REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CRIMINAL APPEAL NO. 10 OF 2010

(From Original Conviction and Sentence in Criminal Case No. 244 of 2009 of the Senior Resident Magistrate's Court at Mariakani: ***Andayi W.F. – S.R.M.)***

SHADRACK PAUL MUTUNGI .... APPELLANT
VERSUS
REPUBLIC .... RESPONDENT

JUDGEMENT

The Appellant **SHADRACK PAUL MUTUNGI** has filed this appeal challenging his conviction and sentence by the learned Senior Resident Magistrate sitting at Mariakani Law Courts. The Appellant had been arraigned with two others before the lower court on the following two (2) counts

COUNT NO. 1
"BAR BREAKING AND STEALING CONTRARY TO SECTION 306(a) OF THE PENAL CODE
On the night of 2nd and 3rd September 2009 at Mariakani Township in Kaloleni District within Coast Province jointly broke and entered a building namely a Bar of SHADRACK KAENDI MUTEMI with intent to steal from therein and did steal one DVD player and one radio cassette all valued at Kshs.15,000/- the property of the said SHADRACK KAENDI MUTEMI"
COUNT NO. 2
"HOUSE BREAKING AND STEALING CONTRARY TO SECTION 304(1) AND 279(b) OF THE PENAL CODE
On the 9th day of September 2009 at Mariakani township in Kaloleni District within Coast Province jointly broke and entered the dwelling house of FERDINAND KISAKA with intent to steal from therein and did steal one TV set make AUCMA valued at Kshs.6,800/- the property of the said FERDINAND KISAKA."

The prosecution led by **CHIEF INSPECTOR MOHAMED** called a total of five (5) witnesses in support of their case. **PW1** the complainant on Count No. 1 told the court that on the morning of 3rd September 2009 he received news that his bar in Mariakani had been broken into and a DVD player and radio were stolen. He reported the matter to police. Later on 9th September 2009 **PW3** the complainant in Count No. 2 whilst at work was called by a neighbour and informed that his house had been broken into. He rushed back home and noted that the lock on his door had been broken and upon entering the house found his TV set make AUCMA missing. The Appellant who occupied a room in the same building was that very day found in his room with a TV set and a radio. **PW2** identified the TV set as his stolen one and **PW1** identified the radio cassette as the one which had been stolen from his bar a few days earlier. The Appellant was then arrested and taken to the police station where he was later charged.
At the close of the prosecution case the Appellant was found to have a case to answer and was placed on his defence. He gave a sworn defence in which he denied both charges. On 8th November 2009 the learned trial magistrate delivered his judgement in which he convicted the Appellant on both counts. He then sentenced him to serve three (3) years imprisonment on Count No. 1, six (6) years imprisonment on

Count No. 2 and three (3) years imprisonment for the limb of stealing. The court further ordered that the sentences on Count Nos. 1 and 2 were to run concurrently whilst the 3 year sentence on the limb of stealing would be served consecutive to the other sentences. Being dissatisfied with both his convictions as well as the sentences imposed the Appellant filed this present appeal.
The Appellant who was not represented by counsel at the hearing of this appeal chose to rely entirely upon his written submissions which with the leave of the court had been duly filed. **MR. ONSERIO**, learned State Counsel made oral submissions opposing the appeal. This being a first appeal I am obliged to re-examine and re-evaluate the evidence adduced before the lower court and to draw my own conclusions on the same [see **OKENO –VS- REPUBLIC [1972] E.A.L.R. 32**]. I have carefully perused the written submissions filed by the Appellant and he mainly challenges his conviction on the grounds that the prosecution in the lower court failed to meet the required burden of proof.

PW1 told the court how upon receiving news that his bar had been broken into he rushed to the scene. He found that indeed his bar had been broken into, the wire mesh cut and the DVD machine make Carnival and a Sony radio cassette were missing. Likewise **PW3** narrated to court how on 9th September 2009 at about 9.30 A.M. he was at his place of work. One of his neighbours called **HASSAN MWINYI** asked to borrow his key in order to charge his mobile phone in the house of **PW3.** When the said ***'Hassan'*** arrived at **PW3's** door he found the latch had been broken. He alerted other neighbours and called **PW3** to inform him. **PW3** rushed home and confirms that he found the latch on his door had been broken using a large screw-driver. There would be no logical reason for **PW1** and **PW3** to declare that their premises had been broken into unless it were true. **PW2 OMAR SAID WASHE** the landlord to **PW3** who lives in the same building states that upon being alerted by ***'Hassan'*** he too went to the door of **PW3** and confirmed that the door had been broken. He also confirmed the testimony of **PW3** that a TV make Aucma had been stolen. **PW2** stated that he often used to see that TV inside the house of **PW3**. I am satisfied that the bar of **PW1** and the dwelling house of **PW3** were broken into the dates stated in the charges.
The prosecution witnesses proceed to state that on 9th September 2009 the very date when the house of **PW3** was broken into neighbours decided to conduct a search in all the rooms in that premises. They searched the room occupied by the Appellant and another and recovered a TV make Aucma. Police were called in. **PW4 PC RASHID HASSAN** was one of the officers who went to the scene. He told the court that they conducted a thorough search in the house of the Appellant. Apart from the TV which **PW3** identified as his stolen TV set, the police also recovered a Sony radio-cassette which they took to the police station. **PW1** later identified that radio-cassette as the one which had been stolen from his bar on the night of 2nd/3rd September 2009.
None of the prosecution witnesses was able to positively identify the Appellant as one of the men who broke into the two premises. In convicting the Appellant the learned trial magistrate relied on the doctrine of ***'recent possession'***. This doctrine of criminal law was very well elucidated by the Court of Appeal in the case of **ARUM –VS- REPUBLIC [2006] E.A. 10**, where it was held

"Before a court can rely on the doctrine of recent possession as a basis of conviction in a criminal case, the possession must be positively proved, that is, there must be positive proof, first; that the property was found with the suspect, secondly that the property is positively identified as the property of the complainant; thirdly, that the property was stolen from the complainant and lastly; the property was recently stolen from the complainant."

In this decision their lordships set out three criteria which must be met before the doctrine of recent possession may be relied upon as the basis for a conviction. Firstly it must be proved that the property in question was found in the possession of the suspect (the Appellant herein). In this case the properties were a TV set make Aucma and a Sony radio-cassette. **PW2** the landlord participated in the search of the Appellant's room immediately after the house of **PW3** had been broken into. He confirms recovery of the TV and radio-cassette therein. The Appellant in his defence denied that he was the occupant of that house and denies that he had any knowledge of the contents of the house. He claims that he was merely a visitor to the tenant and that he had only spent one night there. This defence was considered by the learned trial magistrate who found in his judgement at page 4 line 21

"The 1st accused [the Appellant herein] says he was not aware that the property was stolen. He had only sought shelter from the 2nd accused. I am not satisfied with the explanation. Omar PW2 said

prior to being informed that Kisaka's [PW3's] house had been broken into, he had seen the 1st and 2nd accused at that door. There is also evidence by Kisaka and Omar that the 1st accused had been with the 2nd accused for the few days that they had stayed at the house and not just on 9/9/2009 as alleged by the 1st accused that leads me to the inference that he was aware of how the property came to be in that room and not that he was a stranger. The fact that rent was paid by the 2nd accused and not him cannot mean that he had nothing to do with the property in that room. I find that he was well aware of how it came there."

I find this finding to be logical and relevant in the circumstances. The Appellant claims that he only spent one night in the house yet **PW2** the landlord says that the Appellant was his tenant. I do agree with the trial magistrate that the mere fact that the other occupant paid the rent to **PW2** does not prove that the Appellant did not live in that house. In any event payment of rent money can only be done by one individual and not two. Furthermore **PW3** told the court that he often used to see both Appellant and his room-mate seated outside their house. This belies the Appellant's claim that he only spent one night there. He is clearly just trying to shift blame to his room-mate. Lastly and more importantly the Appellant was actually found inside that house when it was searched and the stolen items recovered. **PW4** confirms that he arrested the Appellant from that house. From this evidence there can be no doubt that the recovered TV and radio-cassette were found in the actual possession of the Appellant.

The second ingredient set out in the **Arum case** is that the recovered property must be positively identified as the property stolen from the complainant (or in this case the complainants). **PW1** claims that the radio-cassette recovered in the Appellant's possession was his property. At page 10 line 25 he states

"I was shown the exhibits recovered and I identified the radio-cassette. As a technician, I repair my items. I had replaced the radio transformer and it is bigger than the original"

This is a specific alteration which **PW1** made to his radio making it exclusive and different from other radios of the same make. Likewise **PW3** identifies the TV set make Aucma as his property. This claim is corroborated by **PW2** who confirms that this was the same TV that he frequently saw in the house of **PW3**. It cannot be a mere coincidence that **PW3** losses a TV set make Aucma and on that very same day a TV set make Aucma is found in the Appellant's house. The Appellant has not challenged this identification by either **PW1** or **PW3** neither does he claim any of the items to be his. I am satisfied that the TV set belonged to **PW3** and the radio-cassette belonged to **PW1**.

The third and last ingredient set out in the **ARUM** case is that the property must be shown to have been ***'recently'*** stolen from the complainant. The term recent is relative, it is not defined and the test is subjective. In the case of **PW3** the item was recovered on the very same day it was stolen from his house. Nothing could be more recent than this. In the case of **PW1** the theft occurred on the night of 2nd/3rd September 2008 and recovery was made six (6) days later on 9th September 2008. In my view this amounts to recent. All three ingredients for the application of the doctrine of recent possession have been satisfactorily proved. The conviction of the Appellant by the learned trial magistrate was sound both in law and based on the facts. I do therefore confirm the conviction of the Appellant on both Counts 1 and 2.

The trial magistrate did allow the Appellant an opportunity to mitigate. He thereafter sentenced him. The sentences were lawful and in my view unlawful. I do uphold the sentence of three (3) years imprisonment on Count No. 1, six (6) years imprisonment on Count No. 2 and three (3) years imprisonment for the limb of Stealing. I also uphold the direction that the sentences on Count 1 and 2 to run concurrently whilst the 3 year sentence for Stealing will be served consecutively. Finally this appeal fails in its entirety.

Dated and Delivered at Mombasa this 25th day of October 2010.

M. ODERO
JUDGE

Read in open court in the presence of:-
Appellant in person
Mr. Muteti for State

M. ODERO

<u>JUDGE</u>
25/10/2010