REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

Criminal Appeal 147 & 148 of 2006

JIMMY MASILA KITEMA.....1ST APPELLANT

CHRISPUS NJULE .....2ND APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

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JUDGEMENT

Before court is the consolidated appeal of **JIMMY MASILA KITEMA** (hereinafter referred to as the 1st Appellant) and **CHRISPUS NJULE** (hereinafter referred to as the 2nd Appellant). The Appellants had both been tried and convicted before the Resident Magistrate, Wundanyi on two counts of **BREAKING INTO A BUILDING AND COMMITTING A FELONY CONTRARY TO SECTION 306(A) OF THE PENAL CODE.** The prosecution called a total of five (5) witnesses in support of their case. The prosecution case was narrated by the two complainants who were **EMMANUEL MWAWASI** (who testified as **PW1**) and **MARGARET SARU** (who testified as **PW2**). Their evidence is that on the night of 10th January 2006 both **PW1** and **PW2** who were traders running their businesses at Maktau Location in Taita Taveta District, locked up their respective shops and went home. The next morning both arrived to find that their shops had been broken into. In the case of **PW1** he told the court that he found a weighing machine, a radio make National and two sacks of 90 kg maize were all missing. **PW2** on her part told the court that various grocery items like, tea leaves, omena, sugar, flour, sweets etc were missing from her shop. PW1 reported the theft to the police who traced the tracks made by a bicycle as well as foot prints to a certain house in the area. Upon investigation it transpired that the occupants of the house in question were the two appellants. Police traced 1st Appellant and searched the house in his presence. They recovered the radio and weighing machine hidden in two sacks of maize. **PW1** identified these as the items stolen from his shop. **PW2** also identified the grocery items found in that house as stolen from her shop. The 2nd Appellant was traced to the nearby river where he had gone to fetch water and was arrested. Both appellants were charged.

When the prosecution closed their case, the court placed both appellants on their defence. They each gave unsworn

defences and called no witnesses. On 3rd May 2006 the learned trial magistrate delivered his judgement in which he convicted both appellants on the two main counts. After listening to their mitigation the trial magistrate sentenced each appellant to serve four (4) years imprisonment. It is against this conviction and sentence that the two now appeal.

At the hearing of this appeal both appellants appeared in person and each relied on their written submissions duly filed in court. **MR. ONSERIO**, learned State Counsel appeared for the Respondent State and opposed the appeal.

In this appeal the question of identification was not raised as a ground of appeal. That is because this question did not arise at all. The incident occurred at night. Neither **PW1** nor **PW2** were present in their shops when the theft occurred. Indeed the two complainants testify that they had both locked their shops and gone home for the day. As Mr. Onserio for the State pointed out the conviction was based solely on the recovery of the stolen items in the house which was said to be occupied by the two appellants. In order for a person to be deemed to be in possession of a particular item he must either be found in actual physical possession of the item in question or he must be in occupancy and control of the house where the item was recovered. The prosecution evidence is that the items stolen from **PW1** and **PW2** were recovered in a house where the two appellants lived. **PW4 PC JOHN MWATATE** stated in his evidence at page 5 line 35 –

> ***"There were foot marks – sandal shoes – which were outside the compound. Also there were marks for one bicycle. We followed it to a certain house in which one of the accused who had been placed on CSO was residing"***

The trail from the scene of crime i.e. the shop of **PW1** led police directly to this house. **PW5 COLP BENJAMIN NYUMU** told the court that he traced the 1st Appellant and went with him to the said house. The police broke down the door and inside recovered the stolen items. **PW3 DANIEL MWAZARO** tells the court that it was his grandfather who is now deceased who left that house to the 1st Appellant. In their defence neither appellant denies being the owner/occupants of the house in question. Thus the facts show that items stolen from the shop of **PW1** and **PW2** were recovered inside the Appellant's house barely hours after their shops had been broken into and the items stolen. **PW1** was able to positively identify the items which had been stolen from his shop. At page 2 line 18 he states –

> ***"We did a search and in the room where they sleep, we found the two bags of maize divided into two bags. In the sacks I had written a label, Mwakitau Posho Mill (MFI'1'). The radio and weighing machine were inside the room. The weighing machine is here – Salter (Spring Scale) MFI'2'. I also have its receipt. I bought it on 20th April 2001. It was bought at Kshs.3,000/- MFI'3' – receipt …"***

Therefore **PW1** has tendered to the court conclusive proof that these items were his stolen property. None of the appellants claim that those items were theirs. As such I am satisfied that with respect to **PW1** (and Count No. 1) the doctrine of "recent possession" does squarely apply. This doctrine was applied by the Court of Appeal in the case of **ODUL –VS- REPUBLIC [1986] KLR 2**, where it was held –

> ***"Taken altogether there was no doubt that the appellant was found in recent possession of stolen property"***

I am satisfied that this finding similarly applies to this present case. There can be no other explanation for the finding of the goods stolen from **PW1** in the house of the Appellants barely hours after her shop was broken into other than that it was the 2 appellants who committed the theft. Therefore with respect to Count No. 1 do find that the evidence is water-tight and that the appellant's conviction on this count was based on sound law. As such I do hereby uphold the conviction of the two appellants with respect to Count No. 1.

With respect to Count No. 2 the items which were allegedly stolen from her shop were ordinary grocery items, the kind which could be found in any other shop or in any home for that matter. **PW2** did not quite exclusively identify the recovered items as her property. In his judgement at page 3 line 4 the learned trial magistrate found as follows:-

> ***"PW2 did not produce any documentary proof for the items listed as Pexb5 to Pexb17 but only confirmed that she owns a kiosk at Maktau which was broken into on the material night. Due to her failure to produce any documentary evidence especially as such goods which obviously she must have been given a receipt, leaves me to doubt the genuity of her claim. Besides, she immediately re-stocked the kiosk before the police could come and inspect it"***

I am surprised that even after admitting that doubt remained in his mind the learned trial magistrate proceeded to render a conviction against the appellants on this count. This count clearly was not proven beyond a reasonable doubt. Any doubt entertained by the trial magistrate ought to have been resolved in favour of the appellants. I am in agreement with the learned State Counsel's concession of the appeal with respect to this second count. I find that the evidence adduced was not sufficient in law to support a conviction on Count No. 2. I therefore do allow the appeal with respect to this charge and quash the conviction of both the appellants on Count No. 2.

With respect to sentence the learned trial magistrate did consider the mitigation and thereafter imposed a sentence of seven (7) years imprisonment on each count for 1st Appellant and four (4) years on each count for the 2nd Appellant. This difference was no doubt based on the fact that the 1st Appellant had a previous record which he did not deny. The sentences given were within the law and I have no inclination to interfere with the sentences with regard to Count No. 1. I do hereby confirm the 7 year term for 1st Appellant and the 4 year term for 2nd Appellant on Count No. 1.

In view of my allowing of the appeal with respect to Count No. 2 I do hereby set aside the sentences imposed with respect to Count No. 2.

Dated and Delivered at Mombasa this 19th day of April 2010.

M. ODERO

JUDGE

Read in open court in the presence of:
Mr. Onserio for State
Both Appellants in person

M. ODERO

JUDGE

19/04/2010