



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NYERI

Criminal Appeal 227 of 2007

JOSEPH MBURU KARIUKI APPELLANT

VERSUS

REPUBLIC RESPONDENT

(Appeal from original Conviction and Sentence of the Senior Resident Magistrate's Court at Mukurweini in Criminal Case No. 516 of 2006 dated 8th August 2007 by Mr. V. W. Ndururu – Ag. SRM)

J U D G M E N T

The appellant was charged with one count of Housebreaking and stealing contrary to section 304 (a) and 279(b) of the Penal Code. After trial before the lower court he was convicted as charged and sentenced to five years imprisonment on the two limbs of the count respectively. Being aggrieved with that conviction and sentence he has preferred this appeal. As I begin to ponder over this appeal, I must remind myself of the role of a first appellate court in matters of this nature. That role was succinctly captured in the celebrated case of **Okeno v/s Republic (1972) E.A. 32**. It is in terms that the first appellate court must subject the entire evidence tendered before the trial court to fresh and exhaustive evaluation so as to reach its independent decision as to the guilt or otherwise of the appellant. In doing so allowance should be given for the fact that the appellate court did not hear or observe the witnesses as they testified and cannot therefore comment on their demeanour.

On 8.8.04, PW1 **Mary Wangui** a resident of Manyamwati within Mukurweini Division woke up early in the morning at about 4 a.m., milked her cows, latched her house and took the milk to the dairy. She returned at 5.00 a.m. only to find the door ajar. On checking for the power saw serial No. 967-06-00/03-46-30188 belonging to her son, PW3 **Joseph Kibe**, she found it missing from underneath the table where she had kept it. She informed PW3 who was at Kiahungu town who in turn reported the matter to the police. Much later in May 2006 PW3 informed her that the power saw had been recovered. PW2 **John Mbogo** told the court that on 8.8.04, the appellant sold him a power saw at Kshs.20,000/= in the presence of a **Mr. Gathumbi** and in return paid him Kshs.500/= from the proceeds to settle long standing loan he had earlier advanced to him. He promised to issue him with a receipt later, but this was never to be. He never pursued the appellant for the same, as he knew where to find him in the event of a problem with the power saw. From his own investigation, PW3 came to know that the appellant had sold a power saw to PW2. He confronted him in May 2006 and PW2 confirmed and showed him the power saw whose serial number had apparently been interfered with and rubbed off, but it still bore the complainant's initials J.K.E.

The complainant never disclosed the source of his information but identified the appellant as his first cousin. He sought the assistance of PW4 **P.C. Muriuki** to apprehend the appellant and took possession

of the power saw which he claimed to have bought at Kshs.45,000/= only to lose it after six months. The power saw was tendered in evidence as an exhibit.

Put on his defence, the appellant elected to give unsworn evidence and called no witness. He denied ever selling the power saw to PW2 as there was no documentary evidence to prove so. He produced proceedings of criminal case No. 3707/04 in the chief Magistrate's Court, Nyeri where some four accused persons were convicted for robbery with violence on him and his wife to postulate the theory that they may have been the informers since they had a bone to grind with him.

The learned magistrate was not impressed with this line of defence. He proceeded to dismiss it holding that **"..... the allegation seems to be his own imagination, given that PW3 never disclosed the names of his informers during the trial. Even if his informers were the accused persons in cr. 3707/04 and their information led to the unravelling of the mystery behind the loss of PW3's power saw, it wouldn't be illegal to consider such evidence"** He proceeded to find the appellant guilty as charged.

At the hearing of the appeal, the appellant tendered written submissions which I have carefully read and considered. In the main his arguments are that there was no evidence of housebreaking. There was no evidence that the house of PW1 was ever broken into. Secondly, that he was not found in recent possession of the power saw. Rather it was found in possession of PW2. Further there was no sale agreement written or otherwise tendered in evidence. That independent witnesses were not called to testify. Finally he claimed that the PW2 fabricated the case against him.

The appeal was opposed. **Ms Ngalyuka**, learned state counsel, submitted that there was evidence that PW2 had been sold a power saw that had been stolen. Indeed it was on the same day that the power saw was stolen from PW1's house. The appellant in his defence never gave an explanation. PW2 had no reason to frame the appellant. There was no existing grudge between the two. The criminal case referred to by the appellant involved other people and not PW2.

It is apparent that the conviction of the appellant turned on the doctrine of recent possession. The complainant power saw was stolen from his mother's house on 8th August 2004. On the same day at about 4 p.m. the appellant sold the said power saw to the PW2 for a sum of Kshs.20,000/=. Although the appellant promised to issue PW2 with a receipt later he was unable to live up to the promise. However PW2 was not a worried man as he knew where to get the appellant in the event that he was required over the power saw. A year later the complainant traced his power saw to PW2 and who upon being asked where he got it, he fingered the appellant. PW3 positively identified the power saw as his and although the serial numbers had been erased his initials "J.K.E." were still embossed on the machine. The appellant did not explain how he had come by the said machine before he sold the same to PW2. There is no reason why PW2 would have framed the appellant with the case. No grudge between the two was disclosed that would have acted as a catalysis in having PW2 frame the appellant with the case. He never raised the issue with PW2 either in his cross-examination or in his defence. The recent possession we are talking about in the circumstances of this case is on 8th August 2004 at about 4 p.m. when the appellant sold the power saw to PW2 and not when the power saw was discovered in the hands of PW2 a year or so later. Indeed PW2 aptly explained how he had come by the power saw. He fingered the appellant, a person he knew very well. The appellant should then have offered an explanation. He did not. The appellant having been in recent possession of the stolen power saw so soon after it had been stolen, the assumption is that he was the thief who broke into the house of PW1 and stole the power saw. This is the essence of the doctrine of recent possession. See **Arum v/s Republic (1006) 2 E.A. 10**.

The appellant has argued that there was no evidence that the house of PW1 was ever broken into. However, there is unchallenged and uncontroverted evidence of PW1 that she closed the door with a latch when taking the milk to the dairy in the morning. When she came back later she found the door ajar meaning that someone had opened it. It could not have been the children she left in the house sleeping as she had latched the door from outside. In any event housebreaking does not necessarily mean physically breaking into house for instance breaking the door open. Housebreaking to my mind is simply getting into a house without the knowledge and consent of the owner during the day by whatever means. In the

circumstances of this case, it would appear that the appellant simply gained entry into the house of PW1 by pulling the latch in the absence of the complainant. That without more was housebreaking. The appellant has also argued that there was no documentary evidence that he sold the power saw to PW2. That no receipt was tendered in evidence to prove that the appellant sold to PW2 the power saw. A fact can be proved by oral or documentary evidence. Not every sale transaction must be evidenced by a receipt however. In this case there is evidence that PW2 had asked for a receipt. Though the appellant had undertaken to avail one, he was unable to do so. The appellant cannot now seek to benefit from his own mischief.

The trial magistrate had the advantage of seeing and hearing PW2 give evidence. He found PW2 a trustworthy witness. I appreciate the advantage enjoyed by the trial court and I would in the circumstances decline to interfere with that finding. An appellate court cannot interfere with the findings of the trial court based on credibility of the witness unless no reasonable tribunal could have made such findings or if it is shown that the findings were erroneous in law. See **Republic v/s Oyier (1985) KLR 353**. I have not seen anything that would remotely suggest that the learned magistrate was in error in coming to that finding. This was the star witness regarding how he came by the power saw. He bought it from the appellant. The appellant is a person he knew very well. He could not therefore confuse him for somebody else.

The appellant maintains that independent witnesses such as one Gathumbi who witnessed the purported sale should have been summoned to testify. He also feels that the informers too should have been forced to testify. As it has been constantly stated by the court of appeal in several authorities, it is not the quantity but quality of witnesses that count in a criminal trial. After PW2 had testified, I do not think that there were any loose ends that would have been tied by the testimony of **Mr. Gathumbi** and or the informers. As for the informers, the appellant thinks that they may have been those whom he had a case of robbery with violence with pending in court. This was pure speculation and as correctly observed by the learned magistrate nothing stops a court of law from receiving and acting on such evidence if it is truthful and credible. In the circumstances of this case, it led to the discovery of the stolen power saw. This is not a case of a frame up as claimed by the appellant.

For all the foregoing reasons, I find no merit in this appeal. It is accordingly dismissed.

Dated and delivered at Nyeri this 22nd day of September 2008

M. S. A. MAKHANDIA

JUDGE