REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT CHUKA

HCCRA NO. 21 OF 2018

ABEL MUTEGI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

((Being an Appeal from the Judgment of the Resident Magistrate at Marimanti (HON. S.M. NYAGA - RM)

delivered on 13/3/2017 Marimanti Principal Magistrate's Court Criminal Case No. 620 of 2016).

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J U D G E M E N T

1. **ABEL MUTEGI,** the Appellant herein was charged with the offence of House Breaking contrary to **Section 304(1**) and Stealing contrary to **Section 279(b**) of the **Penal Code** vide **Marimanti Principal Magistrate's Court Criminal Case No.620 of 2016**. The particulars of the offence was that on the 5th day of September, 2016 at Njukini village Nkondi Location within Tharaka Nithi County broke and entered a dwelling house with intent to steal and stole one battery, 20 Kgs of green grams, 10 kgs of rice, Ampex woofer, mobile charged and two speakers all valued at Kshs.17,500/- the property of **DANIEL NJAGI MWENDA**, the complainant.

2. The Appellant also faced and alternative charge of handling stolen goods contrary to **Section 322 (2**) of the **Penal Code** with the particulars that on 8th September 2016 at Njukini village, Nkondi Location within Tharaka Nithi County, otherwise than in the course of stealing dishonestly undertook the retention of one woofer and 2 speakers the property of Daniel Njagi Mwenda knowing or having reason to believe them to be stolen goods.

3. The Appellant upon trial was not found guilty in the main charge but was found guilty of alternative charge and convicted and sentenced to serve 7 years imprisonment. He was dissatisfied with both the conviction and sentence and filed this appeal.

4. The appellant listed the following grounds in his petition of appeal:

i. That the learned magistrate erred in law by rejecting his defence without giving reasons.

ii. That the learned trial magistrate erred in law and fact by not observing that the prosecution's case had no merit to sustain a conviction.

iii. That the learned trial magistrate erred by not taking into account the evidence tendered by defence.

iv. That the prosecution's case was not proved beyond reasonable doubt.

v. That the learned trial magistrate erred by releasing the goods tendered as exhibits to the complainant and thereby occasioned injustice.

5. The appellant has further filed supplementary grounds of appeal but did so without leave of this court as provided under **Section 350 (2) (i) Criminal Procedure Code**. The amended grounds shall therefore not be considered in this appeal. Before I consider the grounds raised in this appeal and the response made by the State I will consider the brief summary of the evidence against the appellant at the trial.

6. The complainant at the trial (PW1- Daniel Njagi Mwenda) testified that on 5th September, 2016 he arrived home from work and found out

that his house had been broken into via the widow and items stolen to wit a woofer, a battery, pigeon peas, green grams and rice. He was later informed by Justus Mbithi (PW3) that a young man (the appellant) had sold him 53 Kgs of pigeon peas in a sack with initials D.N.M which he recognized as he told the trial court that the initials referred to his name- Daniel Njagi Mwenda. That evidence was corroborated by Justus Mbithi (PW3).

7. The complainant testified that he reported to the police who upon investigation recovered a woofer (one big speaker 2 small speakers) which was tendered as D- Exh 1 by Corporal Henry Nameda (PW4) the investigating officer in the case. The recovery of the woofer (P. Exhibit 1) was corroborated by APC Tony Mwangi (PW5).

8. When placed on his defence, the appellant giving unsworn statement of defence denied committing the offence. He told the trial court that the 55 green grams he sold to PW3 was given to him by his mother. However he did not call her as a witness. He further told the trial court that he got the woofer (P Exhibit 1) from his cousin one Martin Muturi whom he however did not call as a witness.

9. The trial court upon the evaluating the evidence tendered by the prosecution found him guilty of the alternative charge after finding that the doctrine of recent possession did not apply to him in regard to the main charge.

10. In his written submissions, the appellant has contended that the prosecution did not prove that the appellant had knowing retained the stolen goods . He faulted the police for not looking for his cousin to question him on where he go the woofer from. He submitted that the defence he tendered was good but was ignored which is his view lead to miscarriage of justice.

11. The Appellant has further contended that the prosecution's case was full of contradictions as PW1 and PW2 contradicted each other on what he allegedly confessed on his arrest. He has urged this court to scrutinize the evidence in totality and arrive at a better conclusion.

12. The Respondent through the Director of Public Prosecution has opposed this appeal. In its written submissions, the Respondent contends that the appellant had a guilty mind on account of what he was found with the police raided his house. The Respondent contended that evidence tendered indicated that the appellant declined to lead the officers to where he purchased the woofer.

13. The Respondent has further relied on the decision of ***Mercy Kajuju -Vs-R (1981) KLR*** where it was held that unsworn statements have no probative value as the rules of evidence cannot be applied on them. The Director of Public Prosecution has contended that such evidence should be considered persuasive rather than evidential.

14. The State has further submitted that the doctrine of recent possession applied as the woofer was stolen on 5th September 2016 and recovered on 8th September 2016. It has relied on the decision in ***Omar Dube Madero -vs- Republic [2018] eKLR*** where a decision in ***Mahingi -vs- Republic (1989) KLR 225*** was cited to the effect that the doctrine of recent possession shifts the burden of proof to the accused to explain the possession. It is contended that the doctrine is a rebuttable presumption and that the appellant failed to give a proper explanation hence an inference that he either stole it or was a guilty receiver. The State has on that basis supported both the conviction and sentence.

15. This court has considered this appeal and being a first appeal the role of this court is now well settled. It is held in ***Okemo-vs- Republic (1977) EA &*** ***Mark Oururi Mose -vs- Republic [2013] eKLR***, this court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it analyse it and come to its own independent conclusion always bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses as they testified during trial.

16. This appeal in my view boils down to the doctrine of recent possession. The appellant was found with stolen items-(woofer (P. Exh 1) said to be one big speak and two small ones) which the complainant proved to be his through production of a receipt dated 18th February 2016 and tendered in evidence as (P. Exhibit 2). The appellant tried to offer an explanation on how he came into possession of the woofer by tendering receipt dated 29th March, 2016 as D Exhibit 1 but the trial found it to be a forged document.

I have considered the evidence the arresting officer Tony Mwangi (PW5) who told the trial court that the appellant declined to lead them to where the woofer was allegedly bought. The appellant in my view did not help matters by appearing to pass the ownership to his alleged cousin whom he did not call as a witness. The fact that his evidence was unsworn really negated the weight of his allegations when weighed against the evidence tendered by the prosecution's witnesses. In my view the appellant did not offer a reasonable explanation on how he came across the stolen item because if the woofer actually belonged to his cousin, he ought to have been the one in possession of the receipt and the appellant could not have been the one tendering the evidence. I also find it telling that the appellant chose to give unsworn statement of defence so as to shield himself from cross- examination where he could have been put to task to explain how he obtained D. Exhibit 1 and why his purported cousin could not come to testify. In my considered view the learned trial magistrate was entitled to infer that the receipt tendered by the appellant probably was a forgery intended to get him off the hook.

17. This court finds that the appellant's defence was duly considered and given its due weight by the trial court and given that the defence was unsworn, when placed on the scales of justice as compared with the prosecution's case, the prosecution's case carried the day. I have relooked at the evidence in its entirety and find that though the police could have done better by availing the green grams found with PW3, the evidence in regard to the alternative count in my view was sufficient to found a conviction.

18. On sentence, this court notes that the trial court gave the appellant, the maximum sentence provided by law but looking at the social inquiry report it is apparent that the appellant had been found to have engaged in other criminal activities in the past and hence required a stiffer sentence to serve as deterrent and also enable him to reform. I however find that the sentence was little bit harsh and I am persuaded to reduce the same by two years.

In the end, his court find no merit in this appeal on conviction. The conviction for the aforesaid reason is upheld but the sentence of 7 years is set aside and substituted with a sentence of 5 years imprisonment.

Dated, signed and delivered at Chuka this 20th day of May, 2019.

R. K. LIMO

JUDGE

20/5/2019

Judgment signed, dated and delivered in the open court in the presence of Momanyi for State/Respondent and Appellant in person.

R.K. LIMO

JUDGE

20/5/2019