REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI
Criminal Appeal 249 of 2004 & 273 of 2005

VENASIO THUKU WANGOMBE..……..……...…….APPELLANT

Versus

REPUBLIC…….……..……RESPONDENT

(Being appeal against the conviction and sentence of E. O. Obaga, Senior Resident Magistrate, in the Senior Resident Magistrate's Criminal Case No. 2131 of 2003 at Kerugoya)

JUDGMENT

The Appellants were jointly charged with shop breaking contrary to *Section 306(a)* of the Penal Code. In the alternative they were charged with handling stolen goods. The 2nd Appellant VENASIO THUKU WANGOMBE faced an alternative charge of handling suspected stolen goods. They both have brought this appeal against conviction and sentence. The evidence before court was that P.W.1 who operated a shop at Kerugoya town called Central Electronics on 19th September 2003 had his shop broken into. He found that four mobile phones, five lines of Safaricom, four lines of Kencell and batteries of mobile phones and money were missing. On 20th September 2003 a customer came to him and informed him that there was another shop selling mobile lines more cheaply than him. He reported the matter to the Police and on the Police carrying out their investigation they found that that shop had the telephones which were stolen from his shop the serial numbers were tallying. Similarly they found the mobile line that had been stolen from him and also a charger to one of the telephones. P.W. 2 gave evidence and stated that the 2nd Appellant approached him and introduced him to the 1st Appellant, Lawrence Mwendwa Musau with a view to him getting a mobile telephone. The 1st Appellant agreed to give him a telephone on credit if the 2nd Appellant would stand as guarantor. He was known to the 2nd Appellant. His wife went to school with that 2nd Appellant. He got a Motorola 330. He was given a receipt and also given a line. He identified the first appellant in the dock as the person who sold him the phone. P.W.3 was the Police who investigated the theft. He confirmed that he went to the 1st Appellant's shop where he recovered two telephones, which marched the serial numbers of the stolen phones of the Complainant. He also recovered lines and the charger. The third phone was in possession of the 2nd Appellant. On questioning them the 1st Appellant said that he had been given those items by the 2nd Appellant to sell. The Appellants were found with a case to answer. In his defence the 1st Appellant said that he runs a business in Kerugoya town known as City Spice. He sells mobiles and also repairs them. On 20th September 2003 when his employee was at the shop 2nd Appellant brought his telephone for repair. He also brought some handsets for connection with twin lines. These were the telephones that are the subject of the charge. The lines which he brought were also said to be for connection of those phones and they were the same lines that were the subject of the charge. The 2nd Appellant in his defence stated that he had taken his phone to the 2nd Appellant for repair and he was given another phone for his use while his was undergoing repair. The phone which he was given was the one subject of the charge. The Appellant were both convicted of theft and sentenced to three years imprisonment.

The Court has re-examined the evidence tendered at the trial. The most damaging evidence to the Appellant's defence is the evidence of P.W. 2. He was well known to the 2nd Appellant. It is the 2nd Appellant who took him to the 1st Appellant's shop with a promise that he could purchase a phone. He was given a phone on credit. It ought to be noted that it was the 2nd Appellant who went to the home of P.W. to inform him of the availability of a cheaper phone. The Appellants in their defence were unable to shift that evidence. The 2nd Appellant's defence was that his phone was being repaired by the 1st

Appellant. The evidence of D.W. 2 does not tally with the evidence of 2nd Appellant. It is also not understood why if all the 2nd Appellant went for was the repair of his phone why he took P.W.2 to purchase the telephone. The defence is rejected but the Court finds that the prosecution did prove the charge of shop breaking. There is clear evidence that the Complainant's shop was broken into and the following day the stolen merchandise was found in the shop of the 1st Appellant. The learned magistrate found that using the doctrine of recent possession, the prosecution proved its case. In the case of **SAMUEL MUNENE MATU -V- REP. CR. APP. NO. 108 OF 2003** The Court of Appeal found that where stolen property was found in possession of the Appellant three weeks after the robbery that doctrine of recent possession could be used. That possession was found to be sufficient to sustain a conclusion that the Appellant had participated in the robbery.

Accordingly I do hereby uphold the finding of the learned magistrate in respect of the conviction and I do also find that the sentence was reasonable in the circumstances. The Appellants' appeal therefore is hereby dismissed.

Dated and delivered at Nyeri this 28th day of September 2007.

MARY KASANGO

JUDGE