



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

HCCRA NO. 71 OF 2010

LAWRENCE OMONDI

OJUNGA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction and sentence in Criminal Case number 320 of 2009 of the Resident Magistrate's Court at Tamu)

JUDGMENT

On the night of 22nd / 23rd November 2009 at Jaber Village Tonde Sub –location of Nyando District, a group of people broke and entered into the dwelling house of **Willis Ogunyo Mindeu** with intent to steal and did steal from therein, 16 cushion seats, 5 mattresses, 3 blankets, a steel drum, a green drum, a suitcase containing clothes and bed sheets and assorted kitchen utensils all valued at Kshs. 80,000/= the property of the said Willis Ogunyo Mindeu.

These were the particulars of the charge of burglary and stealing contrary to Section 304 (2) and Section 279 (b) of the Penal Code preferred against the appellant, **Lawrence Omondi Ojunga**, and four others. They pleaded not guilty to the charge when they appeared before the Resident Magistrate at Tamu. There was an alternative count of handling stolen property contrary to Section 322 (2) of the Penal Code in respect of the appellant and others.

The alternative count was however defective for duplicity in as much as the ingredients of receipt and retention were combined in a single count (**See, Selimia Mbeu Owuor & another =vs= Republic Civil**

Appeal No. 68 of 1999).

Be that as it may, the appellant and co-accused were tried and convicted on the main count. They were each sentenced to three (3) years imprisonment on each limb of the offence to run concurrently. Being dissatisfied with the conviction and sentence, the appellant filed this appeal on the basic grounds that his constitutional right under Section 72 (3) of the old Constitution was violated and that the learned trial magistrate failed to establish that the exhibits produced in the case were those produced in a previous criminal case number 319 of 2009 in which the appellant was convicted and imprisoned on his own plea of guilty.

Further, the learned trial magistrate disregarded the contradiction in the prosecution case as well as his defence.

The appellant appeared in person at the hearing of the appeal and contended that the exhibits used in this case had previously been produced in another case in which he was convicted.

He also contended that he was not found in possession of the complainant's stolen property and that the complainant did not prove his ownership of the alleged stolen property.

The respondent opposed the appeal through the learned Principal State Counsel, **Miss Oundo**, who summarized the prosecution evidence against the appellant and submitted that although there was no eye witness, the appellant was found in possession of the complainant's stolen property without giving a reasonable explanation for the possession thereof and therefore the doctrine of recent possession applied to him even though the learned trial magistrate did not act on it to convict.

The learned State Counsel contended that the failure by the learned trial magistrate to rely on the doctrine was not fatal and in any event, this court is mandated to re-evaluate the evidence and act on it.

The learned State counsel submitted that the sentence imposed was neither harsh nor excessive and called for the dismissal of this appeal.

As rightly pointed out by the learned State Counsel, this court being the first appellate court is mandated to reconsider the evidence and draw its own conclusions. In doing so, the court bears in mind that the trial court had the advantage of seeing and hearing the witnesses.

Briefly, the prosecution case was that the complainant, **Willis Ogunyo Mindeu (PW1)** was a councillor of God-Nyithindo Ward and on the material date he had gone to Awasi to attend a meeting. While there he received information that two people were selling some cushions. He enquired as to where the cushions had originated by calling his mother and asking her to check his house. It was then that he was informed that his house had been broken into.

He went there on the following day and confirmed the information. Entry into his house was gained through the roof. Some mattresses, a drum, blankets, cushions and some kitchen utensils were stolen from therein.

Later, the complainant learnt that the appellant and another were found by the chief and a village elder selling suspected stolen property at Muhoroni. He (complainant) went to the police station and identified ten cushions and other items as his property. He thereafter recorded a statement.

On 23rd November 2009 at about 4:50 p.m. **John Onyango (PW2)**, a mason at Nyakach was in Muhoroni when he found the appellant and another selling cushions, a jacket and assorted clothes. He became suspicious and together with others interrogated the appellant and his colleague before calling the police.

Tabitha Achieng Oringe (PW3), purchased a drum from a co-accused of the appellant but it was taken away by the police on the 25th November 2009.

An assistant chief in Muhoroni, **Benson Otieno Abongo (PW4)**, was in his office on 23rd September 2009 at 5:00 p.m. when a village elder John Onyango called him. The assistant chief found that the village elder had arrested the appellant and another while in possession of a sack containing household goods including cushions. He (PW4) referred the matter to the police.

P. C. Jackson Omariba (PW5), of Muhoroni police post was called by the village elder and informed that two people had been found and apprehended while in possession of suspected stolen property. He (PW5) saw and interrogated the two people who included the appellant.

Later, **P. C. Omariba** charged the appellant and his colleague but on the 24th November 2009, the complainant (PW1) reported that his house had been burgled and property stolen from therein. He (complainant) said that some of the cushions found with the appellant belonged to him.

In the course of investigations, P. C. Omariba arrested other suspects and thereafter charged them in court together with the appellant.

The evidence by **P. C. Omariba (PW5)** ended the prosecution case against the appellant who was

placed on his defence after the trial court ruled that he had a case to answer. In his defence, the appellant said that he was in possession of ten cushions which belonged to his late brother when he was stopped by two men and asked about the cushions. He was at the time with a bicycle taxi (boda boda) operator who was assisting him ferry the cushions. He was suspected by the two men and taken to the police station. He was taken to court on the following day and charged with being in possession of suspected stolen property.

He pleaded guilty and was jailed for one year. On that very day he was told that he would be charged with another offence. He was then taken to court on 26th November 2009 and charged with the present offence which he denied. He contended that the ten cushions belonged to his late brother and did not know where the exhibits used in court came from.

All the foregoing evidence was considered by the learned trial magistrate who concluded that the case against the appellant and co-accused had been proved beyond reasonable doubt. The learned trial magistrate convicted and sentenced the appellant and co-accused accordingly.

On its own evaluation of the evidence, this court is satisfied that the ingredients of the offence of burglary and stealing were fully established by the prosecution.

However, the prosecution failed to provide any direct evidence linking the appellant to the offence. It would appear that the appellant was convicted on the basis of circumstantial evidence in that he was found in recent possession of cushions which were stolen from the house of the complainant (PW1) after it was burgled.

The learned trial magistrate did not expressly state that he was convicting on the basis of the doctrine of recent possession but he actually applied the same hitherto indirectly.

But even then, the doctrine was inapplicable in the circumstances for the simple reason that there was nothing from the complainant to prove his ownership of the cushions found with the appellant.

Ownership could not be proved by the complainant merely looking at the cushions and saying that they belonged to him especially when such items are ordinary common items capable of being owned by any person.

The explanation given by the appellant that the cushions belonged to his late brother was not disproved at all. It was reasonable in the circumstances. And even if the explanation was unreasonable and at the time of the appellant's arrest no person had claimed ownership then the appellant was correctly charged with being in possession or conveying suspected stolen property. He pleaded guilty to the offence and was convicted accordingly.

He had already been punished for his possession of the cushions. He could not be punished twice on account of the same cushions. His conviction herein was double punishment of the appellant on account of the fact that he was found in possession of the cushions which were exhibited in two different cases. Had he not pleaded guilty to the first case, the prosecution would simply have withdrawn it and pursued this case. But the appellant pleaded guilty. He should not therefore have been charged with this case in which the cushions were the key factor against him.

Most interesting is the fact that the learned trial magistrate acknowledged the existence of the earlier charge against the appellant by remarking in his judgment that:-

“A I, (appellant) says that he was ferrying his late brother's goods to his house for use of (sic) Muhoroni when he was arrested and later charged. Despite the fact, he knew that the goods belonged to his unnamed late brother he pleaded guilty to the charge of ferrying suspected stolen goods”.

Yet, the learned trial magistrate proceeded to convict the appellant herein. It is apparent that the conviction was influenced by the appellant's plea of guilty in the previous case. No regard was given to the doctrine of **“autre fois Convict”**.

From all the foregoing factors, this court must find that the appellant's conviction by the learned trial magistrate was not proper and safe.

This appeal is therefore allowed to the extent that the conviction is hereby quashed and the sentence set aside. The appellant be set at liberty forthwith unless otherwise lawfully held.

Dated, signed and delivered at Kisumu this 25th day of October 2010.

J. R. KARANJA

JUDGE

JRK/aao