



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MALINDI**  
**Criminal Appeal 79 of 2004**

*(From original conviction and in Criminal Case No.1914 of 2003)*

**JUMA HAMISI alias HITLER.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

The appellant was tried for burglary and stealing contrary to Sections 304 (2) and 279 (b) of the Penal Code alternatively handling stolen goods contrary to Section 322 (2) of the Penal Code, behaving in a disorderly manner in a police station contrary to Section 60 (1) of the Police Act, refusing to permit finger prints to be taken contrary to Section 21 (3) of the Police Act and finally having suspected stolen property contrary to of the Penal Code. The trial Court found him guilty and convicted him for the offence of burglary for which he was sentenced to 3 years imprisonment. He was also convicted and sentenced to 3 years for stealing from a dwelling house, 30 days for behaving in a disorderly manner in a police building, 30 days for refusing to permit fingerprints to be taken and 18 months for having suspected stolen property.

Being dissatisfied with both the conviction and sentence the appellant preferred this appeal.

Being a first appellate Court, I am bound to reconsider the evidence on record, evaluate it and draw my own conclusions in order to satisfy myself that there was no failure of justice – See **Okeno V R** (1972) EA 32 and **Ngui V R** (1984) KLR 729.

It was the prosecution case that on the morning of 2<sup>nd</sup> June 2003, the complainant Robin Outran woke up and found his house burgled and various household and electronic items stolen. He got information that the T.V, being one of the stolen items had been taken to a certain workshop for repair. A trap was laid and the person who had taken it arrested. He in turn told the police that he had bought the T.V. from the appellant. The appellant was arrested and various other items suspected of having been stolen recovered from his house. While in the police cells the appellant became rowdy, banging the door in an attempt to break it. He was transferred to another cell but he continued banging the door. He had to be hand cuffed. The appellant also refused to have his fingerprints taken by a police officer.

After a full trial, as I have stated, the trial Court was satisfied that, a part from the alternative charge of handling stolen goods, the prosecution had proved the other counts. The appellant has listed five ground, which can be condensed into three and summarized as follows:

- i) that the learned trial magistrate erred in convicting him when there was no evidence against him
- ii) that the learned trial magistrate failed to consider the his defence

iii) that the sentence was harsh and excessive.

The first matter for determination is whether there was evidence to support the charges.

On burglary, the evidence led by the complainant was that he woke up in the morning to find the house broken into and various items stolen. One of the items stolen a T.V. was recovered the following month in the possession an electrician who in turn had received it for repairs from Robert Anyoso. Robert on the other hand explained that he had bought it for Kshs.5000/= from the appellant. He had only paid Kshs. 3,5000/= to the appellant who had issued to him an invoice. The learned trial magistrate did not specifically state so but his finding that the appellant was guilty of burglary must have been based on the doctrine of recent possession. What constitutes recent possession? The doctrine simply stated, is that where it is proved that premises (in the case of burglary, housebreaking etc) have been entered and property stolen therefrom and that very soon after the entry and theft the suspect was found in possession of the stolen property, then Court can convict on such evidence. What is not clear is how soon after the break in and theft would amount to recent. Courts have not set a definite period in this regard. In England, for instance, it has been held that two months cannot be recent in the computation of the period for recent possession.

See **R V Smythe** (1980) 72 Cr.App R. 8 CA.

In Kenya, it would appear, that recovery of a stolen item from a suspect within 12 days after the theft, would be treated as recent possession.

See **Thathi V R** (1983) KLR 354.

In **Maina & 3 others V R** (1986 KLR 301 the Court of Appeal found 2 ½ months too long to impute guilt on the basis of recent possession. Each case therefore must be decided on its merit and peculiar circumstances.

The guiding principle on this doctrine was laid down by Lord Chief Justice of England in **R V Longhin** 35 Cr.App R 69 as follows;

**“If it is proved that premises have been broken into and that certain property has been stolen from the premises and that very shortly afterwards, a man is found in possession of that property, that is certainly evidence from which the jury can infer that he is the house breaker or stopbreaker”.**

Applying these principles to the present appeal, the burglary occurred on the night of 1<sup>st</sup>/2<sup>nd</sup> of June, 2003. According to Robert, he bought the T.V. from the appellant in July 2003. He could not remember the date. The invoice allegedly issued by the appellant is dated 30<sup>th</sup> July, 2003. What ever the case, the T.V. was recovered nearly 2 months after the burglary. In my view two months cannot be described as recent for purposes of drawing an inference that the appellant participated in the burglary. I find that the conviction of the appellant on Count 1 ought not be allowed to stand.

Regarding Count 2 dealing with behaving in a disorderly manner in a police building, the prosecution adduced evidence through I.P Situma that the appellant kept on banging the doors while in the police cells until he had to be handcuffed. Section 60 (1) of the Police Act provides that any person in any police building, police office, or cell behaves in a riotous, indecent, disorderly or insulting manner is guilty of an offence.

There is no doubt from the evidence that the appellant was in a police cell located with in a police station comprised in a building. He was banging and causing commotion forcing officers on duty to call I.P. Situma, who was the Deputy OCS – Kilifi Police Station. The appellant was moved to another cell but that too did not deter him. He was handcuffed finally. His conduct was clearly disorderly. I find no merit in the ground that there was no evidence to support the conviction.

I also find no ground to interfere with the finding of the learned trial Court that the appellant refused to

have his finger prints taken, in the light of clear testimony of P.C. Kina (PW4).

Finally the appellant was charged in Count 4 with having suspected stolen property. It was the prosecution case that when the police went to the appellant's house, they found one Sony radio, a suit case containing 62 lesos, 6 table clothes, six bedsheets, and one sleeping bag.

The offence of having or conveying goods reasonably suspected of having been stolen or unlawfully obtained is committed

where the suspect is detained on reasonable suspicion of having in his possession or conveying anything stolen or unlawfully obtained, and that suspect is charged with the offence under Section 323 of the Penal code, the burden of proof shifts to that suspect, on a balance of probability, to give an account to the satisfaction of the Court of how he came by the item (s) the subject matter of suspicion. The appellant in the instant appeal did not offer any explanation at all and was correctly convicted.

On sentence 30 days in Count 2 and 3 are reasonable.

On Count 4 the maximum sentence is 2 years. I also find no basis to interfere with the sentence of 18 months.

The appellant's defence was extremely short and the trial magistrate gave consideration to it in his judgment.

For all these reasons, I allow the appeal on Count one, quash the conviction and set aside the sentence of 3 years imprisonment imposed.

The appeal is, however, dismissed in respect of Counts 2,3 and 4.

Orders accordingly.

**Dated and delivered at Malindi this 15<sup>th</sup> day of September, 2005.**

**W.OUKO**

**JUDGE**