REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERICHO

CRIMINAL APPEAL 82 OF 2004

ROBERT KORIR KIPNGENO..... APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant, Robert Korir Kipng'eno, was charged with the offence of 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 22nd of March, 2004 at Salgaa trading centre within Nakuru District, the Appellant jointly with another not before court broke and entered a building namely, a video show room of Simon Juma Echakara and stole therefrom one video deck make JVC S/No.518362 of the value of Ksh.13,500/-, the property of Simon Juma Echakara. The Appellant was alternatively charged with handling stolen goods contrary to **section 322(2**) of the **Penal Code**. The particulars of the charge were that on the 23rd of March, 2004 otherwise that in the course of stealing the Appellant dishonestly retained one video deck JVC S/No.518362 knowing or having reasons to believe it to be stolen property. The Appellant pleaded not guilty to the charge. After a full trial, the Appellant was convicted as charged on the main charge. He was sentenced to serve three years imprisonment. The Appellant being aggrieved by his conviction and sentence has appealed to this court.

In his petition of appeal, the Appellant raised eight grounds of appeal faulting the decision of the trial magistrate. The said grounds of appeal may be summarized as follows: The Appellant was aggrieved that he had been convicted against the weight of evidence and also on insufficient evidence adduced by the prosecution. He was aggrieved that the trial magistrate had applied the doctrine of recent possession in the circumstances of this case when the same ought not to have been applied. The Appellant was further aggrieved that the trial magistrate had considered extraneous matters when sentencing him to a harsh and excessive custodial sentence. Finally, the Appellant faulted the trial magistrate for shifting the burden of proof from the prosecution to the Appellant and therefore wrongly convicting him.

At the hearing of the appeal, Mr. Motanya, Learned Counsel for the Appellant argued the grounds of appeal and urged this court to allow the appeal, quash the eviction and set aside the sentence imposed. Mr. Koech, the Learned State Counsel supported the conviction and the sentence imposed by the trial magistrate. He submitted that the prosecution had adduced sufficient evidence to enable the appellant to be convicted. According to him, the prosecution had established the charge against the Appellant beyond any reasonable doubt. I will revert back to the arguments made after briefly setting out the facts of this case.

The Complainant, Simon Juma Kicheka (Echakara?) (PW1) testified that he was informed on the 22nd of March, 2004 at about 7.30am that his building at Salgaa had been broken into. He went to the building and confirmed that indeed the building had been broken into and his video deck with a cassette, valued at Ksh.13,500/- had been stolen. He reported the matter to Salgaa Police Station. On the 23rd of March, 2004 he was summoned by the police at Salgaa and referred to Molo Police Station. PW1 went to Molo Police Station. He was shown a video deck. He produced a receipt that was issued to him when he purchased the video deck. The serial number in the receipt tallied with the serial number on the video deck. The serial number was 518362. PW1 was told that the video deck had been recovered from the Appellant.

PW2 Police Constable Faisal Haji Lumumba testified that as he was walking at Kaloleni area of Molo Township, he saw the Appellant carrying something in a paper bag. He stopped the Appellant, identified himself and asked the Appellant to open the bag. The Appellant opened the bag. PW2 saw a video deck. He became suspicious. He inquired from the Appellant how he came into possession of the video deck. The Appellant gave an unsatisfactory answer. PW2 arrested the Appellant and took him to Molo Police Station. He interrogated the Appellant. He established that the video deck had been stolen from Salgaa. PW2 rang Salgaa Police Station. He was informed that the Complainant had made a report that his video deck had been stolen. He told the police at Salgaa to send the complainant to Molo Police Station. PW2 testified that the Appellant identified the video deck. The Complainant produced a receipt which convinced PW2 that indeed the video deck belonged to the Complainant. The serial number on the receipt and the serial number on the video deck tallied. PW2 took photographs of the video deck. The receipt and the photographs taken were produced in evidence by PW2.

When the Appellant was put on his defence, he denied that he was found in possession of the video deck. He testified that PW2 found him in Molo Township, arrested him and took him to Molo Police station. The Appellant testified that he had nothing in his possession at the time of his arrest. He denied the charge facing him.

As the first Appellate court in criminal cases, this court is mandated to look at the evidence adduced by the witnesses in the trial court afresh, re-evaluate and re-examine it and reach its own independent conclusion whether or not to uphold the conviction of the Appellant. In reaching its determination, this court has always to put into mind that it neither saw nor heard the witnesses as they testified and therefore cannot be expected to make any finding on the demeanour of witnesses. **(See Njoroge – versus – Republic [1987] KLR 19**]. In the instant appeal, the issue for determination by this court is whether the prosecution established its case against the Appellant beyond any reasonable doubt. The other issue to be determined, if the court finds the Appellant to have been lawfully convicted, is whether the sentence meted on him by the trial magistrate was legal.

The Prosecution called two witnesses, the Complainant and the Police Officer who arrested the Appellant and also charged him. According to the Complainant (PW1), he was informed on the 22nd of March, 2004 at about 7.30am that his building had been broken into. He went to the building and confirmed that indeed the said building had been broken into and his video deck make JVC Serial number 518362 stolen. He reported the matter to the police at Salgaa. On the following day, he was informed by the police at Salgaa to go to Molo Police Station. He identified the video deck. He was able to produce a receipt which had a serial number which tallied with the serial number that was on the video deck. PW2 testified that on the 23rd March, 2004, as he was walking in Kaloleni area in Molo Township, he saw the Appellant carrying something in a paper bag. He approached the Appellant, identified himself and checked the paper bag that the Appellant was carrying. He discovered that the Appellant was carrying a video deck. He interrogated the Appellant to establish the ownership of the video deck. The Appellant did not give a satisfactory explanation. PW2 arrested the Appellant and took him to the police station. PW2 later learnt that a report of a stolen video deck had been made at Salgaa Police Station. He rang Salgaa and secured the attendance of PW1 who identified the video deck as his property which was stolen on the 22nd of March, 2004 when his building was broken into. When the Appellant was put on his defence he denied that PW2 had arrested him in possession of the said video deck.

I have re-evaluated the evidence which was adduced in this case. I have also carefully considered the submissions by the Learned Counsel for the Appellant and the Learned State Counsel on this appeal. The evidence that the prosecution relied upon to secure the conviction of the Appellant was the evidence of recent possession. There is no doubt that the video deck belonged to the Complainant (PW1). He was able to positively identify it by producing a receipt with a serial number which tallied with the serial number at the video deck. He testified that he left the video deck in his building at Salgaa but discovered on the 22nd of March, 2004 at about 7.30am that his building had been broken into and the said video deck stolen. He made a report to the police. On the 23rd March, 2004, the said video deck was found in possession of the Appellant at MoloTownship by PW2. Salgaa and Molo are nearby townships. The Appellant could not give a satisfactory explanation of how he came into possession of the said video deck. When he was put on his defence, he denied that he was found in possession of the said video deck.

Having re-evaluated the evidence, I do hold that the doctrine of recent possession applied in this case. As was held in **Malingi – versus – Republic [1989] KLR 225** by Bosire J (as he was then)

"By the application of the doctrine the burden shifts from the prosecution to the accused to explain his possession of the item complained about. He can only be asked to explain his possession after the prosecution have proved certain basic facts. Firstly that the item he had in his possession had been stolen; it had been stolen a short period prior to the possession; that the lapse of time from the time of its loss to the time the accused was found with it was, from the nature of the item the circumstances of the case, recent; that there are no co-existing circumstances which point to any other person as having been possession of the item. The doctrine being a presumption of fact is a rebuttable presumption. That is why the accused is called upon to offer an explanation in rebuttal, which if he fails to do an inference is drawn that he either stole it or was a guilty receiver."

This decision was cited with approval by the Court of Appeal in the recent case of **Joshua Otieno Dala – versus – Republic C.A.Cr.Appeal number 133 of 2002 (Nairobi)(Unreported).**

The prosecution established that the video deck which was stolen from the Complainant was found in possession of the Appellant so soon after it had been stolen. The Appellant offered no reasonable explanation of how he came into possession of the said video deck. The Appellant was thus presumed to have broken into the Complainant's building and stolen therefrom the said video deck. The prosecution therefore proved the main charge of breaking into a building and stealing therefrom. In his submission, the Appellant seems to have been labouring under a misconception that the prosecution ought to have proved that the Appellant broke into the Complainant's building and stole therefrom. The doctrine of recent possession presupposes that any person who is found with an item that was recently stolen must have stolen it unless he can give a reasonable explanation. In this appeal, the Appellant offered no explanation at all. The trial magistrate correctly applied the doctrine of recent possession. I find no merit in the grounds of appeal filed by the Appellant against conviction. His appeal against conviction is thus dismissed.

On sentence, the Appellant has stated that he was sentenced to a custodial sentence that was harsh and excessive in the circumstances. Mr. Koech, the Learned State Counsel has submitted that the sentence imposed upon the Appellant was legal. Whereas I agree with the submission made by the Learned State Counsel that the sentence was legal, I am of the view that the said sentence imposed was excessive putting into consideration that the Appellant was a first officer and also the value of the item stolen. I will therefore invoke the powers of this court as provided by section **354(3) (ii) of** the **Criminal Procedure Code** and set aside the sentence imposed by the trial magistrate and substitute it with an appropriate sentence of this court.

Having considered all the circumstances of this case I sentence the Appellant to serve one year imprisonment. The sentence imposed shall take effect from the 6th of July, 2004 when the Appellant was sentenced by the trial magistrate. It is so ordered.

Dated at Kericho this 10th day of June, 2005.

L. KIMARU

JUDGE