



No. 170

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CRIMINAL APPEAL NO. 40 OF 2010

SIMON LEMISO

MATASI.....APPELLANT

-VERSUS-

**REPUBLIC.....RESPON
DENT**

JUDGMENT

(Being an appeal from the Judgment of the Senior Resident Magistrate's court at

Kilgoris in Criminal Case No. 799 of 2007 delivered on 1st April, 2008 by Mrs. Oganyo, SRM)

The appellant, **Simon Lemiso Matasi** was arraigned before the Senior Resident Magistrate's court at Kilgoris on one count of Housebreaking and stealing contrary to section 304 (1) and 279 (b) of the Penal code. The particulars of the offence were that on 24th November, 2007 at Lebolosi village in Transmara district within Rift Valley province, he broke and entered into a dwelling house of **Joseph Ngugi** with intent to steal and did steal therefrom one brief case, one pair of open shoes and one simi sword all valued at Kshs, 1,400/= the property of **Joseph Ngugi**. Alternatively, the appellant faced the charge of handling stolen property contrary to section 322 (2) of the Penal code. The particulars given were that on the same date, time and place, the appellant otherwise than in the cause of stealing dishonestly handled one briefcase, one pair of open shoes and one simi sword all valued at Kshs. 1,400/= the property of **Joseph**

Ngugi, knowing or having reason to believe them to be stolen or unlawfully obtained.

The appellant entered a plea of not guilty on the main as well as on the alternative counts. Thereafter his trial ensued. In a bid to prove its case against the appellant, the prosecution called a total of 3 witnesses. In brief the prosecution case was that on 24th November, 2007 at about 11.00a.m. **Joseph Ngugi** left his house for Kilgoris town. At about 2.00p.m. he received a telephone call from one, **Lucy John** who told him that his house had been broken into. He rushed home and on reaching, he confirmed what he had been told on phone. Apparently the front door had been hit and the latches fell off. When he entered the bedroom he found his black briefcase, a pair of brown shoes and a Maasai sword with its sheath all missing. **Lucy John** had seen the person responsible and raised an alarm. The suspect took off and was pursued by members of the public and arrested 2km or so away from the scene. The suspect who turned out to be the appellant ran into the home where a funeral service was taking place from where he was arrested by the mob that had pursued him, according to PW2, **P.C Benson Wambugu**, the investigating officer in the case. As he ran for his dear life, he dropped the brief case but retained the Maasai sword which he used to keep the pursuers at bay. That sword was however part of the stolen items. Upon his arrest, the appellant was beaten until he became comatose. He was only saved by the chief of the area **Jonathan Sialo** (PW3). He successfully pleaded with the members of the public not to kill the appellant. The members of the public had a sword which they had recovered from him. After securing the appellant, the chief telephoned Kilgoris police station who came and re-arrested the appellant from him. Part of the police contingent was **Pw2, P.C Benson Wambugu**. Having re-arrested the appellant and taken possession of the exhibits, he took the appellant to hospital and later to the police station. At the police station, he found the complainant (PW1) who positively identified the recovered items to be his. He later preferred the charges against the appellant.

In his defence, the appellant gave an unsworn statement of defence and called his cousin, **Elvi Perious Matasi** (DW1) as a witness. It was his testimony that sometimes on a Saturday in 2007, he was from Kilgoris Girls Secondary School having visited his cousin DW1. On his way to town he heard a voice calling him from behind. That person was a young man armed with a sheath. He came and grabbed his hand. Suddenly he started beating him. He struggled with the young man and managed to disengage himself and took to his heels. The young man pursued him whilst shouting "thief, thief". Many people joined the fray and started pursuing him. They caught up with him and beat him senselessly, until he became unconscious. When he came to he found himself in hospital. DW1 on the other hand testified that she finished her O'Levels at Kilgoris Girls Secondary School in 2007. The appellant was his cousin. However she knew nothing about the case. The appellant never came to visit her at school on the material day.

The learned magistrate having considered the evidence of the 3 prosecution witnesses as well as that of the appellant and his witness was convinced that the appellant was guilty on the main count. She thus convicted him on both limbs of the offence charged and thereupon sentenced him to 7 years imprisonment on each limb. She also ordered that the sentences imposed run concurrently. She made no finding on the alternative count and that is how it should be.

That conviction and sentence triggered this appeal as the appellant was aggrieved. He faulted his conviction and sentence aforesaid on the grounds that his constitutional rights were violated when he was detained in police custody in excess of 4 days before he was arraigned in court, vital witnesses were not called to testify, the evidence tendered was contradictory and finally that there was no prove that the complainant owned any of the items in the charge sheet.

When the appeal came up for hearing before me on 21st July, 2010, the appellant submitted that the complainant contradicted the evidence of PW2, and that no eye witnesses to the crime testified. He further submitted that PW3 had failed to identify the exhibits and whereas he claimed that his briefcase was black, the one in court was not black. Finally, he submitted that no items were recovered from him. The state through **Mr. Mutai** learned senior state counsel opposed the appeal. He submitted that the conviction was proper as the appellant was arrested shortly after the incident and had in his possession a sword which was part of the stolen items. The evidence of PW2 and PW3 as to what happened at the scene when they arrived and arrested the appellant, what the mob was saying and the recovery of some items on the appellant all pointed to the guilt of the appellant. Finally, he submitted that nothing turned on the evidence of the alleged eye witnesses in view of the evidence of PW1 nor the colour of the briefcase. I have a duty as a first appellate court to reconsider the evidence, reevaluate it and draw my own independent conclusions in order to satisfy myself that there was no failure of justice. **See Ngui V**

Republic (1984) KLR 729.

It is common ground that the complainant's house was broken into and certain items stolen therefrom. It is also common ground that the complainant was not at home when his house was broken into. He therefore did not see whoever broke into the house and stole the items. However, the appellant, it would appear was allegedly seen in the act by the complainant's neighbor, **Lucy John**. However this particular witness was never called to testify for no apparent reason. In the absence of her direct testimony, all that was said with regard to what she did, saw was simply hearsay and inadmissible. She claimed that upon seeing the appellant emerge from the complainant's house, she raised an alarm and the appellant took to his heels. Members of the public responded to the alarm and pursued the appellant to a home about 2km away in which a funeral service was going on, arrested and beat him senselessly. All this was hearsay. Further, none of the members of the public who were involved in the pursuit of the appellant were summoned to testify yet again for no apparent reason. The evidence of PW2 and PW3 in this regard was of no value as they came to the scene after the appellant had allegedly been arrested by the members of the public. The evidence of **Lucy John** and a member of the public who participated in the chase and eventual arrest of the appellant was crucial and critical so as to provide the necessary nexus between the offence and the appellant. In the absence of such vital evidence, I do not see how the conviction of the appellant can be sustained. There is no evidence as to what distance the alleged **Lucy John** saw the appellant emerge from the complainant's house nor whether after the appellant had been subdued, the said **Lucy John** came to the scene and positively identified the appellant as the person she had seen emerge from the complainant's house. There seems to be no explanation as to why these crucial and vital witnesses were not called to testify.

In the case of **Bukenya & Another V Uganda (1972) E.A 549**, the court of appeal for East Africa, held that the prosecution is duty bound to make available all witnesses necessary to establish the truth, even if their evidence may be inconsistent to its case. Otherwise failure to do so may in an appropriate case lead to an inference that the evidence of uncalled witnesses would have tendered to be adverse to the prosecution. However, such an inference can only be raised if the evidence in support of the charge is barely sufficient. The evidence against the appellant in this case, in my view was barely sufficient. If anything, it was actually hearsay as already stated. It was therefore imperative that these witnesses who were essential and critical to the prosecution be called. The prosecution having failed to call them for no apparent reason can only lead me and should also have led the trial court as well to draw the inference that their evidence would probably have supported the defence case. Had the learned magistrate appreciated the foregoing, I am certain that she would have arrived at a different conclusion other than that the appellant was guilty.

The evidence of chase and eventual arrest of an accused person is good evidence and can find a conviction provided that there is no break in the links. As long as the chase was continuous and at no time, the chasers lost sight of the person being chased, is good evidence and can form a basis for conviction. In the circumstances of this case however, it is the case of the prosecution that the appellant was chased from the house in which he had broken into and arrested in a home in which he sought refuge and in which there was an on going funeral service. This was about 2kms away. This is a long distance indeed. However there is no evidence that during the chase, the pursuers' never lost sight of the person they were chasing since none of the pursuers were summoned to testify to that effect nor did any one of them identify the appellant at the scene as the person they were pursuing. It is possible that the pursuers may have lost sight of the appellant at some point in the chase. There may also have been a break in the chain links in the pursuit of the appellant. It may well be that the person **Lucy John** saw is not the same person that was eventually arrested at the funeral considering the defence advanced by the appellant. The learned magistrate despite the above shortcomings in the prosecution case which she appreciated nonetheless proceeded to convict the appellant on the basis that **".....the accused was chased and found with a sword immediately after the incident links him to the offence"** It would appear that the learned magistrate was invoking the doctrine of recent possession without saying so directly.

In the well known case of **Republic V Loughlin 35 Criminal appeals R 69**, the Lord Chief Justice of England stated as follows:

"If it is proved that the premises had been broken into and that certain property had been stolen from the premises and that very shortly afterwards a man is found in possession of that property, that is certainly evidence from which the jury can infer that he is the house breaker or shop breaker". This is the well known doctrine of recent possession. However, considering the misgivings already alluded to elsewhere in this judgment, the doctrine of recent possession may have been wrongly invoked. In any

event the evidence of possession of the Maasai sword was not strong enough to support the evidence of identification of the appellant at the scene. Further a Maasai sword is a common item and indeed forms part of the regalia of the Maasai community and there was no basis for making a finding of fact that the Maasai sword belonged to the complainant. Finally, the complainant did not specifically prove that the Maasai sword belonged to him. He pointed to no special marks as would have proved his ownership. In the result I am satisfied that there is a basis for interfering with the decision of the trial court. Accordingly, the appeal is allowed, the conviction quashed and sentence imposed set aside. The appellant shall be set at liberty forthwith unless he is otherwise lawfully held.

Judgment dated, signed and delivered at Kisii this 16th September, 2010.

ASIKE-MAKHANDIA

JUDGE