



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MERU**

**Criminal Appeal 139 of 1999**

**JAMES MWITI .....**  
**APPELLANT**

**AND**

**THE REPUBLIC .....**  
**RESPONDENT**

***(Being an appeal from original conviction and sentence in Criminal case No. 697 of 1998 dated 6.7.1999)***

**JUDGMENT OF THE COURT**

JAMES MWITI, the appellant herein, was charged with two counts of breaking into a building under S. 306 (a) of the Penal Code before the Nkubu Senior Resident Magistrate's court in criminal case No. 697 of 1998. In the first count he was charged with breaking into a building and committing a felony contrary to section 306 (a) of the Penal Code. The particulars of the offence were that:-

***“On the night of 3<sup>rd</sup> August 1996 at Nkubu in Meru District within the Eastern Province jointly with others not before the court broke and entered into a building namely a shop of JULIA MURITHI and stole from therein radio cassette make Mecasonic and a dozen tiger battery cells 13 pieces of cloth materials and 6 pairs of Eveready battery cells, 8 tins of chipo cooking fat, 4 tins of hair glo, 4 tins of cocoa, 4 packets of cigarettes all valued at Kshs. 16,123/= the property of JULIA MURITHI.***

In the second count, the particulars of the charge were that:-

***“On the night of 4.8.96 at Nkubu market in Meru Central District within the Eastern Province, jointly with others not before the court, broke and entered into a building namely a shop of JAMES MUTHOMI and stole from therein 50 pieces of cloth materials, an electric iron box, a scissors (sic), 4 shirts, 4 dresses all valued at Kshs. 50,000/= the property of JAMES MUTHOMI.”***

The appellant was charged in the alternative charge with handling stolen goods contrary to section 322(2) of the Penal Code. The particulars were that:-

***“On the 5<sup>th</sup> day of August 1996 at Barangu Village in Meru Central District within the Eastern province, otherwise than in the course of stealing dishonestly received or retained 2 skirts, 2 blouses, a pair of scissors iron box, a radio cassette make Macasonic, 1 material ¼ material knowing or having***

***reason to believe them to be stolen goods.”***

The brief facts of this case are that the two complainants in this case operated business at Nkubu market within the same building. Both complainants were tailors, though the first complainant also ran a grocery store alongside her tailoring business. On the night of 3<sup>rd</sup>/4<sup>th</sup> August 1996, the two business premises were broken into and goods as enumerated in the particulars of counts 1 and 2 stolen. The theft was reported to the police.

On suspicion that the appellant was involved in the break in and theft, he was arrested by members of the public, among them the second complainant. On being arrested, the appellant was taken to Nkubu police station for interrogation. During interrogation, the appellant agreed to take police officers to his home where a search was carried out. Some of the stolen items, as set out in the particulars of the alternative charge were recovered from the appellant's house. The appellant also led the police to the shamba from where some other items were recovered among the banana bushes. The appellant also led the police to the home of one MWORIA (an accused on same facts but in a different case) from which some of the stolen items were recovered. The appellant was subsequently charged with the two offences.

After a full trial, the appellant was found guilty on each of the two counts and convicted accordingly. He was sentenced to five (5) years imprisonment on each of the two counts plus three (3) strokes of the cane. He has appealed. In his Petition of Appeal personally drawn by himself and filed in court on 3.8.1999, the appellant set out nine (9) grounds of appeal. I shall deal with each of those grounds later in this judgment.

First the evidence. The prosecution called four (4) witnesses. PW1, JULIA MURITHI testified that she operated a tailoring business at Nkubu market. She closed business at about 6.30pm on the evening of 3.8.96 and secured the whole place before she went home. On the following morning she found her shop had been broken into and the items detailed in the particulars of charge in count one stolen. She also testified that on the 5.8.96 at around 7.00pm, she was informed by police that some of her stolen goods had been recovered. She was able to identify her radio cassette, chipo cooking fat, cocoa, Eveready, batteries, 13 pieces of materials and one piece of material measuring 1½ metres. She further testified that some of the items were recovered from the appellant. She also testified that she had no grudge with the appellant whom she never knew before.

PW2 was GILBERT KIRIMI. He testified that on 2.9.96, he took his clothes to one MUTHOMI's shop at Nkubu market for repairs. He took two coats and one trouser, only to learn later that the clothes had been stolen when the tailor's premises were broken into. Later PW2 went to the police station at Nkubu from where he accompanied some police officers to the appellant's home from where some materials and other items were recovered. The clothes were stashed in a sack which also contained dried coffee berries. PW2's own clothes were not recovered. The appellant led PW2 and the police officers to Ukuu at Mworia's home from where some other items were recovered including men's' and women's clothes.

PW3 was JAMES MUTHOMI. He testified that on 4.8.96, he discovered that his shop at Nkubu market had been broken into and some items stolen. These are the items that were enumerated in particulars of charge in count two. PW3 was able to identify his items during the hearing of the case. The appellant was arrested. Appellant also implicated one MWORIA. The subsequent searches led to some items being recovered from the appellant's home while some of the other stolen items were recovered from Mworia's home. PW3 identified some of the dress materials, the iron box which he said had a crack and some shirts in addition to other items. PW3 was also able to identify the radio cassette.

PW4 was PC SAMSON KIPCHUMBA. He testified that on 5.8.96 at about 12.30pm, while he was on duty at Nkubu police station, he received a report from the complainants in this case. Together with PC ISINGA, PW4 proceeded to the scene. Later that day, the appellant was taken to the police station by members of the public. The appellant who had no house of his own led the police to the coffee shamba in the company of the two complainants. The radio cassette, iron box, pair of scissors, 4 packets of chipo cooking fat, 2 tins of coca and 2 pairs of battery cells were recovered. The police also recovered some of the items from the appellant's brother's house which was situated about 20 metres from the coffee

shamba. PW4 produced the recovered items as P exhibits 1 to 10.

In his defence, the appellant gave an unsworn statement in which he stated that on 5.8.96, he spent the better part of the day harvesting French beans together with his wife. At about 1.30pm while he was at Nkubu market, he was arrested by two police officers and taken to Nkubu police station. While at the station, he was shown some items which he was alleged to have stolen. He was also told to lead the police to the home of some other person who had been arrested earlier. He denied that he knew that other person. He also stated that when his home was searched, no items were recovered therefrom.

In his judgment, the learned trial magistrate found that the prosecution had established its case beyond any reasonable doubt. He also found that all the recovered items both from the accused's home and from Mworira's home were positively identified by the two complainants. The learned trial magistrate convicted the appellant on the basis of recent possession.

My duty as the first appellate court is to reconsider and re-evaluate the printed evidence with a view to reaching my own conclusion as to the guilt or otherwise of the appellant (See **OKENO –VS – R. (1972) EA 32**). I have carefully reconsidered and re-evaluated that evidence. The conclusion I have reached is that the learned trial magistrate applied the correct legal principles in convicting the appellant. I will now consider the appellant's complaints against the learned trial magistrate's judgment.

The appellant's first complaint is that the learned trial magistrate erred in law and fact when he convicted the appellant on the sole evidence of PW2 who was allegedly not an eye witness. This complaint has no basis. The appellant was convicted on the basis of recent possession. The principle of recent possession is that whoever is found in possession of recently stolen goods, without an adequate explanation as to how he came into possession of such goods is presumed to be the thief. The recovered items in this case were recovered from the appellant's brother's home and the coffee shamba after the appellant pointed out those goods to the police and the complainants. On this ground, the appellant's appeal fails.

The appellant's complaint in grounds 2 and 3 of the Petition of Appeal is that there was no investigation carried out by the police. The evidence on record clearly shows that PW4 went to the scene of crime where he established how the break-in had been done. He also interrogated the appellant, followed leads to where some of the stolen items were recovered and consequently decided to charge the appellant. Is that what the appellant calls lack of investigation? My considered view is that the indictment against the police for failing to investigate the case is misplaced and misconceived. Those two grounds of the appeal therefore fail.

In ground 4, the appellant has complained that the learned trial magistrate erred in law and fact in failing to find that none of the stolen items were recovered from him and in failing to note that the prosecution's failure to call the appellant's brother from whose house some of the items were allegedly recovered was fatal to the prosecution's case. I have found that there was more than ample evidence from PW1, PW2, PW3 and PW4 that it is the appellant who led the police and the complainants to the various points at which some of the stolen items were recovered. It would have been good for the prosecution to call the appellant's brother in whose house some of the items were stolen but that failure is not, in my view fatal to the prosecution's case. The evidence against the appellant to the effect that he was found in possession of the stolen items produced in court as P exhibits 1 through 10 was so overwhelming that it did not need any other evidence to directly connect the appellant with the commission of the respective offences. This ground of the appeal lacks merit and same fails.

The appellant's complaint raised by ground 5 of the appeal is the same as that raised by ground 9. As already noted, the appellant's conviction did not rest on eye-witness evidence of the commission of the offence but on the basis of possession of recently stolen goods without any explanation as to how he came to be possessed of the same. Once again, this ground of the appeal fails.

The appellant has also complained in ground 6 of the Petition of Appeal that the learned trial magistrate failed to consider the appellant's defence. A glance at the learned trial judge's judgment reveals that the learned trial magistrate set out the appellant's defence, though he did not analyse it. However, an analysis

of the appellant's defence by this honourable court clearly shows that that defence did not in any way dislodge the prosecution's evidence against the appellant. That evidence by the prosecution was that the appellant led the police in the presence of both the complainant and PW4 to the exact spot from which some of the stolen items were stolen. The appellant's denial that he did not commit the offence had no weight in the face of the overwhelming prosecution evidence of recent possession. How could the police just arrest the appellant? The truth of the matter is that after being suspected of having taken part in the commission of the offence, the appellant was arrested by members of the public and handed over to police. The appellant was not an innocent passerby who was arrested by police when he was there at the market on his own mission.

Finally, the appellant has complained under grounds 7, 8 and 9 of the Petition of Appeal that the learned trial magistrate erred in law and fact in failing to find that the prosecution had not proved its case against the appellant beyond any reasonable doubt in that the complainants were not able to positively say who the wrong doers were. This complaint has already been dealt with in part under grounds 1, 3 and 4 in that the prosecution's case against the appellant rested not on identification of the wrong doers at the time of the commission of the offence but it rested on the principle of recent possession. I need not belabour the point again.

In the result, the appellant's appeal on conviction is found to lack merit. As to sentence, I would set aside the strokes of the cane imposed upon the appellant on each of the two counts as the same has been outlawed. I confirm the five (5) years imprisonment imposed upon the appellant on each of the two counts.

Except to the extent only of setting aside the strokes of the cane, the appellant's appeal is dismissed.

Orders accordingly.

Dated and delivered at Meru this 26th day of July, 2006.

RUTH N. SITATI

J U D G E