REPUBLIC OF KENYA

IN THE HIGH COURT

AT BUNGOMA

CRIMINAL APPEALS NOS.93 AND 94 OF 2010 (CONSOLIDATED)

(Being appeal from the conviction and sentence by the Senior Resident Magistrate Hon. J. O. Magori

at Sirisia in Cr. Case No.300 of 2010)

STEPHEN WANYONYI WEKESA...1ST APPELLANT
MESHACK WANJALA SIKENYI..2ND APPELLANT

~VRS~
REPUBLIC..RESPONDENT

JUDGMENT

The Appellants were charged along with the others with the offence of breaking into a shop and stealing contrary to section 306 (a) of the Penal Code whose particulars were that on the night of 25th/26th April 2010 at Myanga Market in Siombe Sub-location of Kimaeti Location of Bumula District within Western Province they jointly with others not before the court broke and entered into the shop of Lawrence Wabwire (PW1) with intend to steal and stole from therein shop goods worth Ksh.150,000/= the property of PW1. The 1st Appellant faced an alternative charge of handling stolen goods contrary to section 322 (2) of the Penal Code, that on 30/5/2010 at Myanga Village in the same Sub-location he otherwise than in the cause of stealing dishonestly received or retained one blanket knowing or having reasons to believe it to be stolen. The Appellants were convicted of the offence in the main charge and each sentenced to 4 years in jail. They were aggrieved by the conviction and sentence and preferred this appeal. Mrs Leting for the State conceded the appeal.

The evidence on which the Appellants were convicted was that PW1 operated a shop at Myanga. He closed the shop for the day on 25/4/2010 and went home. Next morning he found it broken into and goods worth Ksh.150,000/= were missing. He reported to Myanga Administration Police Post and to Malakisi Police Station. The 1st accused came to PW1 to say he knew who had broken into the shop. He wanted Ksh.100/= to provide the information. He went away but did not return as promised. PW1 caused his arrest. He led to the 2nd accused who was found with a mattress (exhibit 1). The 2nd accused told the police that the mattress belonged to the 2nd Appellant who had pledged it for a credit of Ksh.300/=. The police recovered a blanket (exhibit 2) from the house of the 1st Appellant. The 1st Appellant denied in unsworn defence that he was found with the blanket. The 2nd Appellant gave sworn defence and denied having been found with the mattress. Both denied breaking into the shop or stealing from there. The trial court found the Appellants guilty of the main charge on basis of the doctrine of recent possession.

It is the responsibility of this first appellate court to subject the entire evidence to fresh and exhaustive scrutiny to be able to determine whether the conviction was safe. **(Okeno v Republic [1972] EA 32).**

The Appellants complained that the conviction was against the weight of evidence; the prosecution evidence was contradictory; and that the defence evidence was not considered. The record shows that, although PW1 stated that blankets and mattresses were some of the items stolen from his shop when it was broken into, he was not led to say that the mattress and blanket recovered were among his stolen goods in the sense that there were any peculiar features on them. This issue was raised by Mrs. Leting in conceding the appeal. Secondly, it was the 2nd Appellant who was found with the mattress. If this was

stolen property then he was an accomplice. The evidence of an accomplice has to be materially corroborated **(M'inanga v Republic [1985] KLR 294).** The court did not look for any corroborating evidence, and none existed. If the police believed the 2nd Appellant that he got the mattress from the 2nd accused then they should not have charged him but instead used him as a prosecution witness. They did not believe him, I find, and that is why he was also charged. Thirdly, the 2nd accused gave sworn defence. He was cross-examined by the prosecutor. The record does not, however, show that an opportunity was given to the 2nd Appellant to cross-examine him. He had given evidence incriminating the 2nd Appellant. That evidence was required to be tested by the 2nd Appellant on cross-examination. The action by the court is not allowing the cross-examination was prejudicial to the Appellant who was not represented.

PW2 Antony Kundu Khaemba testified that he had gone to cut sugarcane in his shamba when he found a mattress and two blankets. He took them home. Later the 1st Appellant came to claim them. They were released to him by PW2's mother Agnes Nabangala Khaemba (PW3). Strictly, PW2 and PW3 are accomplices if they were found with stolen property. Even if they are not, PW2 testified that exhibits 1 and 2 were two of the items handed over to the 1st Appellant. If the Appellant had both the two items then how come one of them (the mattress) is being attributed to the 2nd Appellant. Had the 1st Appellant given the mattress to the 2nd Appellant? Can it then be said both Appellants are therefore guilty of the offence in the main charge?

I have considered the evidence as recorded and have come to the conclusion that the conviction was not safe. I allow the appeal, quash the conviction and set aside the sentence. The Appellants are ordered to be set at liberty immediately unless they are otherwise being lawfully held.

Dated and delivered at Bungoma this 6th day of December, 2011 in the presence of the Appellant, Mrs Leting the State Counsel and Lilian Gimose the court clerk.

A. O. MUCHELULE
JUDGE