



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CRIMINAL APPEAL NO.326 OF 2000**

**(From original conviction and sentence in Criminal  
Case No.350/2000 of the Senior Resident Magistrate's  
Court at NAROK – T.O. AUMA(S.R.M.)**

**HASSAN MOHAMED OSMAN.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**J U D G M E N T**

The Appellant has appealed against conviction for a charge of HOUSE BREAKING AND STEALING contrary to Section 304(1) and 279(b) of the Penal Code for which he was sentenced to 31/2 years and 3 strokes of the cane on each limb.

The Appeal is opposed. The Appellant's main contention is that he had been in custody from 10/3/2000 upto 1/4/2000 when the alleged offence took place and thereafter and therefore he could not have committed said offence. Further that PW3 who had the radio said he had it on 18/4/2000 which contradicted PW2 who said he recovered it on 25/4/2000.

The Learned Counsel for the State submitted that the conviction was safe. That the Appellant was found in possession of the Complainant's wallet with his identity cards and other personal documents. He also led to the recovery of the Complainant's radio cassette from PW3.

The Trial court found that the Appellant was the thief and convicted him with the offence before the court.

The Appellant's submission before the court was that he had been arrested on 10/3/2000 and was still in custody on the 25/4/2000 and so could not have committed the said offence. In his defence in court, he stated that he was arrested on 23/4/2000 for a totally different offence. The Appellant is being dishonest to court.

The court was satisfied that he had possession of the Complainant's wallet with his identity cards and personal documents before leading to the recovery of the Complainant's radio cassette. The court found that the Appellant was the thief of the Complainant's goods. I agree with the court's finding.

Even though the court did not mention so, the doctrine of recent possession applies. The Appellant was found in possession of Complainant's stolen wallet 3 weeks after the theft. He made or gave no explanation for his possession. He also led to the recovery of the Complainants radio cassette same day.

The radio and wallet, identity cards and personal documents are not goods that can easily be disposed off. It must be remembered that PW5's evidence was that the Appellant took the radio to him as security for a loan he took from him on the 18/4/2000, two weeks after the theft. All this evidence points to the Appellant being the thief of the Complainant's goods rather than a handler or innocent victim.

I am satisfied that the court fully analysed the evidence before it and came to the correct conclusion. Accordingly I dismiss the appeal against the conviction.

On the sentence, I do agree that 31/2 years imprisonment on each limb of the offence charged was

lenient and I will not disturb it. However the 3 strokes of the cane imposed on the 1st limb of House Breaking were uncalled for. Section 304(1) of the Penal Code does not provide for strokes. That sentence was therefore irregular, I will allow appeal on sentence in part by setting aside the order of 3 strokes of the cane on the 1st limb. The three strokes imposed on the 2nd limb is however confirmed.

**Orders accordingly.**

**Dated and delivered at Nakuru this 20th day of March, 2003.**

**JESSIE LESIIT**

**JUDGE**