



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NYERI

Criminal Appeal 270 of 2008

MARTIN WAMBUGU MARITIM APPELLANT

VERSUS

REPUBLIC RESPONDENT

(Appeal from original Conviction and sentence of the Resident Magistrate's Court at Othaya in Criminal Case No. 147 of 2008 dated 3rd October 2008 by Mr. L. O. Onyina – S.R.M.)

J U D G M E N T

The appellant, Martin Wambugu Maritim was together with Dickson Kariuki Muruthi jointly charged with burglary and stealing contrary to sections 304(2) and 279(b) respectively of the penal code. The particulars of this charge were that “between the nights of 7th and 12th April 2008 at Othaya town in Nyeri District within central province, the appellant and his co-accused jointly with others not before court, broke and entered the dwelling house of Carol Muthoni Muchangi with intent to steal therein and did steal therein one TV make Nash S/No. 0747, one DVD make Roya Tech, one electric iron box make Ramton, one electric kettle make Ramton, one woollen carpet, one Trigas meko cooker with its burner, one rechargeable torch, one blood pressure machine, one stethoscope and several CD disks all valued at Kshs.300,000/=.”

The two also faced an alternative count of handling stolen property contrary to section 322(2) of the penal code, the particulars being that:-

“On the 17th day of April 2008 at Othaya town in Nyeri District within central province, jointly otherwise than in the course (sic) of stealing dishonestly retained one TV make Nash S/No. 01747, one woollen carpet, one electrical kettle make Ramton, one electric iron box make Ramton and ten CD disks having reasons to believe them to be stolen goods or unlawfully obtained.”

Each of the two denied both the main count and the alternative count. However following a full trial, the appellant was convicted of the lesser offence of house breaking and stealing contrary to section 304(1) and 279(b) of the Penal Code and sentenced to three and one years imprisonment on each limb respectively. The sentences were ordered to run concurrently. He now appeals to this court both on conviction and sentence. The appellant's co-accused was however acquitted of all the charges.

PW1 (Carol Muthoni Muchangi) the complainant, testified that she was a doctor at Othaya sub-district

hospital. On 7th April 2008, she came back to her rented house and found the same having been broken into. The padlock was cut and removed. She notified her neighbours then proceeded to make a report to the Othaya police station. The items that were stolen therefrom were one television, one DVD, one radio, one carpet, one electric kettle, one iron box, chargeable torch, stethoscope and blood pressure machine all valued at Kshs.30,000/= . After three days, she was called by the police from Othaya Police Station and told that some items had been recovered and was asked to go and identify some of them if they belonged to her. She went and identified one radio, one electric kettle, electric iron box, television set and its remote control, ten CDs and a woollen carpet. She did not know who had stolen the items from her house.

PW2, Elispha Wanjiku Kanyi testified that the complainant was her neighbour. The complainant notified her that her house had been broken into and items stolen therefrom. She stated that she did not see the people who were said to have stolen the items.

PW3 PC Pius Ngila stated that on 17th April 2008 at around 1.00 a.m. while on operations within Othaya township in the company of Inspector Karisa and Senior Sgt. Mwenda, they searched a house within Mugumo-ini estate. That house had two occupants, the appellant and his co-accused. Prior to that date, a nurse had reported to them a case of burglary at her house. In the house, they recovered one television make Nash, one woollen carpet, one radio make gruding, one electric kettle make Ramton, one iron box, Ten CD disks and one remote control device which they suspected to be stolen properties. He stated that the appellant alleged that the properties belonged to his mother. The two were arrested and escorted to Othaya police station. The following day, the police officers called the complainant to the police station and the complainant identified some of the items as hers and indeed produced receipts as evidence of ownership. PW3 further testified that according to the appellant's co-accused the house belonged to the appellant who is his relative, and that the items recovered from the house were all parked and placed at a corner.

When put on defence, the appellant gave sworn statement of evidence and called no other witness. He testified that between 7th and 12th April 2005 respectively he was at his sister's place at Mweiga organising the burial of his sister's late husband. After the burial he came back to Othaya. On the night of 15th and 16th April 2008, he heard noise and commotion within the plot where he stayed. He got out of the house and found people lying down. Police officers whom he found outside the house ordered him also to lie down. The appellant testified that nothing was recovered from his house upon search.

As already stated, the learned magistrate having carefully considered and evaluated the evidence tendered as aforesaid found for the prosecution, convicted the appellant and sentenced him. In his home made petition of appeal the appellant faults the learned magistrate for convicting him, when the prosecution did not exhibit any recovery form and that the evidence tendered was insufficient and uncorroborated.

In support of the appeal, the appellant submitted that the OB report was to the effect that he had been arrested on suspicion that he was a mungiki member and that nothing was recovered from him.

For the state, Mr. Mukura, learned Senior State Counsel submitted that there was sufficient evidence to support the charge. Some of the Complainant's stolen properties were recovered from the house of the appellant. Those items were positively identified by the complainant by production of receipts. The appellant could not account for his possession of the items. The learned magistrate therefore properly applied the doctrine of recent possession in convicting the appellant. The defence of the appellant was considered and rejected as a mere denial in the light of overwhelming evidence adduced by the prosecution. On sentence, Mr. Makura, submitted that the sentence imposed was legal though lenient. It should however not be interfered with.

This court as a first appellate court has a duty to re-appraise the evidence and come to its independent finding. In doing so I have to appreciate that I did not have the advantage enjoyed by the trial court of seeing and hearing the witnesses and have to make due allowance for that – Soki v/s Republic (2004) 2 KLR 21; Kimeu v/s Republic (2002) 1 KLR 756. Moreover I am guided by the Principle that the first

appellate court should not interfere with the findings of the trial court which are based on the credibility of witnesses unless no reasonable tribunal could make such findings, or it was shown that the findings of the trial court which based on the credibility of witnesses are erroneous in law – Republic v/s Oyier (1985) 2 KLR 353; Burn v/s Republic (1005) 2 KLR 533.

The conviction of the appellant turned on the application of the doctrine of recent possession. That doctrine was succinctly enunciated in the celebrated case of Andrea Obonyo v/s Republic (1962) E.A. 542. It is a presumption of fact and not an implication of law from evidence of recent possession of stolen property uncounted for. Whether the doctrine applies depends on the circumstances of each case and

“Factors such as the nature of the property stolen, whether it be of a kind that readily passes from hand to hand and the trade or occupation to which the accused person belongs can all be taken into account – (Andrea Obonyo – supra)”

In this case the house of the complainant was broken into between the nights of 7th and 12th April 2008. The following items were stolen therefrom; One T.V. make Nash S/No.0747, one DVD make Roya tech, one electric iron box make Ramton, electric kettle make Ramton, one woollen carpet, one trigas Meko Cooker with its burner, one rechargeable torch, one blood pressure machine, one stethoscope and several CD discs. Some of these items namely Ramton electric kettle, Ramton iron box and woollen carpet were later to be recovered in the house of the appellant. The appellant did not dispute the ownership of the house. He also did not deny that he had merely lodged his co-accused overnight in his house in the plot. The items were recovered on 17th April 2008, hardly 10 days after they were stolen. The items were positively identified by the complainant as hers. She did so by production of receipts. The appellant could not account for his possession of the items.

The appellant claimed that none of those items were recovered from his house. In other words he claimed that the case against him was a frame up. However he offered no justification for the frame up. He does allude to any grudge between him and the police officers and or the complainant. I am therefore, persuaded just like the learned magistrate was that items were recovered from the appellant’s house. PW3’s description of how the items were kept in the house, considering their nature is a clear indication that those items did not belong to the appellant. Those items; Ramton electric kettle, Ramton Iron box and woollen carpet are not the kind of items that readily passes from hand to hand. Failure by the appellant to account for the possession of the said items so soon after they were stolen can only mean that the appellant is the one who broke into the house of the complainant and stole therefrom the said items. In my view therefore the learned magistrate properly invoked the doctrine of recent possession in finding a conviction against the appellant. That being my view of the matter I find this appeal both on conviction and sentence to be without merit and is accordingly dismissed in its entirety

Dated and delivered at Nyeri this 30th day of June 2009

M. S. A. MAKHANDIA

JUDGE