REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA

AT KITALE.

CRIMINAL APPEAL NO. 39 OF 2009.

ROBERT KITUYI SIFUNA.....APPELLANT.

VERSUS

REPUBLIC.....RESPONDENT.

(*An appeal from an original conviction and sentence of T.A. Odera – SRM in Criminal Case No. 969 of 2006*

***delivered on 26th June, 2009 at Kitale*.)**

J U D G M E N T.

1. The appellants **Robert Kituyi Sifuna** and **Kasim Masinde Martin** (herein referred to as 1st and 2nd appellants) were charged with the offence of breaking into a building and committing a felony contrary to section 306 (a) of the penal Code. They also faced an alternative charge of handling stolen goods contrary to section 322 (2) of the Penal Code. They were tried by the Senior Resident Magistrate, convicted of the alternative charge of handling stolen goods and sentenced to serve 3 ½ years imprisonment. Being aggrieved by the conviction and sentence, the appellants have appealed.

2. Both appeals were consolidated for purposes of hearing and determination. The appellants have faulted the conviction on the grounds that the prosecution's case was poorly investigated thus the case against them was not proved to the required standards. They also faulted the decision of the trial magistrate which rejected their defence which defences in their view were plausible and should have afforded them an acquittal. In their written submissions, the appellants submitted that the ownership of the house where the goods were found was not proved that it did belong to the appellants. The authenticity of the receipts produced by the 1st complainant as evidence of ownership of the goods did not relate to the items that were produced as exhibits. Moreover the items which were recovered had no particular identification marks and they are goods which are commonly sold in any shop.

3. These appeals were opposed by the state; Ms**. Bartoo**, the learned State counsel submitted that the prosecution's case was proved to the required standards. The 1st appellant was arrested with an assortment of new clothing which was produced as exhibits. PW2 and PW3 identified the clothes and produced receipts that they had used to purchase them. The 1st and 2nd appellant had an opportunity to steal the clothes because the complainants used to leave the keys of their shop with the 1st appellant while the 2nd appellant was the watchman of the premises. The state urged the court to find the evidence of the prosecution was watertight and the convictions of both appellant safe.

4. This being a first appeal, this court is mandated to re-evaluate the evidence before the trial court and arrive at its won independent determination on whether or not to uphold the conviction. In so doing, the court has always to bear in mind that it never heard or saw the witnesses and give due regard to that. I here by albeit in summary restate evidence which the learned trial magistrate relied on to convict the appellants. **Nancy Gathoni Mwaniki**, PW2, with her husband, Titus **Nderitu King'ori**, PW3, testified that they used to sell clothes at Laini Moja Kitale. Between the month of August, 2005 to March, 2006, the two with the assistance of one employee they carried on the business of selling new clothes under the name, Wakings Fashions. PW1 used to obtain her stock of clothes for ladies, gents, and children from Nairobi.

5. The two witnesses testified that they noticed their stock was receding and they were making losses. This even led to a disagreement between the two witnesses because PW2 testified that she could not understand how they were making losses despite the fact that they were restocking the shop regularly. They discussed with the landlady and they even examined the building to find out whether there was a possibility that the shop had been broken into from the ceiling. There was a watchman who is the second appellant and the 1st appellant used to work at the hotel owned by mama Ciru. All along PW1 never suspected the 1st appellant who used to be left with the key or 2nd appellant who was the watchman were involved in stealing their stock until the 13th March, 2006 when PW3 was called to look at some clothes which were recovered and they were at the police station. The 2nd appellant had been arrested with the clothes. PW2 and PW3 were able to identify the items. It is the 2nd appellant who named the 1st appellant and when the police visited his house, they recovered other assorted clothes and items stated in the charge sheet.

6. PC Joseph Mwaura, PW4, was the investigating officer in this matter. The police received information that the 2nd appellant had an assortment of new clothes in his house. The police raided the house of 2nd appellant and indeed he found an assortment of new clothes. The 2nd appellant led the police to the 1st appellant's house. They conducted a search and found an assortment of new clothes, both appellants were made to sign an inventory of the items found in their respective possessions. PW2 and PW3 identified the clothes by producing purchase receipts. The 1st and 2nd appellants were put on their defence.

7. The 1st appellant gave unsworn statement of defence. The 1st appellant claimed that he was forced by the police to carry a luggage upto the Kitale police station and he was implicated with the present charge. On the part of the 2nd appellant, he gave a sworn statement of defence. He narrated how he was arrested while at his place of work and taken to the police station because he had been implicated by the 1st appellant. The 2nd appellant contended that the clothes that were recovered in his house belonged to his wife who used to deal with 2nd hand clothes. He claimed the police refused to give him a chance to produce the receipts to support his claim.

8. The learned trial magistrate considered the above evidence and her conviction of the 1st and 2nd appellant was principally informed by her opinion which she expressed in the following;

"PW2 and PW3 identified the clothes as belonging to them and even produced the purchase receipts for the same. Though accused No. 2 claims to own the said clothes the number of the said clothes was unusual and they were new. Accused 2 ought to have given a reasonable explanation as to how he got the goods. It was not enough for him to just say that the clothes belonged to his wife. I see no reason why PW2 would have implicated accused herein for what they had not done and she and PW2 and 3 were firm in their evidence that they had not differed with accused before. PW4 the investigating officer said he did not know accused before the incident. It is clear from the foregoing that accused dishonestly received or retained the said stolen goods knowing or having reasons to believe them to have been stolen goods. On the charge of breaking and stealing, I find that there was no direct witness to the stealing and the goods were recovered about 7 months from the date of the alleged stealing. In the circumstances the doctrine of recent possession does not apply. Further that the mere fact that the key used to be left with accused 3 does not mean he is the one who broke and stole as it has emerged that there was also a worker in the shop who used to sell alone at times. The main count of breaking and stealing has not been proved by the alternative charges of handling stolen goods contrary to section 322 (2) of the Penal Code."

9. The learned trial magistrate who had an opportunity to hear and see the witnesses as they testified believed the evidence of PW2, PW3 and PW4, that is the complainants, and the investigating officer who recovered the items from the 1st and 2nd appellants. Despite the fact that the 1st appellant signed an inventory of the goods that were found in his possession, he gave a defence that he was forced by the police to carry someone else's luggage. I see no justifiable reason why the police would have implicated the appellants, and connected both the appellants with an offence. The goods were positively identified by PW2 through production of purchase receipts. By virtue of the goods being found in possession of the 1st and 2nd appellant, and the goods having been identified positively by the complainants the offence of handling stolen goods was proved.

10. The learned trial magistrate found that the defence offered by the appellants lacked credibility in view of the prosecution's evidence and particularly because the appellants were found in possession of the stolen items. In this case I find no justifiable reasons why the police would implicate the 1st appellant with handling goods which he had nothing to do with. According to the police and also the 2nd appellant, he was implicated by the 1st appellant when the police searched his house and found assorted goods which he claimed belonged to his wife. I am aware that the 2nd appellant is not obliged in law to say anything in defence. However, he gave a sworn statement of defence and said the goods recovered in his possession belonged to his wife who was dealing with the sale of old clothes. The learned trial magistrate disregarded this defence and lightly saw because it did not make sense in the light of the prosecution's case.

11. I find there was acceptable evidence that the appellants were searched and the items were recovered in their possession. Those items were positively proved to belong to the complainants. In the circumstances I find this appeal lacking merit and it is hereby dismissed. The conviction and sentence imposed on the appellants are hereby upheld.

Judgment read and signed this 20th day of May, 2011.

M. KOOME

JUDGE.