



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL APPEAL NO.160 OF 2002

EDWIN KIMANI NGURE..... APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

[From Original Conviction and Sentence in Criminal

**Case No.21 of 2001 of the Senior Resident Magistrate's
Court at Kiambu]**

JUDGMENT

The appellant herein was charged with 2 counts of burglary and stealing, contrary to sections 304 (2) and 279 (b) of the Penal Code (Cap.63). He also faced a charge of handling stolen goods, contrary to section 322 (2) of the Penal Code as an alternative to each count of burglary and stealing.

On 08.01.01 he is recorded as having pleaded guilty to count 1 (burglary and stealing) and also guilty to count 2 (also burglary and stealing). Respective facts were narrated and he said the facts were true. He went on to say that he broke into the houses of the complainants on the night of 31.12.2000 and stole from therein. The prosecutor then asked for 2 weeks to get the appellant's records. After the 2 weeks no records had been received and the prosecutor asked for a further 2 weeks. By 22.02.01 no records had been received and the prosecutor asked that the appellant be treated as a first offender. When time came for mitigation the appellant said the items were found where he was but he did not steal. A plea of not guilty was then substituted (in respect to each count of burglary and stealing) and the case was listed for hearing.

The appellant was subsequently tried and convicted on each count of burglary and stealing. On 29.09.01 he was sentenced to 7 years imprisonment and 7 strokes of the cane on the first limb of count 1 and to 10 years with 7 strokes of the cane on the second limb of count 1. Regarding count 2, he was sentenced to 7 years imprisonment with 7 strokes of the cane on the first limb and to 10 years imprisonment with 7 strokes of the cane on the second limb. The sentences were ordered to run concurrently. He has appealed to this court against conviction and sentence for each count.

The appellant filed a petition of appeal in person on 14.02.02 and listed 4 grounds. However, he subsequently filed amended grounds plus written submissions. His grounds of appeal basically amount to reiteration of his denial of the offences of which he was convicted. He challenged his 2 convictions on the basis that the subject offences were not proved beyond reasonable doubt; that the doctrine of recent possession relied upon to convict him did not apply; and that his appeal against conviction and sentence

should be allowed.

The basic issue for the determination of this court is whether the evidence on record can sustain the appellant's conviction on the subject 2 counts.

The complainant in count 1 was Ndungu James Thiongo (P.W.1) while the complainant in count 2 was Joseph Njenga Kinyanjui (P.W.3). Each testified to having locked and left his house on the night of 31st December, 2000 and 1st January 2001 and came back next morning to find it broken into and the various items listed in the charge sheet stolen.

The Assistant Chief of Riabai Sub-Location, Francis Kimani (P.W.4) and his Administration Police Corporal, Francis Ngige (P.W. 2) testified that on 03.01.01 they were on patrol when they got information that the appellant had been found with a brief case and radio cassette compacts for sale. The 2 witnesses (P.W. 4 and P.W. 2) started looking for the appellant. At about 8.30 p.m. P.W. 4 and P.W. 2 met the appellant with 2 others. Upon recognizing P.W. 4 and P.W.2, the appellant and his colleagues fled. P.W. 4 and P.W. 2 chased and arrested the appellant and led him to his house where various of the items listed in the charge sheet were found. P.W. 4 and P.W. 2 recovered the items and later took the appellant to Kiambu Police Station where he was re-arrested and the recovered goods taken into police custody by Police Constable Patrick Kinyanjui (P.W. 5). The appellant was subsequently charged as aforesaid, P.W. 5 produced the subject items as exhibits in court and the appellant was convicted and sentenced as indicated earlier.

The appellant gave sworn evidence in his defence and called no witness. He (appellant) told the trial court that on 03.01.01 the Assistant Chief (P.W. 4) found him digging a trench for a water pipeline. That P.W. 4 interrogated him and demanded to go to his house and that he (appellant) took P.W. 4 to his house. That at the appellant's house P.W. 4 looked around and left. That in the evening the appellant met P.W.4 and his Administration Policemen and they arrested him and he was later charged in court. The appellant added that P.W.4 assaulted him during the arrest; that he was charged while in custody; and that his (appellant's) mother told him that the police broke into his house and removed his property. Cross-examined by the prosecutor, the appellant said:

"I saw the exhibits produced in court. The exhibits are not mine. They were recovered in my house."

At the hearing of this appeal the appellant complained that the Assistant Chief (P.W. 4) was his neighbour and that he had a grudge against him following a misunderstanding which arose after the appellant complained against the Assistant Chief for letting his livestock feed on the appellant's mother's vegetables. In essence the appellant was telling this court that the Assistant Chief fabricated the subject charges against him to teach him a lesson.

Learned counsel for the respondent, Mr. Monda supported the appellant's conviction and sentence on each of the 2 counts. Counsel pointed out that the subject items were recovered within 2 days of the burglary and theft; that the doctrine of recent possession applied to the appellant's case; that the evidence against him was water-tight; and that his appeal against conviction and sentence should be dismissed. The learned trial magistrate found all the prosecution witnesses, including the Assistant Chief (P.W. 4), to be credible witnesses. The Assistant Chief was accompanied by his Administration Police Corporal (P.W. 2) when they arrested the appellant and recovered the subject items from his house on 03.01.01. The items were duly identified by the complainants (P.W.1 and P.W.3) to be their items stolen from their respective houses on the material night. The appellant admitted during cross-examination that the items were in his house. Initially the appellant had told the trial court that he would call a witness in his defence but later said he would dispense with the said witness. The appellant's evidence stood on its own. The learned trial magistrate did not believe the appellant's story. I have no reason to believe it either. The evidence on record is overwhelming against the appellant. The doctrine of recent possession applies. The appellant was properly convicted and I uphold his conviction on each count.

The appellant's appeal against his conviction on each of the 2 counts of burglary and stealing, contrary to sections 304 (2) and 279 (b) of the Penal Code is hereby dismissed.

There are 2 limbs to the offence under each count, i.e. burglary contrary to section 304 (2) and stealing, contrary to section 279 (b) of the Penal Code. The value of the items subject matter of count 1 was given as Kshs.34,530/= while the value of the items subject matter of count 2 was given as Kshs.5,500/= The offence of burglary carried up to 10 years imprisonment together with corporal punishment while the offence of stealing under section 279 (b) carried up to 14 years imprisonment together with corporal punishment at the material time. On the burglary limb of count 1 the appellant got 7 years imprisonment plus 7 strokes of the cane while on the stealing limb of the same count he got 10 years imprisonment plus 7 strokes of the cane. He was awarded similar sentences for the first and second limbs of count 2. The sentences were ordered to run concurrently.

In sentencing the appellant as aforesaid, the learned trial magistrate noted that the appellant had 2 previous convictions, one of which was relevant; that while he took account of the appellant's mitigation, the magistrate nevertheless considered that the offences charged were serious and noted that they were extremely notorious in the area. Accordingly, the magistrate awarded the sentences stated above.

I shall address the concurrent prison sentences first. Each is within the law and in view of the appellant's record plus the surrounding circumstances, the said prison sentences are not manifestly excessive. Accordingly, the appellants appeal against his sentence of 7 years imprisonment for the burglary limb of count 1 and 10 years imprisonment for the stealing limb of the same count is hereby also dismissed. His appeal against his sentence of 7 years imprisonment for the burglary limb of count 2 and 10 years imprisonment for the stealing limb of the same count is likewise hereby dismissed. The prison sentences are to run concurrently within each count and also between the counts, i.e. he will serve a total of 10 (ten) years imprisonment.

As regards corporal punishment, it is noted that the said punishment has since been abolished by Act No.5 of 2003, effective from 25.07.03. Accordingly, the corporal punishment of 7 (seven) strokes of the cane for the first limb of count 1 and 7 (seven) strokes of the cane for the second limb of the same count and the corporal punishment of 7 strokes of the cane for the first limb of count 2 and 7 (seven) strokes of the cane for the second limb of the same count is hereby set aside. In short, the appellant's appeal against corporal punishment under each of counts 1 and 2 is hereby allowed.

Orders accordingly.

Delivered at Nairobi this 17th day of February, 2004.

B.P. KUBO

JUDGE