



REPUBLIC OF KENYA

High Court at Kisumu

Criminal Appeal 135 of 2011

JOHN OTIENO EJENJE APPELLANT

-VERSUS-

REPUBLIC RESPONDENT

(Appeal from the Judgment of the PM'S Court Maseno in CR. CASE NO. 1059 OF 2010)

JUDGMENT

The appellant John Otieno Ejenje was faced with 3 counts of breaking and stealing contrary to Sections 304 (1)(a) & 279 (b) of the Penal Code. Against all the 3 above he had alternative counts of handling stolen property contrary to S. 322(2) of the Penal Code.

He denied all the counts and the matter went for trial. He was convicted and sentenced on all the 3 counts of house breaking and stealing. Being aggrieved by the conviction and sentence he preferred this appeal on the grounds that he was convicted based on items recovered yet no investigations were done, there was no independent witness in support of the evidence adduced, there was no identification parade, his *alibi* defence was ignored and his constitutional right under Article 50(2) was violated.

At the hearing of his appeal he relied on written submissions which in brief stated as follows:-

- The court relied on hearsay evidence.
- The court relied on doubtful evidence.
- No receipts were produced to prove ownership of stolen items.
- He was arrested for a different purpose.
- In sentencing him the magistrate relied on extraneous matters.

The learned State Counsel **Mr. Kiprop** opposed the appeal on the grounds that stolen items were recovered from the appellant's house and some of the stolen clothes worn by the appellant's wife and yet

the appellant failed to explain how the items got to his house. As relates to the allegation that the trial court relied on extraneous matters he urged that the trial court simply noted that the appellant is a convict.

This being the first appellate court it has a duty to reconsider the evidence a fresh, examine and analyze the same in order to arrive at an independent opinion.

The evidence by the prosecution witnesses is that between the the 30th of August, 2010 and 12th of September, 2010 they lost various items. **PW1** stated that on the 30th of august, 2010 he met with the appellant who purported to be heading to a certain house to paint. Later she found her house broken into and her clothes and certificates lost. She reported the matter and later she heard of the appellant's arrest. On accompanying the police to the appellant's house she recovered several of her lost items.

PW2 lost shoes that she had left outside. The said shoes upon search at the appellant's house were recovered there. **PW3 P. C. Elizabeth Yatic** of Maseno Police Station received a complaint from PW1 and later the appellant was apprehended by members of public having gone to **PW2's** house. They searched the appellant's house and recovered properties stolen from the 2 houses.

On being put on his defence the appellant gave a sworn statement. He denied the offences and stated that he was arrested as he went to the market, by some 2 young men who assaulted him in the process and later took him to the Police where he was escorted to his house and some exhibits recovered. Further that the police went to his house a second time without him.

The witnesses **PW1 & 2** complained of how their homes were broken into later then items recovered at the appellant's house, yet the appellant did not explain how the stolen items got to his house.

In this case the doctrine of recent possession comes into play. The appellant failed to explain how he came by the stolen items. It is clear therefore that the only inference is that he is the one who broke and stole the items, this inference coupled with the evidence of **PW1** that on the material day she had seen the appellant within the vicinity leave no doubt in my mind that the accused is the one who broke and stole the items. I therefore do concur with the conviction.

As to the sentence, the trial court was informed that the appellant was already serving another sentence for house breaking. The court took note of the same in sentencing. The sentence appears to me to be reasonable and I therefore see no basis of interfering with the same.

The appeal is accordingly dismissed.

DATED AND DELIVERED THIS 18th DAY OF October2012.

**ALI-ARONI
JUDGE**

In the presence of:

..... **present for Appellant**

.....**present for Respondent**