

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISII

Criminal Appeal 29 of 2004

IBRAHIM NYAKERI GWOI APPELLANT

VERSUS

REPUBLIC RESPONDENT

(From original conviction and sentence of the SRM's court at Keroka in criminal case No.548 of 2003)

JUDGMENT:

The appellant IBRAHIM NYAKERI GWOI was convicted on one count of breaking and committing a felony contrary to s.306 9a) Penal Code and one count for offence of Burglary and stealing from a dwelling House contrary to s.304(a) and 279 (b) of the Penal Code. He was sentenced to two years imprisonment in each count.

Prosecution case was that on the night of 7th and 8th July 2003 a shop of PHILIP ANUNDA was broken into and several things stolen. On the same night the dwelling house of OTOTO NYANGAU was broken into and his goods worth shs.12,880/- stolen. They reported to Keroka police station.

On 1st August 2003 P.C PHILIP KURGAT (PW4) received information that there were stolen items at home of appellant. He went there and on searching the house he recovered some of the stolen items.

I have considered the appeal and the evidence on record. The appellant was facing four counts but he was only convicted on counts 2-3. As Mr. Kemo the learned state counsel pointed out, OTOTO NYANGAU OBAGA the complainant in court 2 was never called to testify. There was therefore no evidence, which the trial magistrate based his conviction on in that count.

As for the 2nd count the complainant Phillip Anunda (PW3) stated his items were stolen on 8/7/03. They were recovered by PW4 on 1.8.03. There were three weeks after the theft. Three weeks is such a long time that stolen items can change hands many times. The doctrine of recent possession cannot apply. The fact that those items were found with appellant, without any other evidence to connect him with stealing the same is not enough to comment on. The conviction by the magistrate was therefore not proper and was not based on second evidence.

I therefore allow the appeal, quash the convictions and set aside the sentences.

Appellant be set at liberty forthwith unless otherwise legally held.

DATED 3RD APRIL 2006

KABURU BAUNI

JUDGE

Cc – Mobisa

Mr. Kemo for State

Appellant