REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 53 OF 2010

(From Original Conviction and Sentence in Criminal Case No. 657 of 2009 of the Principal Magistrate's Court at Kwale: A.M. Obura – R.M.)

SUDI SWALEHE .....……...…..... APPELLANT
VERSUS
REPUBLIC …….……..…….. RESPONDENT

JUDGMENT

The Appellant **SUDI MWALEHE** has filed this appeal challenging his conviction and sentence by the learned Resident Magistrate sitting at Kwale Law Courts. The Appellant had been arraigned in the lower court on 4th May 2009 on a charge of **BURGLARY CONTRARY TO SECTION 304(2) AND STEALING CONTRARY TO SECTION 279(b) OF THE PENAL CODE.** The particulars of the offence were that:

"On the night of 17th day of April 2009 at unknown time in Soweto Estate of Kwale Township in Kwale District within Coast Province, you broke and entered a dwelling house of AUSTINE MAUNDU KIOKO and therein did steal (1) DVD machine make JVC S/No. 099B2909 and (2) 6 pieces of table clothes all valued at Kshs.5,600/- the property of AUSTINE MAUNDU KIOKO."

The Appellant pleaded ***'not guilty'*** to the charge. His trial commenced on 31st July 2009 at which trial the prosecution led by **INSPECTOR SIBUDA**, called a total of four (4) witnesses in support of their case. The brief facts were that on 17th April 2009 **PW2 ESTHER KIVOLE** retired to bed in the family home in Soweto Village in Kwale. She awoke the next day 18th April 2009 to find the window grill had been cut and their DVD machine and table-clothes were missing. **PW2** alerted her husband **PW1 AUSTINE MAUNDU** of the theft. **PW1** returned to his home that evening and confirmed the theft. He reported the matter to police. Later one **HAMISI** informed **PW1** that a man was offering him a DVD machine for sale. **PW1** reported the matter to police. Police arrested Appellant who showed them where he had buried the DVD machine and 3 table cloths which the complainant identified as his. The accused was then charged.

The court placed the Appellant on his defence and he opted to make a sworn defence in which he denied any involvement in the burglary or theft. On 29th January 2010 the learned trial magistrate delivered her judgement in which she convicted the Appellant and sentenced him to serve 7 years imprisonment on the first limb of the charge and 5 years on the second limb. The sentences were directed to be served concurrently. It is against this conviction and sentence that the Appellant now appeals.

The Appellant who appeared in person at the hearing of this appeal relied exclusively upon his

written submissions which with the leave of court had been duly filed. **MR. ONSERIO**, learned State Counsel who appeared for the Respondent State made oral submissions in which he opposed the appeal and urged this court to uphold both the conviction and sentence of the lower court.

PW1 who was the complainant in this case and the owner of the goods in question was not present when the burglary occurred. He therefore has no idea who broke into his house. In the case of **PW2** the complainant's wife although she was present when the burglary took place, she admits that she was asleep at the time and therefore saw nothing. Neither **PW1** nor **PW2** was able to identify the Appellant as the perpetrator of this offence. **PW1** after having reported the theft to the police told the court that he was alerted by one ***'HAMISI'*** that the Appellant was selling a DVD machine similar to his stolen one as ***'it had no remote and the wire was cut'***. For reasons best known to themselves the prosecution did not call the said Hamisi as a witness although his evidence was crucial to the prosecution case. Does this failure/omission negate the conviction rendered by the trial court? I think not. Notwithstanding the failure of the said Hamisi to testify there exists direct and concrete evidence linking the Appellant to the commission of this offence. **PW3 PW SAMMY KIPKIRUI** told the court that on 28th April 2009 10 days after the burglary and acting upon the information provided by ***'Hamisi'*** he arrested the Appellant as a suspect in this case. The Appellant led police to the place where he had dug a hole and buried the DVD machine. Police unearthed the said DVD wrapped in polythene paper. This is a case where the doctrine of ***'recent possession'*** squarely applies. The prerequisites for the application of this doctrine were set out by the East African Court of Appeal in the case of **ARUM –VS- REPUBLIC [2006] E.A. 10** where it was held:

"Before a court can rely on the doctrine of recent possession as a basis of conviction in a criminal case the possession must be positively proved, that is there must be positive proof, first, that the property was found with the suspect, secondly that the property is positively identified as the property of the complainant; thirdly that the property was stolen from the complainant, and lastly the property was recently stolen from the complainant"

In this case the property in question is the DVD machine which the complainant alleged was stolen from his house on the night of 17th/18th April 2009. On the issue of recovery there is no doubt. **PW3** told the court that it was the accused who led police and pointed out the spot where he had buried it. The fact that the DVD was buried in the ground is proof of the fact that the Appellant was trying to hide it. On his part the Appellant whilst conceding that indeed the DVD was buried in the ground, claims that it was not he but his in-law who so buried the DVD machine. Firstly the Appellant did not call his in-law as a defence witness to confirm that it was she and not he who had buried the DVD machine. Secondly how was it possible for the Appellant to have known the exact spot where the DVD machine was buried unless he had a hand in hiding it at that spot. In her judgement the learned trial magistrate dismisses the Appellant's defence with the following words at page 14 line 30:

"He [the appellant] told the court that it was his sister-in-law who hid the DVD player. However, there was evidence that after his arrest he took police to the scene. He was not accompanied by the said sister-in-law. He took police to the exact spot. If at all he was not involved in hiding it, how come he was able to take police officers to the scene."

I do agree with the above observations made by the trial magistrate. The tale of his in-law being the one who buried the DVD machine is clearly fabricated by the Appellant in an attempt to deflect attention from himself. It is simply not true. The fact that the Appellant was found in possession of this DVD is further confirmed by his own admission in his defence that he did make arrangements to sell it to the said ***'Hamisi'***. The fact that this DVD belonged to the complainant is also not in any doubt. It was produced in court as an exhibit **Pexb1** and both **PW1** and his wife **PW2** positively identified it as the one which had been stolen from their home. **PW1** was able to identify the DVD by its serial number. He was able to produce the original receipt for the purchase of the DVD machine **Pexb1** from Nakumatt Nyali. The receipt listed the serial number as 099B2909. Further **PW1** was able to identify his machine by an exclusive mark he had placed on it. He states at page 4 line 13:

"I also identify the warrant number 04816 Pexb2. I identify the DVD machine in court. It is S/No.

099B2909 Pexb3. The wire had been cut. (it is now joined with cellotape)."

There can be no doubt therefore that the DVD machine recovered in the possession of the Appellant was the very same machine which had been stolen from his house during the burglary. The complainant has proved his ownership of the same. **PW2** the complainant's wife also identified the recovered DVD machine as the one stolen from their home on the night of 17th/18th April 2009. The second ingredient of the doctrine of recent possession as laid down in the **Arum Case** has been proved.

The complainant and his wife told the court that thieves broke into their house on the night of 17th/18th April 2009. The recovery was made on 28th April 2009 ten days later. In my view this satisfies the doctrine of recent possession. By his own evidence the Appellant had received the machine earlier than 28th April 2009. He kept it with him for some time then later attempted to sell it to ***'Hamisi'***. Clearly this machine had recently been stolen from the complainant. It is pertinent here to note that **PW3** upon searching the Appellant's house also recovered 6 table-clothes which both **PW1** and **PW2** identified as their property, stolen from their home on that same night. The Appellant does not claim that the said table cloths are his neither can he explain their presence in his home. It cannot be a mere coincidence that the Appellant is found with a DVD machine **and** table clothes belonging to the complainant and both of which were recently stolen from the complainant's home.

The only reasonable and indeed the only logical conclusion that can be drawn from this set of facts is that the Appellant was an active participant in the break in and theft of these items from the complainant's house. In her judgement at page 15 line 28 the learned trial magistrate concludes thus:

"I find overwhelming evidence which irresistibly leads to the conclusion of guilt on accuseds part. Having been found with the items 11 days after the burglary and theft, I apply the doctrine of recent possession, and hold that he must have been the thief who broke into the complainants home that night …"

I am satisfied that the trial magistrate made a sound legal conclusion on the basis of evidence availed during the trial. Indeed this is what one can rightly term ***'an open and shut case'***. The guilt of the Appellant was proved beyond a reasonable doubt and I have no hesitation in confirming his conviction as rendered by the trial court.

The Appellant was allowed an opportunity to mitigate after which the trial magistrate convicted him of seven (7) years for the limb of burglary and five (5) years on the limb of stealing. While this sentence is lawful I fail to see why such a distinction in the terms imposed for each limb was made. The offences were committed at the same time and in the course of the same transaction. I set aside the sentence imposed by the trial court and instead substitute a term of five (5) years imprisonment on each limb of the offence and further direct that the sentences be served concurrently from date of first sentence in the trial court.

It is so ordered.

Dated and Delivered in Mombasa this 18th day of April 2011.

M. ODERO
JUDGE

In the presence of:
Appellant in person
Mr. Onserio for State