REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU
CRIMINAL APPEAL NO.294 OF 2002
(From original conviction and sentence in Criminal Case No.1102/2002 of the Senior Principal Magistrate's Court at NAIVASHA - M.M. MUYA(S.P.M.)

THOMAS KIPLANGAT KEBENEI……APPELLANT

VERSUS

REPUBLIC…….RESPONDENT

J U D G M E N T

The Appellant has, through his Advocate filed an appeal against both conviction and sentence. He had together with two others, been charged with the offence of OFFICE BREAKING AND COMMITTING A FELONY contrary to Section 306(a) of the Penal Code.

The Appellant's advocate argued ground two of the Memorandum of Appeal that the learned Magistrate misdirected himself on the legal requirements when relying on circumstantial evidence. He took objection to evidence of PW1 the Police Officer who recovered 640950/- from the Appellant on grounds he was the only recovery officer called. He took issue with evidence of PW5, immediate senior to the Appellant on grounds he had borrowed the Appellant's vehicle before and could have made a key to plant the money in the Appellant's vehicle. He said PW5 had a grudge against the Appellant having given him warning letters and even recommended his sacking. He took issue with PW1's evidence that the Appellant had sped on seeing him while there was no evidence that the Appellant knew PW1 was a police officer. The advocate relied on ***Paul –v- Rep*** and submitted that there were co-existing circumstances which meant circumstantial evidence was not conclusive. He also submitted that **Hassan Mohamed'**s case did not apply to this case on the issue of recent possession.

The Counsel for the State opposed the appeal and submitted that the conviction was safe. He said that Appellant who was a security officer at the Complainant's premises was found with a large sum of money in the bonnet of his car 10 days after the alleged theft. That the Appellant was found in possession of the money and gave no explanation. That doctrine of recent possession applied. He also submitted that the prosecution had no obligation to call Scenes of Crime officers to give evidence.

I had occasion to peruse through the record of the lower court. I am satisfied that the court analysed the evidence adduced before it by both sides. There was no dispute that the Appellant was found with 640,450/- in the car bonnet of his car. The manner in which the money was stored between the engine and the battery and wrapped up to conceal its contents is proof that the person who put the money there was deliberately hiding it from view with a guilty mind. The appellant did not explain his possession. He merely pointed at his boss, PW5 as the one who could have done so. However, as the court observed the evidence of the 3rd accused in the case shows appellant was on duty on night the offence took place. He also instructed the 3rd accused to move away from the office where the safe with the money was giving the Appellant an opportunity to commit the offence.

I am satisfied that the doctrine of recent possession applies.

I am also satisfied that the Appellant gave no reasonable explanation for his possession. I am satisfied that in the circumstances of this case the Trial Magistrate was quite right to infer that the Appellant was more the thief of the money than the receiver. I find that the conviction was safe and do not find any reason to

disturb it.

On the sentence of 2 years and 2 strokes of the cane I do agree it was quite lenient and will not disturb it. The upshot of the matter is that the Appeal is dismissed in its entirety.

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

JESSIE LESIIT

JUDGE