



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU Criminal Appeal 160 of 2008

DAVID ONYANGO OGOLA..... APPELLANT

VERSUS

**REPUBLIC
RESPONDENT**

[From original conviction and sentence in Criminal Case number 114 of 2008

of the Senior resident Magistrate's Court at Ukwala]

JUDGMENT

Dennis Onyango Ogola, (the appellant herein) and another appeared before the Resident Magistrate at Ukwala charged with the offence of burglary and stealing contrary to Section 304 (2) and Section 279 (b) of the Penal Code.

The particulars were that on the nights of 31st March 2008 and 1st April 2008 at Segga Siaya District jointly broke and entered into the office of the Segga Parish Catholic Church with intent to steal and did steal from therein one keyboard, thirty –one pieces of games kit, a candle and cash Kshs. 7,000/= all valued at Kshs. 92,000/= the property of Segga Parish Catholic Church.

There was an alternative count of handling stolen property contrary to Section 322 (2) of the Penal Code, in that on the 21st April 2008 at Busia Township Busia District, otherwise than in the course of stealing, dishonestly received or retained one computer machine and its components and thirty one pieces of games kit all valued at Kshs. 65,000/= knowing or hearing reason to believe them to be stolen property or unlawfully obtained.

The appellant pleaded not guilty to the charges. He was tried, convicted and sentenced to serve five years imprisonment on each limb of the main offence. The sentence was to run concurrently.

The alternative count was rendered obsolete by the conviction of the appellant on the main count. In any event, the alternative count was defective and bad for duplicity in as much as the elements of receipt and retention were combined in a single charge (See, Selimia Mbeu Owuor & Another =vs= Republic Criminal Appeal No. 68 of 1999 [unreported]).

Be that as it may, the appellant was dissatisfied with his conviction and sentence and preferred the present appeal on the basis of the grounds contained in the petition of appeal filed herein on 21st November 2008 in which the appellant complains of the inadequacy of the evidence relied upon to convict him and the lack of evidence of possession of the stolen items on his part.

At the hearing, the appellant represented himself and contended that nothing was recovered from him and that the person found with the property was set-free. He lamented that his co-accused was only sentenced to serve three years imprisonment.

Miss Oundo, learned Senior State Counsel, represented the respondent and opposed the appeal. She contended that after the appellant was mentioned by his co-accused, he was found in Busia where he attempted to escape. He then indicated that the stolen computer and piano were across the border in Uganda and surely the items were found there.

The learned State Counsel contended that the appellant was convicted on the basis of recent possession of stolen property and that his conduct of fleeing showed that he was not innocent.

This is a first appeal, this court is therefore obliged to reconsider the evidence and make its own conclusions bearing in mind that the trial court had the advantage of seeing and hearing the witnesses (See, Okeno =vs= Republic [1972] E. A. 32).

Briefly, the prosecution case was that the assistant father in charge of the Segga Parish Catholic Church arrived at his office on the morning of 1st April 2008 and found that the office had been broken into and property stolen from therein. The property included a computer, a piano, sports uniforms, candle and cash Kshs. 7,000/=.

The father John Maria Oginga (PW1) reported the matter to the police through his catechist and later on a Sunday announced to the faithful that the church had been broken into and property stolen.

On the following day after the announcement a church member informed the father that a person called **Joseph** had been seen with candles suspected stolen from the church. Joseph's house was visited and a candle together with sports uniforms stolen from the church were found therein.

The uniforms had been kept in a sack and hidden in the roof. A cousin of Joseph by the name **Leonard** indicated that the items were taken to the house by Joseph who on being arrested said that the stolen computer and piano were with the appellant in Busia.

The appellant was found in Busia and arrested. He led the police to Uganda where the stolen computer was recovered. The stolen piano was also recovered in Busia.

CPI Emmanuel Ekiru (PW2) of Ukwala Police Station received the theft report from the father (PW1) and commenced investigations. He visited the scene and confirmed that the offence had taken place.

On 21st April 2008 he recovered a stolen candle and game kits from the house of the suspect called Joseph. Joseph was arrested and in the process mentioned that the stolen computer and piano were taken to Busia to be sold by the appellant.

Cpl. EKiru and his team proceeded to Busia and arrested the appellant who had attempted to run away. He (appellant) indicated that the stolen items were in Uganda.

Liaising with their Uganda counterparts, Cpl. Ekiru and his team proceeded to Uganda and recovered the stolen computer and piano.

The appellant and Joseph were eventually charged with the present offence.

In his defence, the appellant made an unsworn statement and said that he was a resident of Busia where he was a photographer by occupation. A customer called him on the 21st April 2008 at 2:30 p.m and said that he was at the Busia Police Station under arrest. He (appellant) proceeded to the station and was apprehended. He was placed in the cells and transferred to Segga Police Station where he was told that he had been involved in breaking and stealing. He did not know anything about the offence.

The trial court considered the foregoing evidence and concluded that the prosecution had proved its case against the appellant. He was then convicted and sentenced accordingly.

On review of the said evidence, this court is satisfied that there was sufficient undisputed evidence showing that the offence of burglary and stealing was committed against the Segia Parish Catholic Church. Although there was no witness to the unlawful act, there was evidence of recovery of some of the stolen items in the house of the suspect Joseph who was charged alongside the appellant but pleaded guilty to the charge.

The evidence by the father (PW1) and the investigations officer (PW2) showed that it was through the co-operation and efforts of the said Joseph that the appellant was traced in Busia and arrested.

Upon his arrest, the appellant provided useful information which led to the recovery of the stolen computer and piano in Uganda.

All the recovered items were proved as belonging to the Segia Parish Catholic Church.

The foregoing facts were pertinent and served to provide cogent circumstantial evidence against the appellant such that his defence proved unsustainable.

The inference drawn was that the appellant was somehow in possession of the property a few days after the theft thereof and had taken part of it to dispose off it in Uganda. Otherwise how would he have known that the computer and the piano were in Uganda unless he was involved in the theft thereof. There was sufficient evidence linking him to the offence through his constructive possession of part of the stolen property and failing to give an explanation for the possession. His conduct of attempting to run away on being confronted by the police officer was nothing more than being conscious of his guilt.

A person's suspect conduct would amount to circumstantial evidence that should be taken into account (See *Gathegu vs Republic* [1984] KLR 652 which was followed by the Court of Appeal in *Ronald Mwachia Ezekiel vs Republic* Criminal Appeal No. 318 of 2007 Nbi [unreported])

In the old English decision in *R vs Taylor Weaver and Donavan* [1928] 21 Criminal Appeal R20, it was stated that :-

“Circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which by intensified examination is capable of proving a proportion with the accuracy of mathematics. It is no derogation of evidence to say that it is circumstantial”.

Herein, the incriminatory facts were more consistent with the appellant's guilt rather than innocence. His conviction by the trial court was sound and safe. The sentence meted out was lawful and reasonable.

In sum, this appeal lacks merit and is hereby dismissed.

Dated, signed and delivered at Kisumu this 30th day of November 2009

J. R. KARANJA

JUDGE

JRK/aao