REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUSIA

Criminal Appeal 12 of 2007

MOSES ACHOKA BWIRE…….APPELLANT

VERSUS

REPUBLIC ,.……RESPONDENT

(From the conviction and sentence of Honorable E.H. Keago-Resident Magistrate's court criminal case no. 1864 of 2006).

JUDGEMENT

The appellant, Moses Achoka Bwire, was originally jointly charged with two others, with the offence of breaking into a building and committing a felony, contrary to section 306 (a) of the Penal Code. The three were, in the alternative, also charged with a count of handling stolen goods contrary to section 322 (2) of the Penal Code. The three were convicted of the alternative charge of handling and sentenced to seven years imprisonment. The appellant appeals against the conviction and sentence.

The prosecution facts of the case are that on 23rd July 2006 at Port Victoria Township in Bukari sub-location in Bunyala West location, the property of the New Testament Church were stolen after the church was broken into. The goods stolen included 3 plastic chairs, one electric fan, a mobile charger, a set of spanners and a screw driver. The theft were reported to administrative authorities and/or the police who visited the church and confirmed the theft through Corporal Fredrick Sumba attached to Port Victoria police station. The latter started an investigation.

On 17.8.2006, Cpl. Sumba on information received, visited the home of James Ouma Ongando and his father Joseph Ogando Ludiro, the 1st and 2nd accused at the lower court. None of them was found at home at about 10.00a.m. But the appellant Moses Achoka Bwire was found in the house of the second accused, allegedly sleeping. The evidence on record shows that Corporal Sumba who was accompanied by an assistant chief of the area, were particularly looking for the one Caxton, who had become a suspect of the theft. On searching the 2nd accused's house the Corporal found three plastic chairs under the bed on which the 3rd accused, the appellant here, was found sleeping. Other properties like the fan was found in the house of the 1st accused, the father of the 2nd accused. Corporal Sumba who gave evidence as PW3,

arrested the appellant was found. The other two were later arrested too and the three were jointly charged as earlier stated.

In his sworn defence the appellant had stated that he had, on the said morning that he was arrested, visited the home of the other two accussed as friend of the 2nd accussed and did not know of the stolen goods in the house where he was purportedly found sleeping. He said also that the house belonged to one one Carton, the brother of the 2nd accussed who was never arrested. He said that he was arrested together with his Aunt, the wife of 1st accussed whom he went to inform that morning of the sickness of their grandmother back in Lubango. He stated that at the police station, the aunt was released but he was charged with an offence he did not commit or know much about. The defence of the 2nd accussed at the lower court included a statement that the stolen goods were brought to that home by his brother Carton who was at large.

It is clear therefore that the appellant was convicted on the principle of "recent possession" in that he was found in a house in which the stolen plastic chairs were recovered.

That specific evidence (of the appellant being found in the house where the stolen goods were recovered), came from PW3, Corporal Fredrick Sumba. Corporal Sumba did not claim that he informed the appellant that his arrest was because he was found at the home of other two accussed. The evidence shows that he just arrested the appellant and his aunt because the owner of the house, Caxton, whom the police and assistant chief had come to look for, was missing.

In my view and finding, the proof of recent possession woulonly hold if the appellant should have been shown to have in effective or positive possession of the stolen property. It was necessary for the prosecution to show that appellant knew of the presence of stolen goods in that house, and that he had taken part to bring them there or that after he knew the goods were there he played a positive part to keep or hide them.

In this case the goods had stolen almost three weeks earlier and brought there. There was no evidence that the appellant took part to bring them there. He came to the home that same morning for all we got from the evidence and there suggesting otherwise. Furthermore there was evidence from 2nd accussed that the goods were brought to that home by Caxton who was at large. No evidence suggested differently. Thirdly the burden upon an accussed in such cases of recent possession is not heavy, being merely on the

balance of a probability; indeed sometimes less.

I have carefully considered the evidence on which the appellant was convicted. I am of the view that the trial magistrate shifted the burden of proof to the appellant by concluding that the appellant's possible mere knowledge of the chairs being stolen made him guilty of handling them if he did not reveal the same to the police. In my finding mere knowledge was not sufficient to transmit the guilt to the appellant.

The trial magistrate having clearly concluded that the house belonged to Caxton who was not arrested, he thereafter had no basis to conclude that appellant's failure to disclose where he lived since the theft took place, made him culpable. Indeed the trail magistrate had no sufficient evidence to presume that the appellant live d in the same house in which he was arrested, especially in the face of the evidence that he went to visit only that the goods were stolen morning. Further, there was no evidence that the appellant knew that the goods were stolen and that he refused or failed to expose the theft.

It is the view of this court therefore that the appellant gave sufficient explanation to show on the balance of probability, that he was innocent. Indeed even if his explanation created only a doubt that he was in the control of what happened in the said house, the doubt should have been treated to his benefit.

The result then is that the trial magistrate erred in convicting the appellant on doubtful or insufficient evidence. This appeal accordingly has merit. It is hereby allowed. The conviction is quashed and the sentence of seven years is hereby set aside. The appellant is ordered released from prison forthwith unless therein lawfully held. Orders accordingly.

Dated and delivered at Busia this 28th day of July, 2010.

D.A ONYANCHA

JUDGE