

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT BUNGOMA

Criminal Appeal 109 of 2005

Arising from Original SPM Cr. Case No.2025 of 2003

JOHN NYONGESA MATIFALI.....APPELLANT

VS

REPUBLIC.....RESPONDENT

JUDGMENT

John Nyongesa Matifali hereinafter referred to as the appellant was arraigned before the Senior Principal Magistrate's Court in Bungoma on 26-9-2003. He was jointly charged with 2 others with the offence of "*store breaking and committing a felony contrary to section 306 (a) of the penal code.*" He denied the charge and the matter went to full trial with the prosecution calling a total of 4 witnesses. On their part, the appellant and the other co-accused persons gave unsworn statements of defence and called no witnesses. The 2 others were nonetheless acquitted under section 215 of the Civil Procedure Code. The appellant was found guilty as charged and convicted accordingly. He was sentenced to serve 7 years imprisonment with hard labour. Being dissatisfied with the conviction and sentence, the appellant filed this appeal. He has urged the court to allow the appeal, quash the conviction and set aside the sentence. He relies on 8 grounds of appeal, some of which are basically unintelligible while the others consist of a summary of some aspects of the evidence adduced before the trial Court. It will not be possible for me therefore to replicate the said grounds for purposes of this appeal. On his part, learned counsel for the state submitted that the appeal was frivolous and thus asked the court to dismiss it. I have considered this submission along with the grounds raised by the appellant. This being a first appeal however, it is incumbent upon me to analyse and re-evaluate the evidence adduced before the trial court and arrive at an independent decision as to whether the same could support the conviction against the appellant.

In a nutshell therefore, the evidence adduced before the trial court is as follows:-

The complainant – Peter Nyongesa used to trade in second hand – or used clothes. At the close of the day, PW2 Raymond Muhanji a hand cart operator used to ferry the remaining merchandise and keep it in a particular store. He carried 2 bales of assorted clothes as usual on the evening of 20.9.2003 and kept them in the store. When he went to collect the same the following morning, he found one bale missing. He told the court that the door to the store had been broken by breaking the lock in order to gain entry into the store. PW2 reported the matter to PW1 who went to the store and confirmed the store breaking. He went to Bungoma Police Station where he reported the matter. Meanwhile, PW3 Cleophas Wanjala who also sells used clothes received information that the complainant's clothes had been stolen from the store. Later the same morning the appellant is said to have gone to him carrying some pairs of trousers which he offered to him for sale. He advised the seller to go and check with him later. PW3 suspected that the merchandise could be some of the stolen clothes belonging to PW1 and he alerted him. They reported the matter to the police station. When the appellant went back to PW3 to sell the clothes, he was arrested by members of public, PW4 – a police officer and a colleague were informed. They went to the scene and rearrested the appellant from the members of public. The appellant is said to have been arrested with 11 pairs of trousers. They went to the appellant's house where they found his co-accused. They too were found to be wearing trousers which the complainant identified as his. According to the complainant all his clothes for sale were marked with the letter "p" – which he said stood for his 1st name i.e "Peter". The other 2 co-accused were also arrested. They told the court that they had been given the trousers in question by the appellant to wear. They were given the benefit of doubt and acquitted under

section 215 of the Criminal Procedure Code.

In his defence which was unsworn, the appellant told the court that he also used to deal in used clothes. He claimed that he had bought the clothes from Kimilili Market. He also said that the letter 'P' was marked on the exhibits after they were recovered. The learned trial magistrate considered this defence and found it untenable. He also found that the complainant had positively identified the clothes with the letter 'P' which denoted the complainant's name '*Peter*'. He further made a finding that the appellant could not have bought those clothes at Kimilili as he claimed, sold them to PW3 and then went to claim the money later the same day when he was arrested. He applied the doctrine of recent possession and concluded that the appellant must be the person who broke into the store and stole the merchandise in question. I have carefully considered this evidence. First and foremost, I am satisfied from the evidence on record before the trial court that the store in which the complainant's clothes were was broken into and the clothes in question stolen.

Secondly, I am satisfied that the complainant herein did properly identify the recovered clothes both before PW3 & PW4 and also before the learned trial Magistrate. The appellant does not deny being found in possession of the said clothes. Having been found in possession of the said clothes, it was up to him to give a reasonable explanation as to how he came to be in possession of the same. He failed to do so. The only inference that the learned trial magistrate could make was that the appellant had indeed stolen the items in question. My finding is that the learned trial Magistrate properly applied the doctrine of recent possession when convicting the appellant. Given that I did not have the chance to see the complainant testify and thus identify his clothes, I cannot fault the learned trial magistrate on his finding that the complainant positively identified the recovered items as his.

After considering the evidence adduced before the trial court, the appellant's grounds of appeal and the reply thereto by the learned state counsel, my conclusion is that the appellant was indeed properly convicted. The conviction before the trial court was based on the evidence before it and the law applicable in such matters.

Accordingly, I must support and uphold the same. I therefore dismiss this appeal on conviction as lacking in merit. I nonetheless find the sentence of 7 years a bit on the high side. I reduce the same to 4 ½ years imprisonment with hard labour. Orders accordingly.

W. KARANJA

JUDGE

Delivered, signed and Dated at Bungoma this 16th day of May, 2007 in presence:- Mr. Ndege for the state

Appellant in person.