before the trial court the appellants were charged with Burglary contrary to **Section 304(2)** and Stealing contrary to **Section 279(b)** of the **Penal Code**. The particulars of the offence are that –

COUNT I: On the nights of 25th and 26th February 2009 at Mbale Township, Mbale sub-location in Vihiga District within Western Province, jointly with others not before court broke and entered a building namely a workshop of VIOLET KARABAT AMIMO with intent to steal from therein and did steal therein one sofa set, one blanket, one jag, one steel door, one timber wood door and a padlock all valued at KShs.23,650/= the property of VIOLET KARABAT AMIMO.

There was also an alternative charge of handling stolen goods contrary to **Section 322(2)** of the **Penal Code**. The particulars were that:-

On the 27th day of February 2009 at Mbale Township, Mbale sub-location, in Vihiga District, within Western Province, jointly with others than in the course of stealing dishonestly received or retained one sofa set, one blanket and one jag knowingly or having reasons to believe them to be stolen goods.

On the second count that was Count 4 before the trial court, the appellants were charged with the offence of kitchen breaking and stealing contrary to Section 306(a) of the Penal Code. The particulars of the offence were that the appellants:

COUNT II: On the nights of 29th and 30th January 2009 at Isimbalo village, Mbale Sub-location, Izava North location in Vihiga District within Western Province, jointly with others not before court broke and entered into a building namely a kitchen of JOHN ASAVA ULALI with intent to

steal from therein and did steal therein two big sufurias, one umbrella, one filter, two pairs of shoes, five hens, 70 kg of dairy meals and one kilogram of sugar all valued at KShs.13,000/= the property of JOHN ULALI.

They were also charged with an alternative charge of handling stolen goods contrary to Section 322(2) of the Penal Code. The particulars of the offence are that:

On the 27th day of February 2009 at Mbale village, Mbale Sub-location, Izava North location in Vihiga District within Western Province, jointly otherwise than in the course of stealing dishonestly received one big sufuria, one umbrella and one filter knowing or having reason to believe them to be stolen goods.

The first appellant's grounds of appeal are that the prosecution evidence was conflicting, based on hearsay and an afterthought, that the case was poorly investigated and that he was not identified. In his supplementary grounds of appeal, the appellant contends that essential witnesses were not called and that his defence was not considered. The appellant filed written submissions that expounded on his grounds of appeal. In his written submission, the appellant maintains that the first report did not mention his name and that the exhibits produced were not found in his possession. The assistant chief who led to his arrest was not called to testify.

On her part, the second appellant CAROLYNE ADHIAMBO's grounds of appeal are that the prosecution evidence is conflicting and based on hearsay, the investigations were poor and that the trial court misinterpreted the evidence on identification. In her written submissions the appellant contends that some of the items were found in the house of an accused who was released, the sub-chief who was mentioned did not testify and no inventory of the recovered items was produced. Further, that there was no evidence adduced that proves that the 1st appellant is her husband and that the proceedings were conducted in English and Kiswahili yet she does not understand the two languages.

The appellants relied on their respective grounds of appeal and written submissions. Mr. Orinda, state counsel opposed the appeals and submitted that the appellants were found in possession of recently stolen items and did not give reasonable explanation.

The proceedings before the trial court indicate that five witnesses testified for the prosecution. **PW1, ALICE OLESI AMUGUNE** testified that on the 26th of January 2009 she left her house at Mukingi village at 4.00 p.m. and went to her rural home at Muhanda. She came back the following morning when she noticed that her house had been broken into and several items stolen. On the 27th of February 2009 there was a police raid and some of her items including a mattress and a radio were recovered from the appellants' house. She went to the police station and identified her mattress and radio.

PW2, EUNICE KHAVERE ASAVA and **JOHN ASAVA ULALI** are couples. On the night of 29th and 30th January 2009 they slept in their home. PW3 woke up at about 3.00 a.m. and went out for a short-call and noticed that their kitchen had been broken into and some items stolen. P3 reported the incident to the area sub-chief and later to Mbale police station. On the 27th of February 2009 the sub-chief told them to go to the Mbale police station where they identified their cooking pot (sufuria), and a sieve, presumably for sieving tea leaves.

PW4, **CHEDADI WILSON ADEMA** worked as a presiding clerk at Kilingili Friends Church. On the 9th of February 2009 he went to the Church at about 7.00 a.m. and found several items stolen including iron sheets, bibles, books and flower vases. There was a police raid and some of the stolen items were recovered from the appellants' home.

PW5, Sergeant EPHANTUS MAINA was based at the Mbale police station. He got information from an assistant chief that a lady complainant had seen her stolen items in the appellants' house. PW5 in the company of the sub-chief went to the 1st appellant's home and recovered several items. The 2nd appellant was also found in the house. Some of the items stolen from PW1's house, PW2, & 3's kitchen

and the Kilingili Friends Church were recovered from the 1st appellant's house. According to PW5, they recovered from the 1st appellant's house one bible, two flower vases and iron sheet stolen from the church, a mattress and radio belonging to PW1 and a sufuria, umbrella and sieve belonging to PW2 and PW3. The appellants were arrested on the same day 27th February 2009 at about 3.00 p.m. and taken to Mbale Police station. They were later charged with the offence.

In his sworn testimony, the 1st appellant testified that on the 27th of February 2009 at about 5.00 p.m. he was at his place of work when police officers from Mbale Police station went and arrested him. He was later charged in court. The 2nd appellant opted to remain silent.

From the prosecution evidence, none of the witnesses saw the two appellants breaking into the premises of the complainants and stealing the items mentioned in the charge sheet. The counts on which the appellants were convicted involved PW1 Alice Olesi and PW3, John Asava Ulali. The items stolen and recovered from the two complainants were a mattress, a radio for PW1 and a sufuria, sieve and umbrella for PW3. PW1's house was broken into on the night of 26th and 27th January 2009 while the kitchen for PW3 was broken into on the night of 29th January 2009. The items were recovered on the 27th February 2009.

The main issues for determination is whether the appellants would be held to have been found in possession of recently stolen items and therefore were involved in the burglary and whether the 2nd appellant could be held to have participated in the offence.

The appellants contend that the prosecution evidence is contradictory and conflicting. The 1st appellant maintains that the first report did not give his name, the landlord of the house was not called to testify as well as the assistant chief. From the prosecution evidence, it is established that the house of PW1 and the kitchen of PW3 were broken into as per the evidence of the two witnesses. It is clear from the prosecution evidence that none of the victims saw the people who broke into their premises. This being the case, there could be no first report with the appellants' description as the witnesses did not see them committing the crimes.

The evidence of PW5 is that he was informed by the area assistant chief that some stolen items were seen in the 1st appellant's home. He went to the 1st appellant's home in the company of the assistant chief and some of the stolen items were recovered. I do find that since PW5 who was the investigating officer testified as to how the stolen items were recovered, the fact that the area assistant chief did not testify does not dent the prosecution's case. It is the evidence of PW1 that she was called to go to the police station when the raid was conducted on 27/2/2009 at the 1st appellant's home. The evidence of PW5 as to the recovery of the stolen items is not conflicting or contradictory.

The prosecution evidence does establish that the stolen items were recovered in the house of the first appellant. There was no need to call the landlord to testify as the evidence on record does prove that PW1 used to reside in the house where the items were recovered.

The breaking in and stealing from the premises of PW1 and PW3 occurred between 27th January to 30th January 2009. The stolen items were recovered from the house of the 1st appellant on the 27th of February 2009. The trial magistrate held that the doctrine of recent possession applied in this case. I do agree with the findings of the trial court as the stolen items were recovered within a period of less than one month. The defence evidence did not disprove the prosecution evidence and was considered by the trial court. I do find that the prosecution did prove its case beyond reasonable doubt. Although the charge sheet for Count one (Count II before the lower court) gives the dates of the offence as the night of 26th and 27th February 2009 but witnesses testified that it was the same dates but of January 2009. I do find that anomaly did not prejudice the defence case.

With regard to the 2nd appellant, it is the evidence of PW1 that she is the wife of the 1st

appellant. The appellant contends that there is no evidence to prove that she is married to the 1st appellant. PW1 testified that he did not know the two accused persons before the incident. If that was the case, it is clear that she could not confirm that she knew the relationship between the two appellants. PW5 testified that the 2nd appellant was found in the house of the 1st appellant when the raid was conducted on 27th February 2009. That aspect of evidence does not prove that she was married to the 1st appellant. I do find that the 2nd appellant was not accorded the benefit of doubt and it is clear that the house where the items were found belonged to the 1st appellant.

In the end I do find that the 2nd appellant's appeal is merited and the same is allowed. With regard to the sentence meted out on the 1st appellant, the trial court made the sentence for the two counts to run consecutively. I do find that taking the circumstances of the case into account, there was no need to have the sentence run consecutively. I will set aside the sentence imposed by the trial court of three years each for count one and two – (Counts 2 and 4 before the lower court) and replace it with a two year sentence for each count. The sentence to run concurrently from the date of conviction.

In the end, the 2nd appellant's appeal is allowed and the appellant is set at liberty unless otherwise lawfully held. The 1st appellant's appeal is disallowed. However, the sentence against the 1st appellant is set aside and replaced with a two year Imprisonment sentence for both counts with the sentence running concurrently.

Delivered, dated and signed at Kakamega this 31st day of July 2012

**SAID J. CHITEMBWE
J U D G E**