



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERICHO

CRIMINAL CASE NO.20 OF 2019

MOHAMMED CLEMENT ONCHONGA.....APPELLANT

- V E R S U S -

REPUBLIC.....RESPONDENT

(Being an Appeal from the conviction and sentence by Hon. B. R. Kipyegon (SRM) in Kericho SRM Criminal Case No.4774 of 2018 delivered on 8/4/2019)

J U D G M E N T

1. The Appellant was convicted with the offence of Burglary and Stealing Contrary to Section 304 (2) and Stealing Contrary to Section 279 (b) of the Penal Code. He was sentenced to Seven Years Imprisonment.
2. The Appellant was charged with an alternative count of Handling Stolen Goods Contrary to Section 222(1) of the Penal Code in that on 22/10/2018 at Milimani Estate in Kericho Sub-County within Kericho County other than in the course of stealing, the Appellant dishonestly retained one T.V make Shiko the property of **MATHEW KIMUTAI BII** having reasons to believe it to be stolen goods.
3. The Prosecution evidence was that on the night of 21/10/2018 at Milimani Estate, the houses of **JOSEPH ODHIAMBO OYOO** and **FLORIDA CHERONO** were broken into and various household goods were stolen.
4. The Appellant was arrested on 22/10/2018 at 8 a.m. with the assistance of sniffer dogs within the tea plantation carrying the T.V. Set. PW.2, **MATHEW KIMUTAI** the owner of the T.V. Set identified the same as his.
5. The Appellant denied the charges and said he was arrested at his place of business at the plantation where he cuts grass. He said the T.V. was recovered at the plantation.
6. The Trial Court found the Appellant guilty and convicted him with the offence of Burglary and Stealing Contrary to Section 304 and 279 (b) of the Penal Code.
7. The Appellant who is aggrieved with both the conviction and sentence has appealed to this Court on the following grounds:-
 - (i) ***THAT he was not identified by the witnesses.***
 - (ii) ***THAT the Prosecution did not prove the charge against him.***
 - (iii) ***THAT there were differences between him and the watchman at the plot where the Complainant was staying.***
 - (iv) ***THAT he was convicted on 3/6/2019 yet the committal warrant was signed on 24/5/2019 before Judgment was delivered***
8. The parties filed written submissions which I have duly considered. This being a first appeal, this Court is, as a matter of law, enjoined to analyse and re-evaluate afresh all the evidence adduced before the lower court and to draw own its conclusions while bearing in mind that it neither saw nor heard any of the witnesses.
9. In the case of **Okeno vs. Republic [1972] EA 32**, the Court of Appeal set out the duties of a first appellate court as follows:

“An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya vs. Republic (1957) EA. (336) and the appellate court’s own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vs. R. (1957) EA.

570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see *Peters vs. Sunday Post* [1958] E.A 424."

10. The issues for determination in this appeal are as follows:-

(i) Whether the Appellant was identified positively.

(ii) Whether the Prosecution proved the guilt of the Appellant to the required standard.

(iii) Whether the appeal should be allowed.

11. On the issue of identification, I find that there is evidence that the Appellant was in possession of the T.V. set belonging to the Complainant which was stolen during the burglary.

12. The Complainant identified the T.V set as his and there is evidence that it was stolen during the burglary.

13. The Appellant failed to account for the T.V. which was recovered shortly after the burglary and stealing.

14. The Trial Court relied on the doctrine of recent possession and there is evidence that the Appellant was arrested while in possession of the T.V set.

15. The fact that the Appellant had in his possession goods stolen during the burglary a short time after the offence was committed raised a presumption that it was the Appellant who committed the offence.

16. I find that all the elements necessary to invoke the doctrine of recent possession were proved and the defence of the appellant did not raise any reasonable doubt.

17. The doctrine of recent possession has been applied in numerous decisions and it was properly cited it in the case of **Isaac Ng'ang'a Kahiga alias Peter Ng'ang'a Kahiga v. Republic Cr App. No. 272 of 2005(UR)** where the elements necessary for proof were stated as follows;

"It is trite that before a court of law can rely on the doctrine of recent possession as a basis for conviction in a criminal case, the possession must be positively proved.

In other words, there must be positive proof:

- i). that the property was found with the suspect;**
- ii). that the property is positively the property of the complainant;**
- iii). that the property was stolen from the complainant;**
- iv). that the property was recently stolen from the complainant.**

The proof as to time, as has been stated over and over again, will depend on the easiness with which the stolen property can move from one person to the other."

18. The Appellant did not rebut the presumption raised by the prosecution and I find that the Trial Court was right in finding him guilty with the offence of burglary.

19. I find that the Prosecution proved that the T.V. Set belongs to the complainant (PW.2) and that it was stolen when PW.2's house was broken into on the night of 21/10/2018. The Appellant was arrested on 22/10/2018 at 8 a.m. carrying the T.V. Set.

20. I find that the appeal herein lacks in merit and dismiss it and uphold both the conviction and sentence.

Delivered, Dated and Signed at Kericho this 2nd Day of October, 2020

A.N. ONGERI

JUDGE