



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

**Criminal Appeal 164 of 2005**

**MARK ONJUKU ODHIAMBO .....APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

**(From original conviction and sentence in the Senior Resident Magistrate's Court at**

**Oyugis, Criminal Case No.807 of 2004 by R. B. Ngetich, SRM)**

**JUDGMENT**

The appellant was charged with the offence of house breaking and stealing contrary to **section 304(1) and 279(b)** of the **Penal Code**.

The particulars of the offence were that on 10<sup>th</sup> November, 2004 at Kowidi sub-location in Rachuonyo district within Nyanza Province, with intent to steal, the appellant broke into the dwelling house of Alfonse Odhiambo Omolo and stole from therein a colour television set valued at

Kshs.19, 000/= and 21 Video compacts valued at

Kshs.8, 400/=, the property of the said Alfonse Odhiambo Omolo.

The appellant was also charged with an alternative count of handling stolen property contrary to **Section 322(2)** of the **Penal code**. The particulars thereof were that on the 11<sup>th</sup> day of November, 2004 at Misambi stage in Rachuonyo district within Nyanza Province, otherwise than in the course of stealing, the appellant dishonestly received or retained one colour television set valued at Kshs.19, 000/= and 21 video compacts, all valued at Kshs.27, 400, the property of Alfonse Odhiambo Omolo.

After a full trial, the appellant was convicted of the alternative count and sentenced to 10 years' imprisonment. He was aggrieved by the conviction and sentence and preferred an appeal to this court.

In his petition of appeal, he faulted the learned trial magistrate for convicting him without sufficient evidence connecting him to commission of the offence which he was charged with. He further stated that the learned trial magistrate disregarded and/or failed to give due consideration to his defence. He lamented that the sentence that was imposed upon him was harsh and excessive. He urged this court to

allow his appeal, quash the conviction and set aside the sentence.

This being the first appellate court, it is mandated to reconsider the evidence that was adduced before the trial court, evaluate the same and draw its own conclusion in deciding whether the judgment should be upheld, see *Okeno vs Republic [1972] EA 32*.

The brief facts of the case were that on 10<sup>th</sup> November, 2004 at about 10.00 a.m, **Alfonse Odhiambo Omolo, PW1**, was informed that his house had been broken into and his television set and 21 video compacts stolen. He reported the incident at Kadongo Administration Police Camp.

On the following day he learnt that the appellant had been arrested, having been found in possession of the aforesaid stolen items. PW1 identified the television set and the video compacts as being his property that had been stolen. He stated that he had written the serial number of the television set in a note book. However, he did not produce the note book.

**Akumu Aketch, PW2**, was the sub-chief of Kowidi sub-location. He testified that on 10<sup>th</sup> November 2004, he received a report from **Jackline Anyango Odhiambo, PW4**, the wife of PW1, that their house had been broken into and a television set and video compacts stolen. The sub-chief commenced investigations. On 11<sup>th</sup> November 2004, an informer told PW2 that he had seen the appellant carrying a big box from a maize plantation along the road. PW2 went to the place where the appellant had been spotted and he saw him carrying a box. PW2 ordered the appellant to stop. He questioned the appellant about the box but the latter looked very suspicious. The appellant tried to escape but PW2 raised an alarm and members of the public arrested him. The stolen television set and the video compacts were found in the box which the appellant had in his possession.

The evidence of the PW1 and PW2 was corroborated by PW4 in all material aspects. She added that two of the video compacts had her name "Jackline" written thereon. The recovered items were shown to the court.

In his defence, the appellant testified that he was dealing in second hand clothes and was also doing video show business. He further stated that on the material day, he travelled from Kisumu and alighted at Misambi Stage. He was carrying a television set, video deck, tapes and a bale of clothes. On his way to his house, he was arrested by some people. He denied having committed the offence, which he had been charged with.

In his submission before this court, the appellant stated that the evidence that was tendered by PW1 and PW4 was contradictory. He added that PW1 did not produce the note book in which he had allegedly written the serial number of the television set. He further lamented that the learned trial magistrate did not consider his defence.

Mr. Kemo, learned State Counsel, submitted that there was sufficient evidence to warrant the appellant's conviction. The stolen items were recovered from the appellant a day after they were stolen yet the appellant did not give a satisfactory explanation as to how he came by the same. The recovered items were properly identified as belonging to PW1 and in particular, two of the video compacts bore the name of PW4, he stated. The State Counsel urged the court to dismiss the appellant's appeal against conviction. As regards the sentence of 10 years' imprisonment, Mr. Kemo conceded that the same was rather excessive, considering that the stolen items were recovered.

Having carefully evaluated the aforesaid evidence, I am satisfied that the appellant's conviction was proper.

The learned trial magistrate was right in acquitting the appellant of the first count since PW4 testified that their house was not broken into, although a theft had been committed. The appellant was found in possession of the aforesaid stolen items in circumstances which suggested that he had reason to believe that they had been stolen. It is trite law that for a person to be guilty of handling stolen property, the necessary **mens rea** must exist at the time of receipt of the stolen goods. His **mens rea** can be established

by a consideration of all the circumstances attending his continued possession of the goods as was held in **KARINGO VS REPUBLIC** [1982] KLR 213. The appellant attempted to escape when he was confronted by PW2 and members of the public had to chase and arrest him. The appellant did not advance any plausible defence as to how he came by those items. In the circumstances therefore, the learned trial magistrate reached a correct finding that the appellant was guilty of handling stolen property. I dismiss the appeal against conviction.

As regards the sentence that was passed by the trial court, I agree with Mr. Kemo that the same was excessive. The appellant has been in prison custody since 16<sup>th</sup> November 2005. I believe that he has been punished sufficiently. I allow the appeal against sentence and reduce the same to the period already served. The appellant is set at liberty unless otherwise lawfully held.

**Dated, signed and delivered at Kisii this 21<sup>st</sup> day of February 2008.**

DANIEL MUSINGA

**JUDGE**

**Court:**

Judgment delivered in open Court.

Appellant present

Mr. Kemo for the State.

**D. MUSINGA**

**JUDGE**