



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

APPELLATE SIDE

CRIMINAL APPEAL NO.455 of 2000

CHARLES MWERA.....1ST APPELLANT

(Original Accused No.1)

V E R S U S

REPUBLIC.....RESPONDENT

CONSOLIDATED WITH

CRIMINAL APPEAL NO.456 OF 2000

GABRIEL CHACHA.....2ND APPELLANT

(Original Accused No.2)

V E R S U S

REPUBLIC.....RESPONDENT

(From Original Conviction and Sentence in Criminal Case No.1079 of 2000 of the Chief Magistrate's Court at Mombasa –Mugambi. Mbaabu, Esq., - R.M.)

J U D G M E N T O F C O U R T

The Appellants were jointly charged with the offence of Burglary contrary to Section 304(2) and Stealing contrary to Section 279(b) of the Penal Code. They were also each charged alternatively with Handling of stolen property. They were found guilty of the counts of burglary as well as stealing. They were each convicted and sentenced to five years imprisonment for burglary and 3 strokes of the cane for stealing. They each appealed, in High Court Criminal Appeals Number 455 of 2000 and Number 456 of 2000, respectively, both against conviction and sentence. We consolidated the two appeals at the start of the hearing of the appeals and will consider the appeals jointly.

The facts of the case are that the Appellants were in the night of 25th/26th March, 2000 at Nyali Police Station intercepted by the police while carrying one weighing machine, one gas cylinder, one stove, one curtain, one shirt and some other personal items all valued at Kshs.20,000/-. On being asked by the police what they were carrying, they replied that they were carrying the abovementioned items which belonged

to their brother who had sent them to transfer the same from Kongowea. This explanation did not satisfy the Police PW.2 No.61911 Pc. Michael Sababa and PW.3 No.69584 Pc. Martin Kitesa, who decided to detain them as they sought to get a better explanation.

Meanwhile, PW.1 who resided at Kongowea, near Nyali where the Appellants were intercepted, had on 24.3.2000 at about 6 a.m. locked his house and gone to work after which he went to his original home elsewhere outside Mombasa. When he came back the next day, he found that his house had been broken into in the night before and the items enumerated above stolen. He proceeded to Nyali Police Station to report the theft whereupon he was shown the items aforementioned. He identified the goods to be his and reported how he found them stolen. The Police then charged the two Appellants for burglary and stealing as shown above and the events as narrated above formed the core of the evidence which the trial Magistrate considered, accepted and convicted upon.

The trial Magistrate noted that the Police, PW.2 and PW.3 who detained and later arrested and charged the Appellants, did not know the Appellants before then. They therefore had no grudge against the Appellants. The Appellants were given a chance to explain away the fact that they were found with the properties which later turned out to be stolen property. The 1st Appellant stated under oath that he had been sent by his mother to his brother at Kongowea but then he was arrested at Shauri Yako by the Police.

If he had earlier explained to the Police why he was found in possession of the stolen items, he failed to repeat the same in court where such an explanation was more crucial for his freedom. The 2nd Appellant in an unsworn statement told the court that he very well understood the charge he was facing before the court but all he said was that he was arrested as he traveled to his place of work at 5 a.m. on 25.3.2000, merely because he did not that day carry and produce his identity card. Both Appellants therefore failed to give an innocent or any explanation, as to how they came into possession of the items they were arrested with, on the material day.

I have carefully considered the evidence on the record upon which the trial Magistrate convicted the Appellants. Although he did not expressly come out to state how he came to his final conclusion of finding the Appellants guilty, he clearly and apparently relied on the principle of recent possession.

The facts in this case show without much doubt that the Appellants were found in possession of recently stolen property. They were each given an opportunity to explain to the Police and more importantly, to the court which was trying them for burglary and handling stolen property how they came into possession of the property. They gave explanations to the effect that the properties they were found carrying belonged to their brother who had authorized them to take it elsewhere. Alternatively, from their explanation each, none really came up with any adequate explanation which would establish that they were innocent or that even on the balance of possibility they were not the burglars or the thieves. This left the trial Magistrate with no reasonable alternative than to conclude that the Appellants were indeed the burglars and/or the thieves. The position would and did remain the same even if the trial Magistrate found that their explanation was not true or was not believable to the court. In this it can be easily concluded that the Appellants gave no explanation of the recent possession. Alternatively, if there was any explanation from each it was found by the court to be either untrue or unbelievable.

I accordingly find that the trial Magistrate properly considered the evidence before him and made a correct conclusion that the two Appellants were the ones who burgled into the complainant's house and stole the items enumerated on the charge sheet. I too find that the evidence upon which the trial Magistrate convicted was sufficient and that the charges were proved beyond a reasonable doubt.

The appeals accordingly raise no meritorious grounds and are dismissed in their entirety.

Dated and delivered at Mombasa this 27th day of May, 2002.

D. A. ONYANCHA

J U D G E

Delivered in the presence of the Appellants.