



REPUBLIC OF KENYA
HIGH COURT OF KENYA
AT MOMBASA
Criminal Appeal 264 of 2004

WYCLIF EMONYI KADENGE
.....**APPELLANT**

VERSUS

REPUBLIC
.....**RESPONDENT**

J U D G E M E N T

The Appellant Wycliffe Emonyi, was first accused in Criminal Case No. 359/04 in the Senior Resident Magistrate's Court at Taveta. He was charged with another on charge of Burglary and Stealing contrary to Section 304(2) and 279 (b) of the Penal Code.

The co-accused 2nd Accused was charged with an alternative charge of handling stolen property contrary to section 322(2) of the Penal Code.

The evidence before the court is that the complainant PW1 left his home and travelled between March 25th and 1st April year 2004. On his return he found that robbers had entered into his house. A neighbour had found the house broken. He found every household item missing – sufuria, bed sheets, stove all valued at Shs.3,500/-. It is to be noted that his evidence varies from the particulars of charge sheet even the value he gives as 3500/- while charge sheet 3760/-. At this juncture it is also to be noted that no one witnessed the burglary and theft at all. So far the evidence is hearsay.

However the Appellant was arrested. He said he stole the goods. He was with his co-accused. The co-accused produced some of the stolen goods, which were identified as of the complainant.

The Trial Magistrate therefore applied the doctrine of recent possession although in their defences the appellant denied the offence and said he was made to say the things he said.

The presumption that a person found with goods soon after their being stolen is that he is the thief. Here the period was 2 weeks. In the circumstances the Trial Magistrate was right in basing conviction on the evidence before him.

However, the Trial Magistrate appears to have left the station after conviction and before sentence.

The sentence was passed by Mshimba Esq. DM II. This was lawful under section 200 Criminal Procedure Code. But the sentencing was the wrong one for the accused (No. 2) was sentenced to one year Community Service. He is the one who had the goods.

This appellant was sentenced to 2 years on each limb to run consecutively bringing the total to 4 years imprisonment. No reasons are given for the differentiation on sentences. This is against principles of sentencing.

Accused should suffer equal sentence for same offence except where there are reasons to be recorded. No reasons are recorded here.

I therefore set aside the sentence of 4 years imprisonment and substitute the same for imprisonment for one year. It is not possible to send the Appellant to Community Service since he says he is serving jail term to year 2007 in another case

This sentence then shall run concurrently with that other imprisonment. The conviction stands. To that extent the appeal succeeds.

Delivered and dated this 25th Day of July 2005.

J. KHAMINWA

J U D G E