



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARSEN

CRIMINAL APPEAL NO. 22 OF 2018

JOSEPH KIMATHI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

*(Being an appeal from the Judgment of Principal Magistrate's
Court at Mpeketoni by Hon. V. K. Asiyu (RM) delivered on the
16th day of April, 2018 in Mpeketoni PMCR No. 211 of 2017)*

Coram: Hon. Justice R. Nyakundi

The appellant in person

Mr. Mwangi for the state

J U D G M E N T

The appellant was tried, convicted and sentenced to five (5) years imprisonment for the offence of burglary contrary to Section 304 (2) and stealing contrary to Section 279 (b) of the Penal Code. The appellant aggrieved with the conviction and sentence, appealed to this Court based on the six grounds of appeal namely:

- (1). That I was sentenced to five (5) years imprisonment for the offence of burglary, stealing and handling stolen goods contrary to Section 304 (2), 274 (b) and 322 (2) of the Penal Code in CR. Case No. 211 of 2017 on 16.4.2018 before Principal Magistrate's Court Mpeketoni.*
- (2). That the Judgment delivered by Hon. V. K. Asiyu was not fairly done because my effort to defend myself from these allegations were dismissed by the Honorable which was unconstitutional.*
- (3). That your honour the trial of this case began six months after a long wait in custody leading to violation of my rights to have a fair trial before him within six months as stipulated in the Constitution.*
- (4). That your honour during cross examinations I proved before the Court beyond reasonable doubt that I was not responsible for the alleged theft since all the prosecution witnesses were not eye witnesses. Your honour I became a victim of speculation and mob justice.*
- (5). That you honour the arresting officers did not turn up before the Court to testify the circumstances surrounding my arrest, I was just arrested for being the first person to cross the road where the items were hidden the bush infact I was harassed and robbed off Kshs.850/= by the mob before I was taken to police which was a gross misconduct and torcher as per the constitution.*
- (6). That I beg the honourable Court of Appeal to receive my application in honour by going through the proceeding, ruling and judgment for the sake of justice and quash the sentence am serving at present.*

The summary of the prosecution case: The witnesses (PW1) – (PW4) stated in Court that on the night of 24.9.2017, the appellant with another acquitted by the trial Court broke and entered into a dwelling owned by **Catherine Wairimu** and stole from therein, chairs, cooking oil, bed sheets, shuka, radio, bar, wine glasses, mattress, TV set, meko gas cylinder, coffee table and accessories. What happened next according to the prosecution case was at arrest of the appellant. Regrettably, the evidence showed the appellant being found in possession of

the itemized stolen goods.

After the conclusion of the investigations, and indictment of the appellant, the record shows that he gave a false information to a person employed in the National Police Service namely **PC. Francis Kinyua**. In that regard the appellant falsified his name as **Peter Kimani Mberia**, a fact he knew to be false.

The Learned trial Magistrate summing up of the case as can be seen from his Judgment, where he convicted the appellant of Burglary and Stealing to five (5) years imprisonment while on the other hand, one year imprisonment for giving false information to a public officer.

Mr. Mwangi for the respondent submitted and argued that the prosecution discharged the burden of proof of beyond reasonable doubt. This was primarily on the doctrine of recent possession of stolen goods in the control and custody of the appellant.

Resolution

For purposes of this appeal, the duty of the Court is clearly spelt out in **Ruwala v R {1957} EA 570 and Pandya v R {1957} EA 336**. It is of course the duty of the Court on first appeal to evaluate the evidence for itself bearing in mind that the trial Court had been advantage of seeing and hearing the witnesses. There are two aspects of the appellant's case which can be disposed of first. The first one is whether the prosecution discharged the burden of proof for the offences of burglary and stealing, and further on giving false information as alleged against the appellant.

It is trite that on a charge of burglary and stealing, the prosecution has the burden to prove the following elements:

- (a). The break in into a building at night.*
- (b). The theft of property belonging to the complainant.*
- (c). Participation of the accused in the theft.*

On these ingredients, the prosecution drew the Court's attention from testimonies of **(PW1), (PW2), (PW3)** and **(PW4)** that the house of the complainant was unlawfully broken into on the night of 24.9.2017. The theft of the items in the indictment was not contested. I emphasize that the offence of stealing under Section 279 of the Penal Code envisages a fraudulent act of taking and without claim of right by one person against the other's right to property, that property in question must also be capable of being stolen.

According to the prosecution case, **(PW1)** the complainant on the night of 24.9.2017 she went home and found her house had been broken into and several household items carried away. The report was made to the relevant authorities and a search and recovery mission launched. As the record stands, **(PW2)** informed **(PW1)** that the stolen items had been recovered from the appellant. It also transpired from the evidence of **(PW2)** and **(PW3)** that they tracked the appellant on the morning of the fateful day after it came to their attention that a crime of burglary and stealing had taken place. It is at that juncture they caught up with him, with various tools used to break into buildings and houses in his possession. A further search was conducted under the interrogation of the appellant in which most of the items stolen from the house were produced as exhibits. The prosecution evidence is clear that the recovered household goods were those stolen after the crime of burglary.

This was done without any color of right or claim. The main aim in this scenario was to deprive the complainant permanently of any rights that accrue with such ownership of property.

On the basis of this evidence, the appellant was the one who had the opportunity to break into the house of the complainant on 24.9.2017 and commit a further act of stealing.

In the **Isaac Kainga alias Peter Nganga Kahiga v R CR Appeal No. 272 of 2005 UR** the Court of Appeal outlined the following criteria from which to draw an inference on the doctrine of recent possession:

- (1). That the property was stolen.*
- (2). That the property was proved to be that of the complainant.*
- (3). That the property has been positively identified by the complainant.*
- (4). That the property in question was recently stolen from the complainant and found with the suspect.*

From the record, the Learned Magistrate in convicting the appellant made references to the pieces of evidence given by **(PW1), (PW2)** and **(PW3)** respectively. The items stolen from the house of the complainant were duly recovered under the behest and direction of the appellant. He is the one who gave credible information on the recovery of the items, upon being questioned by **(PW2)** and **(PW3)** at the time of arrest.

Looking at the evidence before the trial Court and upon reviewing it, I have reached the conclusion that there could be no doubt on proof of the elements of burglary and stealing against the appellant. As far as the evidence concerns the appellant's defence, it never went far to contrast the strong and overwhelming position advanced in the Court below.

The other significant charge was on giving false information to a person employed in the public service. In this appeal, on scrutiny of **(PW4)** evidence there is material in the circumstances of the case which led the Learned trial Magistrate to find the appellant guilty of this offence. As a consequence, he was convicted and sentenced to one year imprisonment. In this regard, the appellant gave a false name of identity to the police officer one **Kinyua**. That false presentation to the witness **(PW4)** was never controverted by the appellant.

In my view, on that evidence alone, the appellant's conviction by the trial Court was inevitable. In short, the Learned trial Magistrate went into the facts and prepared the Judgment in which the evidence is laid bare with his reasons for believing as credible and truthful that evidence by the prosecution found corroboration in the recovery of the stolen goods with full knowledge of the appellant.

Again on appeal, I found no error, mistake, misapprehension or application of wrong principles to warrant this Court to invoke appellate jurisdiction to interfere with the impugned Judgment. I am satisfied that the appellant was properly convicted and sentenced. The appeal is ordered to be dismissed.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 4TH DAY OF NOVEMBER 2021

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R NYAKUNDI

JUDGE

In the presence of

1. Mr. Mwangi for the state

2 The Appellant