



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT KISUMU**

**Criminal Appeal 170 of 2008**

**BERNARD OUMA WANGA.....**  
**APPELLANT**

**VERSUS**

**REPUBLIC.....**  
**RESPONDENT**

***[From original conviction and sentence in Ukwala SRM'S Court at  
Ukwala criminal case No. 144 of 2008].***

**J U D G E M E N T**

Bernard Ouma Wanga, (herein the appellant) appeared before the Resident Magistrate at Ukwala charged with two counts of burglary and stealing contrary to section 304 (2) and section 279 (b) of the penal code.

There was an alternative count of handling stolen property contrary to section 322 (2) of the penal code.

The particulars of the first count were that on the 28<sup>th</sup> October 2003 at Ruwe sub-location, Siaya District, jointly with others, the appellant broke and entered the dwelling house of Stephen Oyugi Ogutu and stole from therein assorted items all valued at Kshs. 54,000/= the property of the said Stephen Oyugi Ogutu.

For the second count, the particulars were that on the 16<sup>th</sup> August 2003 at Sigomere sub-location, Siaya District, jointly with others, the appellant broke and entered the dwelling house of Miriam Akinyi Agolla and stole from therein assorted items all valued at Kshs. 80,000/=, the property of the said Miriam Akinyi Agolla.

In the alternative count, the particulars were that on the 30<sup>th</sup> June 2008 at Sigomere sub-location, Siaya District, otherwise than in the course of stealing, the appellant dishonestly retained a gas cylinder, gas cookers, and assorted clothes all valued at Kshs. 16,500/=, knowing or having reason to believe them to be stolen property or unlawfully obtained.

After pleading not guilty to all the counts, the appellant was tried, convicted and sentenced to seven (7) years imprisonment on each of the first and second count to run concurrently.

Being dissatisfied with the conviction and sentence, the appellant preferred this appeal on the basis of the grounds of appeal contained in his petition of appeal filed herein on the 5<sup>th</sup> December 2008.

At the hearing of the appeal, the appellant appeared in person and contended that he was not found in possession of the stolen property and that the same were recovered in a house not belonging to him. He said that although a suspect was arrested and released, the suspect did not testify against him and that he had no relationship with the suspect.

The learned senior State Counsel, M/S Oundo, appeared for the respondent and opposed the appeal. She went through the vital segments of the prosecution case and contended that the person found with the property was the appellant's wife who was not a compellable witness and that she (appellant's wife) stated that the items were taken to their house by the appellant.

The learned State Counsel further contended that the appellant was arrested five years after the offence after he had been spotted by an assistant chief and that he did not give an explanation of how he came by the stolen goods.

The learned State Counsel also contended that the appellant's conduct of fleeing and remaining at large for five years was very suspicious and corroborated his guilt. She said that the prosecution evidence was strong and urged this court to dismiss the appeal.

Being a first appellate court, this court is obliged to reconsider the evidence adduced at the trial and arrive at its own conclusion bearing in mind that the trial court had the advantage of seeing and hearing the witnesses (See, Okeno –VS- Republic [1972] EA 32).

Briefly, the prosecution case was that on the 28<sup>th</sup> May 2003, the first complainant Stephen Oyugi Ogutu (PW1) left his place of work and went to his house on the following day. On arrival, he found that the house had been broken into and his property stolen from therein. The property included a T.V set, a gas cooker, cylinder, clothes and beddings. He reported the matter at Sigomere Police Station and investigations commenced. After about one year his stolen gas cooker and cylinder were recovered. He identified them by producing the appropriate purchase receipt. The wife of a suspect was arrested after the suspect escaped.

The suspect who was the appellant was later arrested. The second complainant Miriam Okech (PW2) had on the night of 15<sup>th</sup> August 2003 attended a funeral at her home in Western province. She returned on the following day only to find her house broken into and property stolen from therein. The property included bed sheets, gas cylinder, radio, weighing machines, clothes, shoes and cash Kshs. 34,000/=, plus maize and beans. She reported the matter at Sigomere Police Station and investigations commenced. About a year thereafter, on the 3<sup>rd</sup> August 2004, she went to Ugunja market and spotted a woman wearing one of her stolen clothes.

She followed the woman to her house and then reported to the police. She accompanied the police and an assistant chief to the woman's house. They found the woman, her children and her husband, the appellant.

The second complainant had previously known the family as they were once her neighbour. The police searched the house and found a locked box inside a bedroom. They (police) asked for the keys to the box and at that juncture the appellant went outside the house, locked the door from the outside and went away.

The locked box was broken and items stolen from the second complainant were found therein including items stolen from other people.

The second complainant said that the appellant's wife was arrested and in the process said that the stolen items had been taken into their house by the appellant who was arrested after a period of five years.

PC Baranas Okello (PW3) of Sigomere Police Station was on duty on the 30<sup>th</sup> June 2008 when the

appellant was taken there by an assistant chief for having previously committed some offences. He (PW3) confirmed that such reports were made and that some stolen items had been recovered. He produced the items in court.

The assistant chief of Sigomere sub-location, Wilfred Otieno (PW4) stated that on the 3<sup>rd</sup> August 2004 he was informed by the second appellant (PW2) that a woman wearing her (PW2's) stolen clothes was spotted at Ugunja and traced to her home.

The assistant chief reported the matter to the police and accompanied by a police officer and the second complainant proceeded to the house of the woman and found her with her husband, the appellant. As the house was being searched, the appellant tricked the group, went outside the house and locked the door from outside. He (appellant) then disappeared. Several stolen items were found in the house and the suspect woman who was the appellant's wife was arrested. The appellant was arrested much later on the 28<sup>th</sup> June 2008.

In his defence, the appellant stated that he was a fisherman and was in Kisumu on 27<sup>th</sup> June 2008 when he was called and informed that his pregnant wife was unwell. He took a bicycle and went home to see her. She told him that she was due to deliver on the following day. He put her on the bicycle and took her to Sigomere Health Centre where she was admitted. He went to buy some items for her but police officers arrived abruptly and held his hand. He was slapped and taken to the police station where he was shown some stolen items. He was later charged with the offences which he did not commit and was in Kisumu when they occurred.

All the foregoing evidence by the prosecution and the defence was considered by the learned trial magistrate who concluded that the case against the appellant had been proved beyond reasonable doubt on the basis of the doctrine of recent possession.

The learned trial magistrate remarked:-

“Although nobody saw the accused committing the crime, I weigh all the circumstances herein i.e. that some of the items were found in his house, the behaviour is tricky. Then that he was to get the key for the box only to lock them inside the house and disappear and the act of disappearing for all that period are enough to convince me to believe that the accused was involved in the crime and as such apply herein the principles of recent possession”.

This court, after having reviewed the evidence is satisfied that the offences of burglary and stealing were committed against the two complainants on two separate dates.

Although there was variance between the charge and the evidence with regard to the actual dates of the offences, that variance by virtue of section 214 (2) of the Criminal Procedure Code was immaterial. (See, Morris Muthami Sammy –VS- Republic Criminal Appeal No. 14 of 2006 C/A Nbi).

This court is also satisfied that there was sufficient circumstantial evidence based on the doctrine of recent possession showing that most likely that not, the appellant was involved in committing the offences. His wife was found wearing one of the stolen clothes. She was traced to her house which was searched and additional stolen items recovered. The wife said that the items had been taken there by the appellant. The appellant did not offer any explanation for his possession of the items which were positively identified as belonging to the two complainants (PW1 and PW2). He instead sneaked out of the house, locked the searching party and his family inside the house and disappeared only to be traced and arrested five years after the offences.

His conduct of disappearing just when he was about to be arrested and staying out of the scene for such a considerable period was further proof of his inculpability and truly inconsistent with his innocence. His defence was therefore unsustainable and was in any event well – rebutted by the prosecution evidence.

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

[Delivered and signed this 25<sup>th</sup> day of November 2009].

**J.R. Karanja**

**JUDGE**

J.R.K/va