



REPUBLIC OF KENYA
IN THE HIGH OF KENYA
AT KISUMU
CRIMINAL APPEAL 114 OF 2011
FANUEL OLUKO NG'ONGA.....APPELLANT
VERSUS
REPUBLIC.....RESPONDENT

**From original conviction and sentence in Criminal Case number 1182 of 2010 of the
Senior Resident Magistrate's Court at Bondo – Mr. P. W. Mutua Esq.)**

JUDGMENT

The appellant and his co-accused were charged with the offence of breaking into a building and committing a felony contrary to Section 306 (a) of the Penal Code.

The particulars are that on the night of 27th – 28th June 2010 at Bondo township in Bondo district within Nyanza province jointly with others not before court broke and entered a building namely Tippo systems and did steal 18 plastic chairs, 6 sufurias of different sizes, ½ sack of charcoal and 12 kilograms of dried maize all valued at Kshs. 16,970 the property of John Olulo Ojath.

The alternative charges was handling stolen goods contrary to Section 322 (2) of the Penal Code.

The particulars are the same as the main charge. After full trial the 2nd accused was acquitted and the appellant convicted and sentence to five (5) years imprisonment.

The appellants petition of Appeal basically is premised on the grounds that the prosecution failed to call vital witnesses, the owner of the house was not established and that the trial court did not apply the doctrine of recent possession properly . He also argued that the court did not give him an alternative option during sentencing.

The brief facts of this case are that PW1 the complainant closed his business at 6:00 p.m. On 27th June 2010. The following morning he came and left his daughter to open the business while he travelled elsewhere. Shortly thereafter his daughter called him back.

He told the court that they found that the padlock had been broken and on taking inventory they discovered the items listed in the charge sheet stolen. The complainant reported the matter to the police. Subsequently, he was informed that some items had been found. He went to the police stolen and identified those items.

PW2 Lilian Akinyi the complainant's daughter gave similar story as the complainant. None of them saw the thieves.

PW3 David Barno a police officer told the court that acting on some tip off they raided some house which had been suspected to harbour some criminals. At the said house they found three (3) people who included the appellant, his co-accused and a woman who turned out to be the appellant's wife.

He told the trial court of how they recovered some items which included the exhibits another case. According to him the appellant and his co-accused were unable to explain their ownership.

PW4 P. C. Yohana Lengandu is the investigating officer. After carrying out his duties he charged the appellant and his accomplice.

PW5 Alexander Muruyo is the OCS Bondo. He told the court that during that period April – June 2010 there had been several robberies in the area. He told the court that after getting some information from a whistle blower they raided one of the suspected houses. They found the appellant and another person as well as some lady. As they could not give account of the items they possessed they arrested them. Later members of the public came and identified their items.

When put on his defence the appellant told the court that on 1st July 2010 he went to the house of Nyalego to take changaa. He said that while there somebody else joined them. Police came and they were arrested and together with the goods recovered in that house they were taken to the police station. He alleged that he was beaten up by the police and compelled to sign the inventory forms. He nevertheless denied the charge. His co-accused nevertheless implicated him in the whole case.

The issue to determine is whether indeed the items that were stolen were found in the appellants house. The other issue is whether the court misdirected itself in the application of the doctrine of recent possession.

From my analysis of the evidence presented to the court, I have no doubt that the items were recovered by the police in an house where the appellant was in at that time. This fact is not disputed by the appellant. But who owned the house?. Was it the lady who sold changaa one, Nyalego who was also called **Mary Adhiambo Ongonga**?. Was the said lady the wife to the appellant? The appellant in his defence in Chief said:-

“on 1st July 2010 I went to the Lake to fetch water. I went back to Nyalego who sells changaa and found she had opened the door.....

The police recovered items in the house. They brought us to police station together with the husband of the lady and recovered items”.

When he was cross examined by the prosecution he said:- **“It is not true Nyalego is my wife. It is not true in 2008 I was charged in this court with the said Nyalego as my wife”.**

Apparently the 2nd accused spilled the beans even prior to the trial court demanding that he be cross examined by the appellant. The Nyalego lady turned out to be the relative to the 2nd accused and a wife to the appellant.

By his own admission during cross examination the appellant conceded that the said Nyalego whom he was found by the police in her house was his wife.

How that can the appellant deny that that was never his house? He went further to admit that suspected goods were recovered from the said house. It follows without say that the lady Nyalego was the wife to the appellant and therefore the house where the suspected stolen items were found belonged to the appellant.

Did the goods belong to the appellant? The prosecution established that the goods belonged to PW1 who brought the receipts and identified them by their various marks. The goods did not belong to the appellant.

At this juncture therefore the appellant was bound to appear whom the goods belonged to. Under the provisions of Section 111 of the Evidence Act Chapter 80 Laws of Kenya the Appellant ought to have explained how he came into possessing the suspected stolen items. Without any reasonable explanation, which apparently the appellant lacked the court had no alternative but to find the appellant guilty. This position I fully agree and hold so.

The court did not apply the doctrine of recent possession wrongly. The trial court warned itself and indeed the stolen items were found only four (4) day's or thereabout from the appellant premises. These items were found shortly after the complainant's shop had been broken into. The items which the complainant recovered with the police are exactly the items found in possession of the appellant.

For the foregoing reasons this appeal must fail. The maximum sentence imposed by the Act is seven (7) years. The appellant was sentence to five (5) years imprisonment. Although the appellant is serving another sentence and therefore is an habitual offender I shall not enhance the sentence. The appeal is dismissed.

Order accordingly.

Dated, signed and delivered at Kisumu this 24th day of September 2012

H. K. CHEMITEI
JUDGE

In the presence of:

Mr. Meroka for State Counsel

In person Appellant

HKC/aa0