REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KAKAMEGA

Criminal Appeal 132 of 2009

DAVID OWINO WAMUKOYA …….…….. 1ST APPELLANT
HOSEA ONINA OGOL ……. 2ND APPELLANT

V E R S U S

REPUBLIC …… RESPONDENT

J U D G M E N T

1. At the hearing of this Appeal, learned Senior State Counsel, Mr. Karuri conceded it on the ground that the Appellants were arrested in a sugar cane plantation while drunk and within the same plantation, the allegedly stolen items were recovered. That it was not stated who owned the plantation and the Appellants could not have been said to have been in constructive possession and the case was therefore not proved beyond reasonable doubt. Further, that their conviction was in error and the Appeal ought therefore to be allowed.

2. I will shortly return to those issues but in the trial court, the Appellants were charged with the offence of breaking into a building and committing a felony contrary to Section 306 (a) of the Penal Code. It was alleged that on the night of 3rd and 4th September 2009 at Etatira Primary School in Butere District they jointly broke and entered into the school's store and stole one sufuria, six sacks of beans, four sacks of maize, 4x4 liters of paint and one spraying pump all valued at KShs.35,500/=. They were also charged with the alternative count of handling stolen goods contrary to ***Section 322 (2)*** of the Penal Code and the allegation was that on an unclear date at an unidentified place they were found to be in possession of the stolen items.

3. The Appellants pleaded not guilty to both counts and they were convicted of the offence in the main count before being sentenced to serve four (4) years in prison.

4. In the Petition of Appeal, the Appellants faulted the trial court for finding that there was sufficient evidence to convict on the main count yet the evidence on record was speculative, fabricated and lacked probative value. That the court also erred in relying on the evidence of PW3, the Area Chief, which evidence was actuated by malice and sinister motives against the Applicants.

5. The evidence tendered against the Appellants was that according to PW1, Julius Boaz Likua, the Head teacher of Etatira Primary School, on 4.9.2009, he went to the school at 7.15 a.m. having been informed that the school store had been broken into. He made a report at Manyala Police Post and later in the day, the stolen items were returned to the school together with a steel bar and shoes. He stated that the steel bar and the shoes did not belong to the school neither did a small hammer which was found in the school store. The items were brought to the school together with the Appellants who were said to be the suspects in the case.

6. PW2, PC Nabukure of Manyula Patrol Base received the initial report, proceeded to the school store and saw that a window grill had been damaged and an entry point created. That after talking to the area Assistant Chief, some persons were named as suspects and one of them was the 1st Appellant. This was at 11.00 a.m. and when the police officers and other persons went to look for him, he was not in his house. That since it had rained, they followed footprints leading into a sugar cane plantation and there they found the Appellants both drunk and a search around the plantation unearthed the stolen items.

7. PW3, Francis Anzayi corroborated that evidence but he did not give the basis for suspecting that the 1st Appellant was one of the burglars.

8. In their defences, the Appellants denied the offence and stated that they were arrested without lawful cause. The 1st Appellant added that he was forced to admit the theft but he refused to do so and he was then framed while the 2nd Appellant said that he was arrested while weeding in his garden and he denied knowledge of the break in.

9. In his judgment, the learned trial magistrate found that the recovery of the stolen items in the sugarcane plantation where the Appellants were also found was a relevant consideration in their culpability and so he convicted them accordingly.

10. Inspite of the fact that the Appeal is conceded, I am obligated as is the law in Okeno vs r [1972] E.A. 32 to analyze and evaluate the evidence afresh and reach my own conclusions. In doing so, it is clear that there was no eye witness to the break in and the only evidence connecting the Appellants to the offence is the fact that the stolen items were found in the same sugarcane plantation as the Appellants' were found, seated and drunk. Although he did not say so directly, the trial magistrate took the view that by being in possession of suspected recently stolen property, the Appellants could only be deemed to be the thieves. That is the doctrine of recent possession but the question is, were the Appellants in possession of those items?

11. In David Kanyoro & Another vs R Cr. Appeal No.265/2005 (unreported), the Court of appeal stated as follows:

> ***"The position in law is that a person found in recent possession of property reported as stolen is presumed to be the thief of it unless he gives a reasonable explanation as to how he came to be in possession thereof. This is a presumption of fact arising under section 119 of the Evidence Act Cap 80 Laws of Kenya and is rebuttable [see Jethwa v. R. 1969 E.A. 459."***

12. ***Section 119*** of the Evidence Act, Cap 80 Laws of Kenya provides as follows;

> **119.** ***"The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case."***

13. In relation to the doctrine of recent possession, the presumption of fact is as set out in the Kanyoro case and which is the issue to be determined in this case.

14. In Archibold, Criminal Pleading, Evidence and Practice, 2002 at page 1885, para 21-320, it is stated that "what constitutes recent possession depends upon the nature of the property and the circumstances of the particular case. Further, in R. vs

Raviranj 85 Cr. App. R. 93, Stocker L.J. at page 103 had this to say;

> "The doctrine is only a particular aspect of the general proposition and where suspicious circumstances appear to demand an explanation, and no explanation or an entirely incredible explanation is given, the lack of explanation may warrant an inference of guilty knowledge in the defendant. This again is only part of a wider proposition that guilt may be inferred from unreasonable behaviour of a defendant when confronted with facts which seem to accuse."

15. The above being the law, I am not satisfied that the Appellants were in fact found in "possession" of the stolen items. I say so because firstly, the basis for suspecting the 1st Appellant as a thief was never placed for consideration before the trial court. Secondly, no evidence was tendered to show the proximity of the Appellants to the stolen items. The two may have been on their own drunken business and happened to have been in the same plantation as the hidden stolen goods and may have had no knowledge of their existence. They maintained that the stolen items were unknown to them, and no attempt was made whatsoever to show that they were the only persons who could have taken the stolen items to the sugarcane plantation. Their explanation cannot be said to be unreasonable in the circumstances.

16. In the end, I agree with Mr. Karuri that once possession is left to conjecture and the Appellants having been arrested on suspicion, their conviction was improper and the Appeal has merit.

17. In the event, the Appeal is allowed, the conviction quashed, sentences set aside and the Appellants shall be released unless they are otherwise lawfully held.

Delivered, dated and signed at Kakamega this 6th day of May, 2010

ISAAC LENAOLA

JUDGE