REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU

Criminal Appeal 35 of 2007

DORCAS MITHIKA.....APPELLANT
VERSUS
REPUBLIC.....PROSECUTOR

(An appeal against the judgment of the Hon. G. Oyugi Ag SRM in Tigania in Criminal Case No. 889 of 2006 delivered on 22nd February 2007)

JUDGMENT

The appellant, Dorcas Mithika, was charged along with other co-accused in the lower court with various charges of burglary, breaking into building and she on her own faced an alternative count of handling stolen goods. The lower court, by its judgment dated 22nd February 2007, convicted the appellant of the charges of burglary and house breaking. As a result, the alternative charge was not considered. This is the first appeal. As the first appellant court, I am expected to submit the whole evidence of the lower court to a fresh and exhaustive examination. In so doing, I must weigh the conflicting evidence and draw my own conclusion. In so doing, I should also make allowances for the fact that the trial court had the advantage of hearing and seeing the witnesses. See the case of Okeno Vs. Republic [1972] EA. 32. PW1 up to PW5 and 7 had their houses broken into where theft took place. The different charges of burglary and house breaking relates to those thefts in their houses. PW6 was a chief of the area and following the report of those burglaries and theft, he, together with the police begun to carry out investigation. In carrying out the investigation, they found in the appellant's house bed cover, pillow cases, curtain, crochet, and 3 long trousers. These items were identified by PW3 as being her property. The court, after receiving evidence from the prosecution witnesses, found the appellant had a case to answer. The appellant in her defence in unsworn statement said that she was found in her house and arrested. She denied the offence. It would be noted that the appellant did not deny that the items found in her house were indeed found there. She also did not lay claim to those items. The theft of PW3's house took place on 17th April 2006. The items were recovered from the appellant's house on 3rd May 2006. In my view, apart from the fact that those items were found in the appellant's house, there was no other evidence that shows she was part and parcel of the burglaries and the house breaking. As stated before the lower court convicted the appellant for burglaries and house breaking but found no evidence for the alternative charge. The prosecution had a burden to prove the guilt of the appellant in respect of the burglaries and the house breaking. That burden was well set out in the case Thomas Patrick Gilbert Chomondeley Vs. Republic Criminal Appeal No. 116 of 2007 the Court of Appeal had this to say on the burden placed on the prosecution.

"……in each and every criminal prosecution, the burden of proof of guilt is invariably upon the prosecution and at no stage does that burden shift to an accused person whether the accused person be the meanest beggar on our streets, or Lord Dalamere whose grandson the appellant is said to be."

Having considered the evidence tendered in the lower court, I find that it tends to prove the charge of handling stolen goods rather than the charge of burglary and house breaking. In this regard, I would rely on the doctrine of recent possession. That doctrine was well set out in the case Antony Kariuki Kareri Vs. Republic Criminal Appeal No. 110 of 2002. The Court of Appeal in that case had this to say:-

"*In the doctrine of recent possession is comprehensibly dealt with in the case of Andrea Obonyo Vs. Republic [1962] EA 542 relied on by the appellant's counsel. The presumption is that a person in possession of stolen goods soon after the theft is either the thief or has received the goods knowing them to be stolen unless he can account for his possession. That is a presumption of fact and not an implication of law which presumption is merely an application of the ordinary rule relating to circumstantial evidence."*

In that case, the Court said at page 349 Para H, I:

"*When a person is charged with theft and, in the alternative, with receiving and the sole evidence connecting him with the offence is the recent possession of stolen property, then, if the only reasonable inference is that he must have either stolen the property or received it knowing it to be stolen, he should be convicted either of theft or of receiving according to which is more possible or likely in the circumstances. He is not entitled to be acquitted altogether merely because there may be doubt as to which of the two offences he has committed."*

Applying that doctrine of recent possession, and considering the evidence of the recovery of the items at the appellant's house, I find that the appellant was guilty of handling stolen goods contrary to section 322 (2) of the Penal Code. I do not find that the evidence points to appellant's guilt on burglary or house breaking. Having made that finding, I find that the appellant's appeal does succeed to the extent that her conviction is hereby quashed and her sentence is hereby set aside. The appellant Dorcas Mithika is hereby convicted of the alternative charge of handling stolen goods contrary to Section 322(2) of the Penal Code and is hereby sentenced to serve 3 years in imprisonment from the date of conviction by the lower court.

Dated and delivered at Meru this 19th day of March 2010.

MARY KASANGO
JUDGE