**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISII**

**CRIMINAL APPEAL 108 OF 2008**

**MICHAEL OMONDI AKAMA …….. APPELLANT**

**VERSUS**

**REPUBLIC ……...…… RESPONDENT**

**(From original conviction and sentence in the Ndhiwa Resident Magistrate's**

**Court Criminal Case No.30 of 2008 by Z. J. Nyakundi**

**Esq., R.M)**

**JUDGMENT**

The appellant was convicted by the Resident Magistrate, Ndhiwa of burglary and stealing contrary to **section 304(2)** and **279(b)** of the **Penal Code** and sentenced to serve 7 years' in jail. The particulars were that on 1/1/08 at Central Kanyamwa Location in Homa Bay District within Nyanza Province he jointly with another already before court broke and entered into the dwelling house of **Austin Odiwuor Otunge** with intent to steal and stole from therein two mattresses, a metal box, two bed sheets, stove, thermos flask, a charcoal jiko, a door frame and a door all valued at Kshs.20,000/= the property of the said **Austin Odiwuor Otunge**. He faced an alternative charge of handling suspected stolen property contrary to **section 322(2)** of the **Penal Code** which alleged that he had on 14/3/08 dishonestly received or retained a mattress, a metal box, the bed sheets, a Kerosine stove and a charcoal jiko knowing or having reason to believe them to be stolen goods. He was aggrieved by the conviction and sentence and preferred this appeal.

The facts on which the appellant was convicted were that the complainant was a student at Nyamanga Secondary School and would be sleeping at his uncle's house. The uncle, **Michael Oteyo**, was in Nairobi. On 1/1/08 at 9.30 p.m. he came to the house to sleep as usual. He found the door broken and the items named in the charge sheet, and others, were missing. He went to call his father **Silvanus Odongo** who came and confirmed the incident. That night complainant slept at his father's house. Next day they reported to clan elder and on 5/1/08 to Ndhiwa Police Station. On 14/3/08 at 1 p.m. a mattress, metal box, 2 bedsheets, stove, lamp, plastic yellow bucket, cups and jiko were recovered, according to the prosecution, from the appellant's house and that he was in the house when the recovery was made. The items belonged to the complainant as special owner and some of those stolen in the incident above. The appellant denied in sworn defence he was found with these items. He stated he was at his house with his wife **Christin Odhiambo** on 14/3/08 when police came and arrested him. He was taken to Ndhiwa

where his brother had rented a house. In that house the items in question were recovered. He knew nothing about them. His brother is **Ben Odhiambo** who had earlier on been found with door and frame, also belonging to complainant and stolen in the incident. **Silvanus Odongo** testified regarding the door and frame and stated they were recovered on 13/1/08. He did not say from whom. **Christian Odhiambo** told court that when appellant was arrested at their house nothing was recovered. The trial court considered the evidence and found the prosecution had established the guilt of the appellant beyond doubt.

It is the duty of this court to exhaustively examine and analyse all the evidence that was tendered before the trial court and to make its own findings and draw its own conclusions as a basis for determining whether the conviction was supported **(Kiilu & Another v. Republic, [2005] KLR 174)**. In so doing, it should make allowance for the fact that the trial court had the advantage of hearing and seeing the witnesses.

**Austin** came to the house at 9.30 p.m. to find it broken into and items stolen. There was no evidence when he had been last in the house, or when the house was last seen intact. The safest charge should have been that of house breaking and stealing contrary to **sections 304(1)** and **279(b)** of the **Penal Code**, as there was no evidence before the court that the breakage and theft were at night.

The prosecution case was based on circumstantial evidence. Appellant was not seen or found in the breakage and theft. The test laid in **James Mwangi vs. Republic [1983] KLR 327, 331** is as follows:

"**In a case depended on circumstantial evidence in order to justify the inference of guilt the incriminating facts must be incompatible with the innocence of the accused or the guilt of any other person and incapable of explanation upon any other reasonable hypothesis than that of his guilt (Sarkar on Evidence – 10th Edition, P.31). It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference – Teper v. The Queen [1952] AC 480 at page 489."**

The house was broken into on 1/1/08. Appellant was said to have been found with recovered items on 14/3/08. They were substantial items. That is a period of over three months. **Silvanus**'s evidence was that appellant's home was 2 km from complainant's house. The question for decision is whether the possession was proximate enough in time in relation to the theft to sustain the conclusion that the appellant participated in the robbery. The well known doctrine of recent possession is that where a person is very shortly found in possession of property following breakage into premises in which that property was stolen, that is certainly evidence from which the court can infer that he was the housebreaker **(R v. Loughin 35 Cr. Appl. R 69** which was cited with approval in the Court of Appeal decision in **Maina & 3 others v. Republic [1986] KLR 305)**. In the Court of Appeal case, the appellant was found in possession of a pistol 2½ months after its theft. It was held that:

"**the time lag between the date of the theft and the discovery of the pistol was so much that it would be unreasonable to hold that the mere possession of the pistol on this date is sufficient to found a conclusion that the appellant participated in the robbery." (Page 306).**

I find that the mere possession of the items by the appellant, even if proved, 3 months and 13 days after the theft would not be sufficient to found a conclusion that he took part in the theft. There had to be other evidence connecting the appellant with theft. No such evidence was led in this case.

But, was possession established beyond doubt? In the evidence of **Silvanus** and **P. C. Lototo Joash** of Ndhiwa Police Station , on 13/1/08 a door and frame were recovered in possession of a person who was arrested and charged with this offence. The appellant testified that was his brother **Ben Odhiambo**. The Police Officer did not know the appellant before. He did not know the appellant's house. **Silvanus** said he knew the appellant well. Did he know the appellant's home? He stated:

"**I got a report that those items were in the house of the accused. I traced his house**

**…….. I had traced the home of the accused person myself ……"**

That is not evidence of a person who knew the appellant's house. He had to look for it to get it. Who told him his was the appellant's house? The appellant stated this house belonged to his brother who had earlier been arrested. He called his wife to support the claim. I find that there was insufficient basis for the trial court to find these items were found in the house of appellant, or in his possession.

I allow the appeal. The conviction is hereby quashed and sentence set aside. The appellant is set at liberty forthwith unless he is otherwise lawfully held.

Dated, signed and delivered at Kisii this 14th day of July, 2009

**A. O. MUCHELULE**

**JUDGE**

14/7/09

A. O. Muchelule JU

cc. Mongare.

Mr. Kemo for State

Appellant present

Court: Judgment in open court**.**

**A. O. MUCHELULE**

**JUDGE**