REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL APPEAL CASE NO. E039 OF 2020

JOSEPH GITONGA NKARICHIA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. Joseph Gitonga Nkarichia was charged in Tigania Criminal Case No. 1399 of 2019 with the following three counts and their respective particulars as follows: -

***i) Breaking into a building and committing a felony contrary to Section 306 (a) of the Penal Code**: -*

On the night of 8th December 2019, at Matabithi Police Patrol Base in Amuthumbi Location in Tigania East Sub-County within Meru County, with others not before court broke and entered Matabithi Police Patrol Base office with intent to steal and did steal from therein three (3) GR firearms serial numbers FMP 77084836, J52692, A3 6698987 valued at Ksh 339,000/= and sixty (60) rounds of 7.62 ammunitions valued at Ksh 3,060/= all valued at Ksh 342,000/= the property of National Police Service.

***ii) Being in possession of ammunition without a firearm certificate contrary to Section 4 (1) (2) (a) of the Firearm Act Cap 114 Laws of Kenya**: -*

On the 8th December 2019 at Matabithi Police Patrol Base in Amuthumbi Location in Tigania East Sub-County within Meru County, you were found in possession of one round of ammunition of 5.56mm without firearm certificate.

***iii) Being in possession of government stores contrary to Section 324 (2) of the Penal Code**: -*

On the 8th December 2019, at Matabithi Police Patrol base in Amuthumbi Location in Tigania East Sub-County within Meru County, you were found in possession of one National Police Service cleaning kit containing one gun oil container, two pull through and two cleaning brushes which were reasonable suspected to be stolen.

The alternative count to iii) above was as follows: -

iv) Handling stolen property contrary to Section 322 (2) of the Penal Code: -

On the 8th December 2019, at Matabithi Police Patrol Base in Amuthumbi Location in Tigania East Sub-County within Meru, otherwise than in the course of stealing dishonestly handled one National Police Service cleaning kit containing one gun oil container, two pull through and two cleaning brushes knowing or having reason to believe them to be stolen property of National Police Service.

2. The Appellant pleaded not guilty to all the counts and the matter proceeded to full trial with the Appellant being placed on his defence on 9th December 2020 when the trial Court found that a *prima facie* case against him had been established. Following hearing, the Appellant was convicted of all the three counts as per the Judgement of the trial Court delivered on 16th December 2020 by Hon. P. M Wechuli SRM and consequently sentenced to serve five (5) years imprisonment for each count consecutively being a total of fifteen (15) years.

3. Being dissatisfied with the Judgement of the trial Court, the Appellant lodged the instant appeal raising the following grounds of appeal which he asks this Court to substitute with his earlier grounds: -

i) That the learned trial magistrate erred in law and fact by relying on evidence that was not corroborated, contradicting and marred with falsehood.

ii) That the learned trial magistrate erred in law and fact by not noticing that the prosecution did not prove their case beyond any iota of doubt.

iii) That the learned trial magistrate erred in law and fact by rejecting the Appellant's defence of alibi without cogent reasons.

iv) That the learned trial magistrate erred in matters of law and fact by using the statement of OCS who was not called as a witness for purposes of cross-examination by the Appellant, thus violating the Appellant's right to a fair trial. Under Articles 50 (2) (j) (k), 25 (c) and 27 (1) of the Constitution of Kenya, 2010.

Appellant's Submissions

4. The appeal was canvassed by way of written submissions. The Appellant filed his submissions on 4th May 2021. He submits that none of the witnesses who testified in Court adduced evidence linking him to the offence. He urges that PW1 said that he, the Appellant had called them saying that he could buy them drinks which he did. He urges that PW1 then told the Court that he, the Appellant, kept on talking on the phone in his mother tongue and that he did not know what he was saying and that when they decided to leave, they reached the police post at 1045 hours and they found that the armory had been broken into and that the rifles had been stolen. He urges that this evidence does not link him to the offence since when the armory was broken, they were not around to confirm that the Appellant was the one who broke into the said armory. He urges that despite being Merian like PW1, it is questionable how come he could not hear what he, the Appellant said. He urges that the evidence of PW2 similarly does not show how the break in happened as he testified that they were arrested before the guns recovery.

5. He urges that the evidence of PW3 indicates that the guns were found hidden in the bushes and yet the evidence of PW6 who alleges that he, the Appellant led them to where the riffles were found was not supported by any other witness. He further urges that there was no one who was summoned within the village to prove that the alleged house where PW6 was supposedly led to by the Appellant and wherefrom the items in Count 2 and 3 were recovered belonged to him, the Appellant. He urges that the sub-area or area manager was not called to confirm if the house belonged to him and that no photographs were produced by the Prosecution to prove the fact. He further urges that none of the citizens of Matabathi village who according to PW1 were summoned to assist with investigations were called to prove that he was the owner of the alleged house.

6. He further urges that the trial magistrate allowed the OCS' statement to be used in Prosecution evidence without noting that he, the Appellant, was not in a position to challenge that evidence and that the Prosecution did not apply to Court to adduce the evidence under Section 33 of the Evidence Act. He refers to the OCS Statement marked as PEX 19 and page 26 of the Judgement of the trial Court as follows: -

> ***"What links the accused directly to this offence is the evidence of PW6 and the statement of IP Ouma formerly OCS Muthara Police Station. The twin evidence is clear that after his arrest the accused led the officers to Matabithi Village where the stolen guns were recovered."***

He urges that the OCS' statement was allowed by the trial magistrate without his knowledge of the Appellant, thus violating his right to fair trial under Article 50 (2) (j) of the Constitution.

7. He urges that the complainants of the case are the only ones who are responsible for their arms and that they ought to have known better than to leave the station unattended. He urges that the complainants could have been charged with an offence of failing to prevent a felony since they were to blame for leaving the post unattended.

8. He urges that from the evidence of PW1 and PW2, it was clear that he, the Appellant was apprehended and implicated with three offences simply because he was talking on phone and that evidence alone, cannot put him at the scene of crime and that there was no data produced from Safaricom or Airtel companies to confirm that he was at the scene of crime during night hours.

9. He further urges that he was not found in physical possession of the alleged exhibits. He outlines the definition of possession as per the Oxford English Dictionary (12th Edition) which is defines as the state of possessing something; visible power or control, as distinct from lawful ownership. He thus urges that the offence of being in possession of a firearm is committed where the person is found in possession of the firearm without a firearm certificate. He urges that the evidence adduced does not prove that he was found in possession of the exhibits. He urges that the Prosecution's evidence that the exhibits were found in his house is not true and further, there were no photographs to confirm the same. He makes reference to the part of the trial Court's Judgement which reads as follows: -

> ***"The evidence on record shows that no one actually saw the accused steal the rifles, the evidence of PW1 and PW2 is circumstantial on the accused culpability. It only proves that the accused met both officers for some time away from the station. In so doing, the officers left the station unattended. Although that was a shocking dereliction of duty, that act in itself is not a reason <u>to find the accused culpable herein</u>."***

10. He urges that after making the above finding, the magistrate ought not to have sentenced him to 15 years imprisonment. He urges that he was given a harsh sentence despite the fact that the charges under counts 2 and 3 indicated that the exhibits were found in the same place. Relying on the case of ***Sawedi Mukasa s/o Abdulla Aligwaisa (1946) 13 EACA 97*** for the proposition that where a person commits more than one offence at the same time and in the same transaction, save in very exceptional circumstances, the Court should impose concurrent sentences. He urges for the Court to re-visit the sentence adding that the Prosecution's case was not proven beyond reasonable doubt.

11. He further urges that the trial Court erred in law and fact by finding that the act of the complainant of making numerous phone calls raises eyebrows. He urges that the act of making phone calls is not to be used as evidence to link him with the offence because there was no

data from safaricom or airtel to confirm that he indeed made numerous phone calls on that day. He further urges that PW1, PC Peter Mugambi was the one who alleged that he made numerous phone calls and it being that PW1 was a Merian like himself, and there was no evidence to show that he was talking about stealing rifles. Referring to Section 4 (2) (a) of the Firearms Act, under which he was charged, he urges that it being alleged that he was in constructive possession cannot work. He relies on the case of ***Abdi Osman Ahmed v R*** where he highlights Lenaola J's *(as he then was)* finding while referring to the case of ***Abdalla Said Katumu v R*** as follows: -

> ***"The net effect of all these matters is that possession in abstract cannot be possession in the sense envisaged by law because save for being in the manyatta, a little more evidence to determine to whom the manyatta belonged and who else had access to it would have either exonerated the Appellant or firmly removed any doubt that he was indeed the person unlawfully in possession of the firearm and ammunition. As it is, the evidence against him was conclusive only to the extent of suspicion and no more. Suspicion cannot be the basis of a conviction."***

12. He urges in conclusion that the police officer who went to the so called Appellant's house had been sent by their boss to do investigations and it did not really matter what he did, had or did not have as they had a mission to accomplish hence the failure to undertake detailed investigations including taking photos of the scene and dusting the fire arms for fingerprints. He urges that the Prosecution's case was not proven beyond reasonable doubt and he relies on the Supreme Court of Canada's case of ***R vs Lifchus (1997) 3 SCR 320*** for the reasonable doubt standard requirement.

Respondent's Submissions

13. The Respondent filed submissions on 7th July 2021. They start by outlining the elements of each offence. For the offence of Breaking into a building and committing a felony contrary to Section 306 (a) of the Penal Code, they cite the provisions of the section. They urge that PW1 and PW2 were the ones on duty on 8th December 2019 at Matabithi and this is a fact that was within the knowledge of the Appellant who was a police reservist and he did also have knowledge of the fact that 3 firearms, 120 rounds of ammunition firearms, register and OB were all placed in a safe box and kept in PW3's house. They urge that all this being within the Appellant's knowledge, he took advantage of the same and invited both PW1 and PW2 at midday on 8th December 2019 to buy for both of them miraa at Cheseles, after which they went to Isiolo G. K Prison where the Appellant bought them alcohol and that while they were there drinking, the Appellant got a phone call at around 9.30 p.m and he left without informing PW1 and PW2. That PW1 and PW2 went to Matabathi Police Post at 10.45 p.m and that is when they found the armory had been broken into where 3 rifles and 60 rounds of ammunition had been stolen. They urge that the photographic evidence produced by PW5 clearly showed that Matabithi Police Post armory was broken into whereby rifles and ammunitions were stolen. That the photos showed a broken lock, a broken padlock of PW3's house used as an armory. That the stolen rifles were further recovered and this is seen in the evidence of PW6 who did state that the Appellant led them to where the stolen riffles were found which was in his house. They urge that it is quite evident that when the Appellant called PW1 and PW2 to buy them miraa and later have them leave the police post unattended, thus giving the Appellant and his accomplices enough time and space to steal from the armory. They urge that PW4, the ballistic expert confirmed that the three riffles recovered by PW6 were examined and were confirmed to be firearms capable of being fired.

14. For the offence of being in possession of a firearm without a firearm certificate, contrary to Section 4 (1) as read with Section 2 (a) of the Firearm Act, they cite the provisions of Section 4 (1) and 2 (a) of the Act. They urge that an inventory was produced as an exhibit and the same showed that one round of ammunition was recovered from the Appellant. That this evidence was not challenged by the Appellant during trial. They further urge that while the police conducted a search in the Appellant's house, they found one round of ammunition of 5.56mm without having a firearm certificate. They urge that PW4, the ballistic expert confirmed that the one round of ammunition was capable of being fired.

15. With respect to the offence of being in possession of Government stores contrary to Section 324 (2) of the Penal Code, citing the provision of Section 324 (2) and 4 (a) of the Penal Code, they urge that PW6 confirmed to Court that after conducting a search, the police found one national police service cleaning kit containing one gun oil container, two pull through and 2 cleaning brushes which were property of the Government. They add that in addition, the inventory listed the items in count 3 which were recovered from the Appellant's possession. They urge that the Appellant had no explanation for being in possession of the items.

16. On sentencing, they urge that the sentence meted out on the Applicant was lenient taking into account that the facts prove that the Appellant was intending to commit a felony with the stolen items thus the deterrent sentence of 5 years on each of the counts.

Determination

17. This being a first appellate Court, the Court is enjoined to examine both the facts and the law and make an independent finding, being mindful that it did not have a chance to observe the witnesses' demeanour. See ***Okeno v Republic (1972) EA 32.*** The Appellant's grounds of Appeal can be condensed into one issue for determination which is whether or not the Prosecution proved their case beyond reasonable doubt. Before going into the analysis of this issue, the Court will first reproduce the evidence adduced at the trial Court.

Evidence adduced at trial Court

Prosecution's Case

PW 1

18. The Prosecution called a total of 6 witnesses. PW1 was No. 238426 PC Mugambi Peter of Muthara Police Station. He testified that the accused used to be a police reservist at Matabithi. That on 8th December 2019, he was at work with colleague Chepkwony and at midday, he accused invited them to Cheseles shopping centre to eat *miraa* and when they got to Isiolo, the accused led them to GK prison for drinks. That they went to GK prison at about 8 p.m and while there, the accused kept on talking on phone in his mother tongue. That at 9.30 p.m, he

left them without warning and they then decided to leave at 10.00 p.m. That they got to the police post at 10.45 p.m and found that the armory had been broken into and 3 rifles (FMP 77084836, J52692 and A36698987) and 60 bullets had been stolen. That they searched in the bushes and villages to no avail and at midnight, they called Corporal Ngomoo and on the next day, the OCS Muthara and others came to the camp. That all residents of Matabithi were summoned and informed and that later during the day, himself, Chepkwony and the accused were arrested. That villagers mentioned the accused name and he was sought. That he was not present when the rifles were recovered.

19. During cross-examination, he stated that he has been an officer for 10 years and that he went to Matabithi in 2019 and that they were 3 officers, himself, Chepkwony and Corporal Mbonga. He stated that on the material day, they were two officers on duty full time. That he had known the accused for 5 months who was a police reservist but he did not have a gun. He stated that the accused had paid the bill by the time he left at 9.30p.m. He stated that when they arrived at the police post, they found that the armory door was broken and 3 guns, 60 bullets, OB and arms movement were missing. He stated that although he is a Merian just like the accused, he could not hear what he was saying since he kept on walking outside.

PW2

20. PW2 was No. 255016 PC Bett Chepkwony who works at Matabithi police patrol. He testified that the accused used to be a police reservist. He testified that on 8th December 2019, at about midday, PW1 was called by the accused to have *miraa* at Cheseles. That they walked up to GK prison and arrived at 8 p.m where the accused bought them alcohol and he received a phonecall talking in Kimeru. That at 9.30 p.m he left and at 10.00 p.m, they left using a motorcycle and reached the post. That PW1 found both his door and that of the armory broken into and when he went, he found that the safe box was stolen alongside 3 riffles. He identified the G3 riffles in Court as the ones that were stolen. During cross-examination, he said that the guns placed in the safe box were stored in Corporal's house.

PW3

21. PW3 is No. 221426 Corporal Theuri Muringa attached at Muthara police station and previously at Matabithi police post. He stated that on 2nd December 2019, he requested for off day and he handed over the post to PW1 with G3 firearms, plus 120 rounds of ammunition 7.62 MM. That he handed over the OB, firearms, register which were placed in a safe box and he handed over the key to the safe box and that all these were kept in his house at the post. That on 9th December 2019, he received a called from PW1 informing him that his house had been broken into. He stated that on the next day, he joined the team doing investigations and they searched and recovered two rifles that were hidden in the bushes and handed these over to OCS Muthara. He identified the weapons recovered as the ones in Court.

PW4

22. PW4 was No. 235227 Cl Kenneth Chomba of DCI Headquarters in the forensic departments, ballistics section. He stated that his duties are identification of firearms and their parts, examination and identification of ammunition and their component parts, scene incident, reconciliation in cases where firearms are involved, serial number restoration on obliterated firearm and any other duty from DCI.

23. PW4 was allowed pursuant to Section 33 (b) of the Evidence Act to produce the report which was done by IP Reuben Bett. As per the report, he testified that 3 G3 rifles, 60 rounds of ammunition were received in the ballistic lab. That they also have 3 magazines and that No. 79888 PC Wanjohi escorted the firearms as they wanted to ascertain whether the G3 rifles are firearms as per the Firearm Act and whether they are capable of firing; whether the magazines are genuine; whether the rounds are ammunition and whether they are capable of being fired. That on 23rd December 2019, exhibits were examined and it was established that FMF2 – 4 are G3 rifles to chamber rounds of ammunition in caliber 7.62 mm * 5 mm. That they are firearms, capable of being fired as 3 rounds were test fired in each rifle. That each of the magazine is in good working condition and are capable of being used in each firearm. That the rounds of ammunition are 60 rounds in caliber 7.62mm * 5.1 mm. He produced the exhibits and an exhibit memo for 1 round of ammunition

PW5

24. PW5 was NO. 80926 PC Mwika Kipkech Ngeno of Isiolo CIO Office. He testified that on 9th December 2019, while on his normal duties, he received DCIO Tigania East Omondi. That he went to Matabithi patrol base which had been broken into and he saw the building with 2 rooms and the right one was an armory. He took photographs.

PW6

25. PW6 was No. 67974 PC Gikundi of Tigania East. He testified that on 9th December 2019, the case was reported by No. 23826 PC Mugambi of Matabithi police post. He testified that a team was formed with OCS IP Ouma and upon search, 3 riffles were recovered at Matabithi village. He stated that the accused led him to where the riffles were and they were recovered. That the accused led them to his house where items in count 2 and 3 were recovered.

DW1

26. DW1, the accused person introduced himself as Joseph Gitonga Nkarichia from Matabathi. He said that he is a hustler. He denied committing the offence. He said that they went to eat together and since he was communicating on phone, they said it was a deal.

Analysis

Whether the Prosecution proved its case beyond reasonable doubt.

Count I

27. The Court will determine this issue as per the order of the counts that the Appellant was charged with. Section 306 of the Penal Code provides as follows: -

306. Breaking into building and committing felony

Any person who –

(a) Breaks and enters a schoolhouse, shop, warehouse, store, office, counting-house, garage, pavilion, club, factory or workshop, or any building belonging to a public body, or any building or part of a building licensed for the sale of intoxicating liquor, or a building which is adjacent to a dwelling-house and occupied with it but is not part of it, or any building used as a place of worship, and commits a felony therein; or

(b) Breaks out of the same having committed any felony therein,

Is guilty of a felony and is liable to imprisonment for seven years.

28. The elements of the offence under this provision of law requires the Prosecution to establish that any of the buildings mentioned in the said section was broken into and that the breaking in was followed by the commission of a felony. The Appellant in urging that the Prosecution did not prove the case against him beyond reasonable doubt urges that none of the witnesses who testified produced evidence linking him to the offence.

29. This Court has analyzed the evidence adduced at the trial Court and observes that indeed, there was photographic evidence produced to show that there was a break in into PW3's house. The photographic evidence clearly exhibited a broken padlock, the interior of the house which was broken into and a safe. PW1 and PW2 confirmed that 3 riffles, 60 rounds of ammunition, firearms movement register and O.B had been stolen. The photographs were accompanied by a report and certificate signed by PW5 PC Ngeno. PW3 confirmed that indeed, his house had been broken into and that he joined the team in search of the items which he had left in his house, now stolen. To this extent, this Court is satisfied that there was indeed a break in into PW3's house, which was being used as an armory, within the context of Section 306 of the Penal Code and that a felony was committed.

30. The next question to consider is whether there was sufficient evidence to link the Appellant to the offence. The prosecution did not call any eye witness to testify that they saw the accused braking into the house. An eye witness was critical particularly because the act of breaking into a building is a positive action which could be ascribed to anyone and it is important to link the act to the particular accused. This is to be contrasted with the other two counts of being found in possession which only requires the prosecution to prove that the items the subject of the charge were found in an accused person's possession.

31. The above notwithstanding, it is this Court's view that in the absence of eye witness(es), it is still in order for the Court to look at the circumstantial evidence of a matter in determining the accused person's guilt or otherwise. The admissibility of circumstantial evidence in criminal trials was discussed in the case of ***Kihungu v Republic, Criminal Appeal No. 1697 of 1983 [1984] eKLR*** where E. O. O'kubasu J *(as he then was)* held as follows: -

"Mr. Kinyua complained that the evidence against the appellant was circumstantial. That may be the case, but as we know, circumstantial evidence is very often the best evidence. In Republic v Taylor Weaver and Donovan [1928] 21 Cr Appeal R 20 the principle as regards the application of circumstantial evidence was enunciated in the following words:

"Circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by intensified examination, is capable of proving a proposition with the accuracy of mathematics. It is no derogation of evidence to say that it is circumstantial".

The above is what was said in England but the same principle applies in East African as was demonstrated in Tumuheire v Uganda [1967] EA 328 in which Sir Udo Udoma (CJ) said:

"It should be observed that there is nothing derogatory in referring to evidence against an accused as circumstantial. Indeed, circumstantial evidence is in a criminal case, often the best evidence in establishing the commission of a crime by a person as in the present case."

32. The factors to be considered when considering circumstantial evidence was further discussed in the Court of Appeal case of ***Kariuki Karanja v Republic, Criminal Appeal No. 62 of 1985 [1986] KLR*** where **Nyarangi, Platt & Apaloo JJA while citing the other case of *Rex v Kipkering Arap Koske, 16 EACA 135* held as follows: -**

"Secondly, circumstantial evidence, to sustain in a conviction must point irresistibly to the accused. In order to justify, on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. The burden of proving facts which justify the drawing of that inference to the exclusion of any other reasonable hypothesis of innocence is always on the prosecution and never shifts: Rex v Kipkering Arap Koske, 16 EACA 135. An aggregation of separate facts inconclusive because they are as consistent with innocence as with guilt is not good enough evidence."

33. The circumstantial evidence in the matter, as identified by the trial Court was the fact of the Appellant having invited PW1 and PW2 who were on duty on the material date to have drinks and *miraa* with him at Isiolo Police Mess on his bill and thereafter leaving them without notice after taking numerous phone calls in the course of their supposed hang out. It was on the same night that this hang out happened that the armory was broken into. They all met at about 8 p.m at the police mess, then the Appellant left them at 9.30 p.m and they got back to duty at about 10.45p.m, thereby making it conceivable that the offence was committed in the knowledge of their absence at their station. The other circumstantial evidence is that of the Appellant himself taking the arresting officer to the site in the bushes and to his house where the items were recovered. This was the evidence of PW6.

34. According to PW3, they recovered two rifles namely J52692 and A36698987 in the bushes. He testified that after this recovery, an OB, G3 riffle, jungle jacket and boots were still missing. According to PW6, upon search, 3 riffles were recovered at Matabithi village. He stated that the accused led him to where the riffles were and they were recovered. He further stated that the Appellant led them to his house where items in count 2 and 3 were recovered. To this extent, this Court agrees with the finding of the trial Court that the fact of the Appellant taking the officers to his house where the items were recovered is sufficient to link him to the offence in the absence of any other explanation as to why the items were found in his house.

35. The Appellant has urged that in taking the circumstantial evidence, the trial Court erred in admitting the statement of IP Ouma despite him not having being called as a witness thereby denying him the opportunity to cross examine the deponent. This Court has observed that indeed, the trial Court made reference to the statement by PC Ouma in its judgment. This statement was produced by PW6. This Court finds that the Appellant ought to have raised his objection to the production of the statement by PC Ouma at the time of its production. Furthermore, noting that the matter is being raised post Judgement on appeal, the question to ask is whether this error is sufficient enough to warrant a disturbance of the Judgement of the trial Court. The test for this issue is found in the provisions of Section 382 of the Criminal Procedure Code which provides as follows: -

> ***382. Finding or sentence when reversible by reason of error or omission in charge or other proceedings***
> ***Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:***
>
> ***Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.***

36. Going by the above provisions, this Court finds that if a failure of justice was occasioned, then this would warrant a disturbance of the finding of the trial Court. As already stated above, this Court finds that the Appellant's contestation on production of IP Ouma's statement ought to have been raised promptly at the tiem of its production. This notwithstanding, the Court observes that nature of evidence found in IP Ouma's statement was relevant in corroborating PW6's evidence linking the Appellant with the offence, in him having led them to where the stolen items were. His evidence was more or less similar to that of PW6 who the Appellant had a chance to cross examine. As per PW6, the investigation team with respect to the case was formed which included himself and IP Ouma. Other than corroborating what PW6 had already stated, this Court does not find that the evidence of IP Ouma as per his statement raises other issues for which his absence in Court prejudiced the Appellant as to be said to cause a failure of justice.

37. Another point raised by the Appellant is that there were no photographs or supporting evidence from the chief or other villagers to confirm that the house in which the items were recovered belonged to him. This Court however observes that this issue was raised for the first time in this appeal and this raises questions marks on the genuineness of this rebuttal. This appears to be an afterthought as he had adequate opportunity during the cross-examination of PW6 to contest the house not being his.

38. Further, this Court does not find any contradiction on the Prosecution's evidence as to the issue of recovery of the items mentioned in the count. Only 3 witnesses led evidence on recovery of the stolen items. A summary of what each witness said with respect to how, where and what items were recovered is as follows: -

i) PW1 said that he was not present when the items were recovered.

ii) PW3 said that they recovered two rifles namely J52692 and A36698987 in the bushes.

iii) PW6 said that the Appellant led him to where the riffles were and they were recovered and that the Appellant led them to his house where items in count 2 and 3 were recovered.

39. In the bushes, the rifles were recovered and in the Appellant's house, the items in count 2 and 3 being *one round of ammunition of 5.56mm* and *one National Police Service cleaning kit containing one gun oil container, two pull through and two cleaning brushes* respectively.

40. This Court has also considered the fact that the Appellant at the material time was a police reservist, which fact he has not denied. This is another circumstantial matter which makes this Court infer that he had some special knowledge of the happenings and protocols of police activities and this gave him an edge in orchestrating the acts the subject of the charges he faced.

41. Despite him alleging that he was convicted based on the fact that had had numerous phone calls on the material nights, this Court does not find that this was the sole or even main basis of his conviction. There is other overwhelming circumstantial evidence as discussed above which links him to the offence.

Count II

42. Section 4 (1) and (2) (a) of the Firearm Act provides as follows: -

> ***4. Penalty for purchasing, etc, firearms or ammunition without firearm certificate***
>
> ***(1) Subject to this Act, no person shall purchase, acquire or have in his possession any firearm or ammunition unless he holds a firearm certificate in force at the time.***
>
> ***(2) If any person-***
>
> ***(a) Purchases, acquires or has in his possession any firearm or ammunition without holding a firearm certificate in force at the time, or otherwise than as authorized by a certificate, or, in the case of ammunition, in quantities in excess of those so authorized; or***
>
> ***(b) …***
>
> ***(c) …***
>
> ***He shall, subject to this Act, be guilty of an offence.***

43. This Court has already discussed above that as per the unchallenged evidence of PW6, the items in Count II and III was recovered from the Appellant's house. In Count II the item was one round of ammunition. This item was part of the inventory that was produced in Court. As per the expert ballistic evidence of PW4, the rounds of ammunition were test fired in the riffles and found to be capable of being fired. To dispute the trial Court's finding on this charge, the Appellant has cited the definition of the term possession as per the Oxford English Dictionary (12th Edition) which defines it as the state of possessing something as visible power or control, as distinct from lawful ownership. This Court however finds that a more accurate and legal definition of the term would be found in the Black's Law Dictionary, Tenth Edition which has various dimensions to possession including actual possession, bona fide possession, civil possession, constructive possession, corporeal possession, criminal possession and natural possession among others.

44. Of relevance to this case is the definition of criminal possession and constructive possession. Criminal possession is defined as *'the unlawful possession of certain prohibited articles, such as illegal drugs or drug paraphernalia, firearms or stolen property.'* Constructive possession is *'control or dominion over a property without actual possession or custody of it.'* Possession has also been defined under Kenyan law in Section 4 of the Penal Code as follows: -

> ***"possession" –***
>
> ***(a) "Be in possession of" or "have in possession" includes not only having in one's own personal possession, but also knowingly having anything in the actual possession or custody of any other person, or having anything in place (whether belonging to or occupied by oneself or not) for the use or benefit of oneself or of any other person;***
>
> ***(b) If there are two or more persons and any one or more of them with the knowledge and consent of the rest has or have anything in his or their custody or possession, it shall be deemed and taken to be in the custody and possession of each and all of them;***

45. To this end, this Court finds that to the extent that the accused person held ammunitions without a firearm as required by law, and to the extent that the Appellant led the investigation team to recover the said ammunition, he was in criminal and constructive possession of the items. The Court finds that this count was sufficiently proven.

Count III

46. Section 324 (2) of the Penal Code provides as follows: -

> ***324. Marking and possession of public stores***
>
> ***(2) Any person who is charged with conveying or having in his possession, or keeping in any building or place, whether open or enclosed, any stores so marked, which may be reasonably suspected of having been stolen or unlawfully obtained, and who does not give an account to the satisfaction of the court how he came by the same, is guilty of a misdemeanor.***

47. As per PW6's evidence, the items in Count III, being one National Police Service cleaning kit containing one gun oil container, two pull through and two cleaning brushes were recovered from the Appellant's possession. These items were part of the items in the inventory produced in Court. This evidence was not challenged. In his defence, he merely states that this was a deal. Further, the accused person did not offer any explanation, credible or otherwise as to how these items came into his possession. Borrowing from the definition of criminal and constructive possession as per the discussion of Count 11 above, this Court finds that indeed, the elements of this offence were proven.

Sentencing

48. The Appellant was sentenced to serve 5 years imprisonment for each of the offences he was convicted of. He urges in his submissions that his sentence was harsh and excessive going by the fact that the offences were founded on the same series of transaction and that the items recovered for Count II and Count III were found in the same place. The Prosecution on the other hand urged that the sentence was in

fact lenient going by the fact that the Appellant was intending to commit a felony with the stolen items.

49. This Court observes that all the three offences are based on a series of one transaction. Indeed, as pointed out by the Appellant, the items recovered in the Counts II and III were recovered from the same places. This Court agrees with the Appellant's submission that when offences are founded on the same transaction, the practice should be for the Court to adopt concurrent sentences.

50. In the High Court case of ***Ng'ang'a vs Republic, Criminal Appeal No. 882 of 1975 (1981) KLR 530, 531,,*** Trevelyan J & Sachdeva Ag J held as follows: -

> ***'Concurrent sentences should have been awarded for this one criminal transaction.'***

51. A similar finding was made in the other High Court case of ***Ondiek vs Republic, Criminal Appeal No. 34 of 1975 (1981) KLR, 431, 444,,*** where Simpson & Kneller JJ held as follows: -

> ***'The practice is that where someone commits more than one offence at the same time and in the same transaction, save in very exceptional circumstances, to impose concurrent sentences: Republic v Sawedi Mukasa s/o Abdulla Aligwansa (1946) 13 EACA 97 (CA-K).'***

52. In the trial Court, the Court did not express any reasons for imposing consecutive sentences. This Court does not find that there were any exceptional circumstances calling for imposition of consecutive sentences. This Court will therefore order that the sentences imposed on the accused of five (5) years for each of the counts will run concurrently.

Conclusion

53. On the night of 8th December 2019, the Appellant, who at the time was a police reservist at Matabithi Police Post, with special knowledge on the protocols at the police base invited PW1 and PW2 who were similarly attached to Matabithi Police Post to have drinks and *miraa* with him on his bill. PW1 and PW2 who were on duty on the material date honoured this invitation and they met Appellant at Cheseles and accompanied him to Isiolo Police Mess, arriving there at 8.00 p.m. The Appellant who was at the phone for the better part of this hangout session, paid the bill and left unannounced at about 9.30p.m. PW1 and PW2 thereafter went to back to their station at 10.45 p.m, only to find that the armory, in which a safe containing 3 G3 rifles, 120 rounds of ammunition, an arms movement register and an OB register, among others, had been broken into and the items stolen.

54. The Appellant was found in possession of the items and he in fact led the investigations team to the place he had hidden the items including his house. His defence did not raise any credible explanation as to how the items came to be in his possession. Although there was no direct evidence linking the Appellant to the offences, particularly to that of breaking into a building and committing a felony, this Court finds that there was overwhelming circumstantial evidence linking him to the offences. As required in the aforementioned cases of ***Kariuki Karanja v Republic [1986] KLR and Rex v Kipkering Arap Koske, 16 EACA 135,*** this Court finds that the inculpatory facts and evidence adduced by the Prosecution witnesses were incompatible with the innocence of the Appellant and incapable of offering any other reasonable hypotheses than that of the Appellant's guilt.

55. Although he claims that the trial Court relied on a statement by a person who was not called as a witness thereby denying him a chance to cross examine the maker, this Court has considered that there was evidence in the testimony of PW6, whom the Appellant had a chance to cross-examine, which mirrored the statement used by the trial Court. This Court does not find that there was a miscarriage of justice to warrant a disturbance of the finding of the trial Court.

ORDERS

56. Accordingly, for the reasons set out above, this Court makes the following orders: -

> ***i) The Appellant's Appeal on conviction is hereby declined and the finding of the trial Court is hereby affirmed.***
>
> ***ii) The Appellant's Appeal on sentence is allowed to the extent that the five (5) years sentences imposed for each of the 3 counts will run concurrently and not consecutively as was ordered by the trial Court.***

Order accordingly.

DATED AND DELIVERED THIS 16TH DAY OF SEPTEMBER 2021.

EDWARD M. MURIITHI

JUDGE

Appearances

Joseph Gitonga Nkarichia, the Appellant in person

Ms B. Nandwa, Prosecution Counsel for the Respondent