



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUSIA

CRIMINAL APPEAL NO.34 OF 2009

CHARLES JUMA ODUORAPPELLANT

VERSUS

REPUBLIC.....RESPONDENT

AND

CRIMINAL APPEAL NO.35 OF 2009

JOHN MUGABE MATHIAS.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the conviction and sentence of E.H. Keago, SRM in Busia Criminal Case No. 1172 of 2007)

JUDGMENT

The appellants Charles Juma Oduor and John Mugabe Mathias and six others who were acquitted or did not appeal, were originally charged with the offences of Shop Breaking and Stealing contrary to Section 306(a) of the Penal Code. They were also charged with the alternative charge of Handling Stolen Goods contrary to section 322(2) of the Penal Code. They were, after a full trial, convicted of the main charge of Shop Breaking and Stealing and sentenced to seven years imprisonment. The two appellants apparently appealed against the conviction and sentence. There is no indication as to whether the 8th accused in the lower court appealed or not or if he appealed, what happened to his appeal. The appeal record also does not show that the two appeals before me were consolidated.

I accordingly hereby consolidate the two appeals numbers 34 of 2009 ad 35 of 2009 under appeal number 34 of 2009 so that Charles Juma Oduor becomes 1st appellant and John Mugabe Mathias becomes the 2nd appellant.

I have carefully perused and considered the evidence in the appeal record. It is clear that the conviction was entirely grounded upon the evidence of recent possession.

PW1 Janet Susan Ndira the complainant's testified that her shop at Nangina Market was broken into in the night of 17/8/2007 and several pieces of ready made and unmade pieces of cloth stolen from it. A piece of iron box was also stolen. Within the same month several similar clothes were recovered from several persons who included the appellants or others who pointed their fingers at the appellants as the persons who had sold some pieces of cloth to them. It is on record that the trial court finally got satisfied beyond a reasonable doubt that the complainant properly identified as hers the several pieces of cloth that were stolen during the break-in on 17/8/2007. Using the principle of recent possession as I understand it, the honourable trial magistrate found that the appellants had failed to produce an innocent explanation for the possession of the stolen pieces of cloth and the iron box and found that they were the people who had broken and stolen from the complainant's shop.

On the other hand the appellants had denied the charge on oath and having admitted possession, they claimed the recovered pieces of cloth, as their own. They testified that they bought the goods recovered from them in the open market and thus denied knowledge of the goods having been originally stolen or illegally acquired.

It is the view of this court however, that it was necessary for the complainant to properly identify the recovered items as his. Although the honourable Magistrate thought that the items had been so identified, this court finds that a proper standard of identification was not proved or established. This is because the complainant conceded during cross-examination during the trial that she did not buy the pieces of cloth and vitenges which were stolen from her shop, but that but same had been deposited for stitching by customers that the "edge – cutting" by which she had identified some of the clothes was not special to his shop alone. She also conceded that the Kitenge materials recovered from 1st appellant (1st accused) could be purchased anywhere and without receipts being supplied to the purchaser She further admitted that she was not the only tailor who could sell the same items in the market in the area, including Nangina market.

The police officer, PW3, Patrick Laweri attached to Koru who recovered the purportedly stolen items also admitted that the recovered clothes and materials were common and available in the open market and that the complainant did not show evidence of having herself bought or owned them.

In conclusion, this court finds that the items recovered from the appellants were common goods found everywhere and were therefore not properly or could not firmly be identified as those stolen from the complainants shop at the material time. It is also noted that the owners of goods who were complainant's customers were not called to testify.

In the above circumstances the charge, mainly against the appellants, was not proved beyond a reasonable doubt and the benefit of doubt should have been given to them. The conviction cannot be left to stand. It is hereby quashed and the sentence of seven years set aside. The appellant, if not otherwise lawfully held in prison, are ordered released forthwith. It is so ordered.

Dated and delivered at Busia this 3rd day of February 2011.

D. A. ONYANCHA

JUDGE