



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO.47 OF 2001

**(From original conviction and sentence in Criminal
Case No.46/2001 of the Senior Principal Magistrate's
Court at Molo – J. KIARIE (S.R.M.)**

JAMES OMWERE MASESE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

The Appellant JAMES OMWERE MASESE has appealed against the conviction and sentence of five years imprisonment and five strokes of the cane on each limb of the charge. The Appellant and his co-accused had been charged with Burglary and Stealing contrary to Section 304(2) and 279(b) of the Penal Code.

The only evidence against the Appellant was that he led the arresting officer, PW2, to the house of his sister, Hellen Bosibori, called as a defence witness where the Complainant's pump pexh.1 was recovered. The Complainant, PW1, identified the pump as his. It was recovered on 6/10/99 while the offence was committed on the night of 25th and 26th August, 1999. The Appellant has denied having stolen from the Complainant. He told the lower court that on th date of the alleged offence he was in Kisii far away from Kamwaura where the offence took place. DW1, Hellen, in her evidence told the court that she was not at home when the pump was taken to her house but that she was told that it was one NYAMWEYA not an Accused or witness in the case, who took the pump there.

The Learned State Counsel supports the conviction on grounds the recovery o the pump through the Appellant was evidence sufficient to sustain the conviction. He said that the doctrine of recent possession applied to the case.

For the doctrine of recent possession to apply the prosecution must prove that the Appellant had possession of the things stolen and secondly that it was recently stolen from the Complainant. On the 1st point, the evidence before the trial court was very clear that, HELLEN, DW1. Was the one found in possession of the pump. In the Judgment, the Learned Trial Magistrate stated:-

“I believe it as a fact that Complainant ow ned the pump. Evidence is that it was recovered from house of DW1. She admits so. She is the sister to Accused 1...She admits so.”

It was clear in the court's mind that it was DW1 who had possession of the pump. In DW1's evidence, which the court acknowledged in Judgment, she said that she was not aware who took the pump to her house. She only heard it was Nyamweya. The court went further to state in its judgment:-

“How did the Accused know that Complainant’s stolen pump was in house of DW1. The answer to that can only be that they took it there alone or with the alleged JAMES NYAMWEYA.”

With every due respect to the Trial Magistrate, there was no evidence upon which such an inference could be made. The Accused (now Appellant before this court) explained how he led the police to DW1’s house. He said that the police asked him to take them to his sister’s place in Molo Town. PW2, the Police Officer who recovered the pump said in his evidence that it was Accused 2 who said that the pump in question was in the Appellant’s sister’s house. His evidence on that point was:-

“Accused 2 said the others (stolen items) were at house of Accused 1’s sister at Molo. They led me there...”

There is nothing in this evidence to show that the Appellant led PW2 to his sister’s (DW1’s) house because of knowing that the stolen pump was there. The Appellant could have led PW2 to DW1’s house because he knew where she lived.

The evidence of possession whether constructive or direct was missing from the evidence before the court.

On recent possession of same the pump was stolen on night of 25th and 26th August, 1999. It was recovered on 6/10/99. That is a period of 11/2 months. The period can only be said to be recent if it is shown that the items is not one which can easily be disposed of. One and a half months is a long period and a person could have disposed of the stolen pump by then. In any event this test can only be applied if the first one of possession was found to be positive. In this case it was not positive.

On considering the evidence before the court and all the circumstances of the case, I must find that the conviction of the Appellant on the basis of the recovery of the spray pump exh.1 was not safe. He was not in possession of the pump and neither is there clear evidence he had knowledge that DW1 had it when he and his coaccused led police to DW1’s house. I find that the conviction should not be allowed to stand. Accordingly I quash the conviction, set aside the sentence and order that the Appellant be set at liberty unless otherwise lawfully held.

Orders accordingly.

Dated and delivered at Nakuru this 6th day of March, 2003.

JESSIE LESIIT

JUDGE