REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Criminal Appeal 394 of 2004

JAMES OLE SILANGA…….....……..…..……..APPELLANT

VERSUS

REPUBLIC ……..…….....……....RESPONDENT

J U D G M E N T

The Appellant was convicted of **BURGLARY AND STEALING** contrary to **Section 304(2)** and **279(b)** of the Penal Code. He was sentenced to three years imprisonment in each limb with sentences ordered to run concurrently. The Appellant was acquitted of another similar charge.

In his appeal he challenges the conviction on grounds the evidence adduced by the prosecution was insufficient to sustain a conviction and further that the person who identified the Appellant's house to PW2 was not a witness. In his oral submission the Appellant urged the court to consider both sides. The Appellant continued to deny that any of the exhibits in this case were recovered from his house.

The brief facts of the case were that PW1 was a landlady who had rented out some of her houses. PW1 stated that on the material night, one of her tenant's houses was broken into and things stolen. That she heard the break-in and she screamed before going out to meet the watchmen. One week later PW1's house was also broken into and things stolen. Later PW1 went with one **MAJOR** to a house where she said the Appellant opened for them. Inside, they recovered the items stolen from PW1's tenant which she, PW1 identified. PW2 received the Appellant and others at the police station together with the exhibits and eventually charged them with the offences in this case. PW3 was the AP who arrested the Appellant and others after an informer led him to their houses. PW3 also recovered the exhibits in this case.

I have carefully considered this appeal and re-evaluated the entire evidence adduced therein bearing in mind that I never saw nor heard the witnesses and giving due allowance. See **OKENO vs. REPUBLIC 1972 EA 32**.

The appeal was opposed.

MISS NYAMOSI for the State submitted that the State was supporting both the conviction and sentence. Learned counsel submitted that the tenant of PW1 had the house broken into while away. That PW1 was in her house and she heard the burglary. The stolen things were later recovered from the Appellant's house. That PW1 identified the recovered items. Learned counsel submitted that the doctrine of recent possession applies.

There are several legal issues which arise out of this appeal. The pertinent issue is who was the

Complainant in this case. The second being who had possession of the recovered items.

On the issue of the Complainant, it was PW1 whose name appears in the charge sheet as the Complainant. PW1 made it very clear that she was the landlady to the house. The name of the tenant is nowhere mentioned in this case. The most important issue connected thereto is, on what basis were the recovered exhibits identified by PW1. The evidence is clear that the house of PW1's tenant was broken into on the 9th and the items recovered on 17th February 2003. Due to the lapse of time between the burglary and theft on one hand and the recovery of the items on the other, it was imperative for the prosecution to establish in evidence, the basis upon which PW1 identified the recovered goods. It being very clear that the goods were not hers, PW1, due to the said lapse, should have adduced more evidence to show what it is that enabled her to identify the items as those stolen from her tenant's house. Did PW1 know these items before? There was no evidence adduced. All we have in the evidence are bare statements that the recovered things were the ones stolen from the house in issue here. Those bare statements were not sufficient to establish the fact that the recovered items were same as those stolen from the house of the tenant of PW1. On this finding alone, it would be sufficient to dispose off this appeal. However I will deal with the second issue as well which is; from whose house were the items recovered?

The record of the learned trial magistrate shows clearly that hearsay and therefore inadmissible evidence was recorded. The evidence by PW1 and PW3 that one "Major" told them that the house from which the recovery was made belonged to the Appellant was hearsay. The said "Major" was not called as a witness. Secondly neither PW1 nor PW3 knew the Appellant's house prior to the arrest.

The evidence as to ownership of the house ought not, in those circumstances, to have been admitted in evidence as doing so was contrary to **Section 63(2)** of the **Evidence Act**. Without that evidence, the prosecution would be unable to prove that the items were actually recovered from the Appellant. I find that the Appellant suffered prejudice when the hearsay evidence was admitted in evidence by the Court. Consequently the conviction entered against the Appellant was unsafe and cannot be sustained.

After considering this appeal on grounds included in the Judgment, I find that it has merit and should be allowed. Consequently I quash the conviction, set aside the sentence and order that the Appellant should be set free unless he is otherwise lawfully held.

Dated at Nairobi this 22nd day of March 2006.

LESIIT, J.

JUDGE

Read, signed and delivered in presence of;

Appellant present

Miss Nyamosi for State

Huka CC:

LESIIT, J.

JUDGE