REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEALS NOS. 13, 14 AND 15 OF 2017

(From Original Conviction and Sentence in Criminal Case No. 1661 of 2016 by the Chief Magistrate's Court at Kakamega)

DAN IMBIRI AGOI.....1ST APPELLANT

KELVIN MASINDE WEKESA.....2ND APPELLANT

LIVINGSTONE OMBENI KITATWA.....3RD APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

JUDGEMENT

1. The appellants were convicted by Hon E Malesi, Senior Resident Magistrate, of burglary and stealing contrary to sections 304(2) and 279(b), respectively, of the Penal Code, Cap 63 of the Laws of Kenya, and were accordingly sentenced to five (5) years imprisonment for the burglary and three (3) years for the stealing, to run consecutively.

2. They were charged with one joint count, with alternative counts of handling contrary to section 304(2) of the Penal Code. The 3rd appellant faced a separate count of burglary and stealing, with an alternative of handling stolen property. The particulars of the joint count against all the appellants were that on the night of 9th and 10th May 2016 at Kakamega Township, Kakamega Municipality within Kakamega County they jointly broke and entered the shop of Gidraf Maina Njoroge with intent to steal and stole therefrom assorted shoes worth Kshs. 400, 000.00, hundred bags of laptops valued at Kshs. 200, 000.00, eight suitcases valued at Kshs. 32, 000.00, one sub-woofer make Ampex valued at Kshs. 5, 500.00 and one DVD Samsung valued at Kshs. 6, 500.00, the total value of the property being Kshs. 644, 000.00 the property of Gidraf Maina Njoroge. The particulars of the alternative charge were that in the same night they, otherwise than in the course of stealing dishonestly received or retained goods listed in an inventory attached to the charge knowing or having reason to believe that they were stolen property.

3. The particulars of the count against the 3rd appellant were that on the same night within the same area as charged in count I jointly with others not before the court, he broke and entered the shop of Zakari Maina with intent to steal and stole therefrom assorted phone accessories details of which were attached to the charge sheet. The goods were valued at Kshs. 63, 095.00 the property of the said Zakari Maina. The particulars in respect of the alternative charge were that on the same date and at the same place stated in the main count, he had, otherwise than in the course of stealing, dishonestly received or retained assorted property listed in a sheet attached to the charge knowing or having reason to believe it to be stolen property.

4. The appellants pleaded not guilty to the charges before the trial court, and the primary court conducted a full trial. The prosecution called four (4) witnesses.

5. Gidraf Maina Njoroge, the first complainant, testified as PW1. He stated that he operated a shop within Kakamega township, dealing with shoes, suitcases and laptop bags. When he reported on 9th April 2016 to open the shop he was surprised that the lights inside the shop were on. Upon opening the shop, he noted that items were strewn all over and some were missing. The doors to the shop were intact, but the iron sheets on the roof and the ceiling had been removed. He made a report straightaway to the police, and got information that some people had been arrested the previous night with assorted items. He produced an inventory of the items that had been recovered by the police. PW2, Zachary Maina, the second complainant, testified next, He stated that he too was a businessman within Kakamega town. He said that on the morning of 10th May 2016 he went to his shop, and found the locks intact. When he opened he found his goods strewn all over the shop. He noticed that some items were missing from the shelves. Upon checking around he noticed that there was a hole on the roof. He made a report the same day to the police. He was called later in the day to identify some items that had been recovered. He mentioned the recovered items as twelve earphones and phone batteries. They were marked for identification.

6. Corporal David Serem (PW3) was the police officer who arrested the appellants. He testified that he was on night patrol when he got a tip

off from an informer, at about 2.30 AM on 9th May 2016, that a shop had been broken into. The informer told him that he knew the persons involved, and he took him to where the shoes were and to the house of the alleged culprits at Masingo. At the house, he found the 1st and 2nd appellants and a black briefcase. The 1st appellant was wearing a shoe on one leg which was different from the shoe on his other leg. The 1st appellant was wet and it had rained heavily that night. He insisted that he had not stolen and that the bag had been brought by the 3rd appellant. PW3 stated that the 1st appellant was someone he knew. The 1st appellant offered to take him to the house of the 3rd appellant at Jua Kali. He found that the 3rd appellant was also wet, and had a fresh cut wound on his head which was also bleeding, and there were blood stains at his door. In his house he found a brown briefcase, which had shoes inside it. He also recovered earphones and two mobile phone batteries. He arrested the 3rd appellant, who protested that he was innocent saying that he was the owner of the shoes and that he was dealer in shoes. He testified that a formal complaint was filed ta the police station of shop-breaking and stealing. He arrested the three appellants and took them to the police station, where he prepared an inventory which he signed, and which he put in evidence as an exhibit. Corporal David Sugut (PW4) was the investigating officer, he testified on the steps he took on the matter after the same was assigned to him. He stated that according to his investigations the officer on duty who had arrested the appellants had received information from an anonymous source that some people were dividing items at a certain place. He alleged that that officer proceeded to the scene and caught the suspects along with the items. He stated that he was shown the items whereupon he prepared an inventory listing the recovered items, which inventory was counter- signed by the suspects.

7. The appellants were put on their defences. They gave sworn statements, and did not call witnesses. They all denied the offences. They stated that they were not arrested in the manner narrated by the police witnesses. They all stated that they were arrested at dawn as they went about their daily businesses.

8. After reviewing the evidence, the trial court convicted them of the main charges, and sentenced them as stated in paragraph 1 of this judgement.

9.Being dissatisfied with the sentence the appellants appealed to this court. They filed separate appeals that were consolidated on 12th July 2018. In his petition of appeal, the 1st appellant raises grounds that the evidence upon which he was convicted had not been corroborated, that an identification parade was not conducted, that the search at his house did not yield an exhibit, that he was not arrested at the scene and that the complainant had confessed to the court that he did not know him. The 2nd appellant raises similar grounds save that he adds that he was tortured at the police station to accept liability. The 3rd appellant also raises similar grounds but adds that the landlord was not called to the scene to confirm that he was his tenant in whose premises stolen goods had been found.

10. Being the first appellate court, I have re-evaluated all the evidence on record. I have drawn my own conclusions, whilst bearing in mind the fact that I did not have the benefit of observing the witnesses as they testified. The Court of Appeal's decision in the case of ***Okeno vs. Republic*** **(1972) EA 32** has. consistently been cited on this issue. In its pertinent part, the decision is to the effect that: -

> *"An appellant is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. 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 findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrates' findings can 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."*

11. The appellants filed supplementary grounds. The 1st appellant's supplementary grounds were filed on 12th July 2018. He averred that the trial court had taken him through an unfair trial where Article 50(2)(g)(h)and (j) of the Constitution had been offended, that the court had relied overly on an inventory which was not prepared and signed at the place of the alleged recovery, that the court erred in finding that the charge of burglary was proved without inquiry into the absence of photographic evidence as required under section 78 of the Evidence Act, cap 80 Laws of Kenya, and that the court erred in believing the testimonies of PW1 and PW2 even in the absence of proof of ownership of the exhibited items. The 2nd appellant's grounds were filed on even date. He raises similar grounds but adds that the court relied on inconsistent doubtful farfetched and fabricated evidence, and that the court erred in awarding consecutive sentences when the evidence was based on the same facts.

12. They also filed written submissions. In his written submissions, the 1st appellant, argues that his rights to fair hearing were violated, especially that relating to advance knowledge of the evidence that the prosecution was to rely on. He complains that he was ambushed throughout with evidence during the hearing and instantly required to cross-examine the witnesses that notwithstanding. He submits that the ownership of the shops allegedly broken into was not proved neither was the offence of burglary as section 78 of the Evidence Act was not complied with. He also submits that the ownership of the goods that were exhibited as stolen was also not established. On the recovery of the alleged stolen items, he submits that the police witnesses gave contradictory evidence, and in any case the inventory allegedly prepared by the two officers, he submits, was done at the police station rather than at the alleged scene of recovery. He further submits that some of the witnesses mentioned persons who were not called to testify in court. He particularly takes issue with the informer who allegedly triggered his arrest. He further points at contradictions and inconsistencies that he says are material. The 2nd appellant makes similar submissions. There are additions though. For example, he submits that the prosecution did not disclose to him in advance the evidence that it wished to rely on and he was not informed of his right to legal representation. The submissions made by the 3rd appellant were along similar lines.

13. The appeal was canvassed on 7th March 2019. The appellants relied on their written submissions, but the 1st appellant added one point, that PW3 had said he had recovered clothes from the house of someone who was not presented at the trial to explain how he was found with such items. Mr. Ng'etich, Senior Prosecution Counsel, made oral submissions. He submitted that even though there were no eyewitnesses for the offences for which the appellants were convicted of, the trial court had properly applied the doctrine of recent possession. He further submitted that the items allegedly stolen from PW1 and PW2 were found in the appellants dwelling places. He stated the complainants had positively identified the recovered goods as belonging to them. He asserted that the prosecution had proved their case beyond reasonable doubt.

14. I shall first deal with the ground that the fair trial rights of the appellants were violated. They raise two sub-issues under this general ground, that they were not furnished with the prosecution's case in advance and that they are not the proceed of their right to legal representation.

15. On the matter of not being provided with the prosecution's evidence in advance, they argue that that placed them in a position where they were ambushed with evidence at the trial unprepared to cross-examine the prosecution witnesses thereafter.

16. The right to be informed of the evidence the prosecution intends to rely on is provided for in Article 50(2)(j) as a right 'to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence.' The High Court in *Joseph Ndungu Kagiri vs. Republic* [2016] eKLR said that Article 50(2)(j) correctly interpreted means that an accused person should be furnished with all the witness statements and exhibits which the prosecution intends to rely on in their evidence in advance. The sole purpose of doing so is so as to avail the accused sufficient time and facilities to enable him prepare his defence and challenge the prosecution's case at the opportune time both in cross-examination and defence, adding that the provision should be read together with Sub-Article 2(c) which provides for the right of an accused person to a right to a fair trial which includes the right to have adequate time and facility to prepare a defence. The issue was also addressed in *Richard Munene vs. Repbulic* [3018] eKLR and *Thuita Mwangi & 2 others vs. Republic* [2015] eKLR.

17. I have scrupulously gone through the record of the trial court. There is nothing to indicate that the appellants ever requested to be furnished with the prosecution's evidence in advance. Neither is there anything to indicate whether the court gave any directions on provision of such documents. I have also noted that the state did not respond to the submission by the appellants on this score.

18. I agree with the decision. in *Joseph Ndungu Kagiri vs. Republic* (supra) that failure to provide accused persons with prosecution witness statements in advance as required by Article 50(2)(j) amounts to a violation of their constitutional rights to a fair trial and vitiates the entire trial, and it would be immaterial that they were able to cross-examine the witnesses or were eventually acquitted. It would be the obligation of the state to avail such evidence and that of the court to satisfy itself that that has happened.

19. The appellants also take issue with the failure by the court to inform them of their right to legal representation. Article 50(2)(h) of the Constitution states that every accused person is entitled to be assigned to him an advocate by the state at state expense if substantial injustice would otherwise result and to be informed of that right promptly. The importance of accused person being afforded legal representation has been underscored in a number of decisions such as in *Joseph Ndungu Kagiri vs. Republic* (supra), *Macharia vs. R* [2014] eKLR, among others. However, it has been held that the same is qualified and subject to the substantial injustice test. Not everyone therefore is entitled to an advocate at the state's expense, with each case being considered on its merit. It was stated in *Charles Maina Gitonga vs, Republic* [2018] eKLR that legal representation is not an inherent right available to an accused person under Article 50 of the Constitution, adding that under section 36(3) of the Legal Aid Act, No. 6 of 2016, an accused person has to first establish that he was unable to meet the expenses of trial.

20. In the instant case, the appellants have not sought to establish that they would suffer substantial injustice should they not be provided with legal representation at state expence. It has not been demonstrated that that their case involved complex issues of fact or law which made them unable to effectively conduct their own defence owing to some disability or language difficulties or the nature of the offence.

21. However, I do note that the appellants case is not so much that they were not afforded a right to legal representation but the omission by the trial court to inform them promptly of that right. Article 50(2)(h) is phrased as follows:

> "*to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly*;"

22. My reading of this provision is that it does not require that a court informs the accused of his right to legal representation in general, but rather in cases where an advocate at state expense would be necessary if substantial injustice would result. The duty would therefore arise where the case raises complex issues fact or law making it difficult for the accused to effectively conduct their own defence owing a disability or language difficulties or the nature of the offence. In the instant case, I have already made a finding here above, that the appellants have not established that theirs was a case where substantial injustice could occur if they did not get an advocate appointed by the state, nor that the case raised complex issues of fact or law which made it difficult for them to defend themselves due to some disability or language difficulties or the nature of the offence. That being the case it cannot be said that the failure to inform the accused of the right amounted to a breach of their rights or prejudiced them in any way.

23. The other ground is that the prosecution did not adduce any evidence to support the assertions by PW1 and PW2 that they ran shops which could be broken into and property stolen therefrom. The argument is that the appellants faced a criminal case, and the principle in all criminal cases being that the standard of proof in those cases is beyond reasonable doubt, it required that every element of the offence be established beyond doubt. The other ground is that the offence of burglary was not established for section 78 of the Evidence Act was not complied with.

24. I will take the two grounds together. The principal offence charged in this case was burglary contrary to section 304(2) of the Penal Code. The provision states as follows:

> "*304. (1) Any person who –*
>
> *(a) breaks and enters any building, tent or vessel used as a human dwelling with intent to commit a felony therein; or (b) having entered any building, tent or vessel used as a human dwelling with intent to commit a felony therein, or having committed a felony in any such building, tent or vessel, breaks out thereof, is guilty of the felony termed housebreaking and is liable to imprisonment for seven years.*

(2) If the offence is committed in the night, it is termed burglary, and the offender is liable to imprisonment for ten years."

25. The twin offences of burglary and housebreaking are committed by a person who breaks into a building or structure with intent to commit a felony therein. It was stated in *Njoka vs. Republic* [2001] KLR 175 that the two are committed in one transaction with the felony intended. In the instant case stealing, and the count of either should include the felony intended. It was stated in *Rex vs. Charles Awala* [1948] 23 (1) KLR 61, that the prosecution must prove both the elements of the breaking in and the commission of the felony alleged. As I have stated above, the burglary alleged was the principal offence, with the theft being secondary to it. The burglary must be established first before the issue of theft is adverted to.

26. I have carefully considered the provisions upon which the appellants were charged with, as well as case law, and I have come to the conclusion that to the extent that the charge relates to breaking into premises it would be critical for the prosecution to establish existence of the premises alleged to have been broken into. There must be some proof that the said premises existed and were connected to the complainants. It would therefore not be sufficient for them to merely orally allege that they ran businesses on some premises. To ran a business in some premises one will require permits or licenses from some authority. It would be a critical component of the charge to establish that, as that would then found basis for a claim that the said premises were broken into and property stolen from therein.

27. Secondly, on the break in, there ought to be some evidence more than the oral narrative of the complainant. What amounts to breaking in is set out in section 303 of the Penal Code. It includes opening by unlocking, pulling, pushing, or by any other means a door, window, cellar flap or other thing intended to close an opening in a building or by any opening giving passage from one part of the building to another. It could involve some form of actual breaking of some part of the building in order to gain access. Photographic evidence is critical in such cases.

28. PW1 did not provide any documentary proof that he operated a business dealing in the sort of merchandise that he alleged was stolen from him. He said that the persons who stole from his shop gained access through the roof after removing iron sheets and ceiling. A police officer called Alice allegedly came to the scene after he made a report to the police, but she did not testify at the trial. PW2 similarly did not provide any documentary evidence that he ran the sort of business that he alleged to run nor that he dealt with the merchandise that he alleged were stolen. He said the persons who stole his property accessed the shop through a hole in the roof. None of them alluded to the holes not being there previous to their closing the shops the day before.

29. PW3, the officer who arrested the appellants, was not clear in his testimony whether or not he visited the shop. He merely said after he got information about the alleged burglary from the informer he went to where the shoes were. He did not say anything about the state of the shop at that material time. PW4, the investigating officer, did not talk about the visiting the scene of the crime, the shops, during his evidence in chief, he only mentioned it at cross-examination, and even then said very little. The said that he confirmed that the shops were broken into. He did not describe the scene nor the state in which he found them. No scenes of crime personnel were apparently called to the scene and no photographs were taken of the scene.

30. From the testimonies of these four witnesses it cannot be said that the offence of breaking in was proved beyond reasonable doubt. It was not proved adequately that the premises in question existed, that they were connected to the complainants and that they had been broken into as alleged. An effort should have been made to obtain concrete evidence that would have established these matters beyond the mere oral stories of PW1, PW2, PW3 and PW4.

31. It is critical for the prosecution and the court to note from that the charges, the offence created under section 304 of the Penal Code attracts a maximum penalty of ten years in prison, while that created under section 279(b) of the Penal Code, stealing attracts a penalty of fourteen years' imprisonment. The offence of handling stolen property, charged under section 322(2) of the Penal Code attracts a maximum of fourteen years in prison.

32. The right to liberty is fundamental and is guaranteed by the Constitution and in various international legal instruments that Kenya is party to. It cannot be taken away by the state unless there is legal justification. It is for that reason that the principle of criminal law that a criminal charge ought to be proved beyond reasonable doubt exists, as justification for taking away the liberty of any person. It is a serious matter. For that reason, those charged with prosecuting suspected offenders must endeavor to justify the criminal charges they bring, by way of credible evidence, to persuade the court that reasons exist for it to take away a person's liberty.

33. So far as the charge of breaking and entering is concerned, I am not persuaded that the prosecution marshalled evidence that should have justified conviction of the appellants, and I do not think that the trial court had before it any material upon which it could say that it had been persuaded beyond reasonable doubt that the crime of breaking and entering had been committed.

34. On the second aspect raised on burglary, relating to section 78 of the Evidence Act, the appellants faulted the state for not complying with that provision. Section 78 deals with reliance on photographic evidence, and details how such evidence ought to be presented before the court. In my reading of it I do not see how the same places an obligation on the prosecution to rely on it in burglary cases. Section 78 of the Evidence Act, in my understanding, is to be invoked only in cases where the state proposes to rely on photographic evidence and seeks to place on record such evidence. The prosecution in the instant case did not rely on photographic evidence, and therefore the question of the relevance of section 78 of the Evidence Act should not arise.

35. The prosecution relied on circumstantial evidence to establish both the offence of burglary and that of stealing. No eyewitness account was given by any of the persons who testified in this matter. The appellants are linked to the crimes by the claim that they were found in recent possession of items that were suspected to be stolen from the premises of the complainants. It is on that basis that they have raised issues with the evidence on that score.

36. Ownership is critical to the offence of theft, for the same is established where the accused is alleged to have dealt with it in a manner that is inconsistent with the rights of the owner or that denies the owner's right to it. It must therefore be established that the goods allegedly stolen belonged to the complainant, or, in cases of recent possession, that the goods allegedly found in possession of a suspect belonged to

the complainant. In *Michael Karimi Kamunyu vs. Republic* [2005] eKLR, in dealing with that issue, where the prosecution witnesses, including the complainants, stated that the recovered items had been found with the accused persons without more, that it should come out in the prosecution's evidence that the complainants were laying claim to ownership of the recovered items, and that the evidence showed that they had a better claim of ownership.

37. The court in *Elijah Ngugi Kimemia & another vs. Republic* [2010] eKLR addresses the matter of proof of ownership of stolen goods by alleged owners. It was stated that proof of ownership of such goods is determined on the basis of the facts of each case. It may be way of producing receipts or other documentary proof, or by way of showing identifying marks on the items or other features such as initials. It could also be by evidence that the same was gifted to the complainant or that he had used it for such a long time that it developed features or characters that could be pointed out to aid identification. See also *Lawrence Omondi Ojungo vs. Republic* [2010] eKLR.

38. In the instant case, both PW1 and PW2 did not categorically state that the items that were allegedly recovered from the appellants belonged to them. Their oral testimonies were vague on the issue of ownership of the recovered items as they did not say that the recovered items belonged to them. It is not clear from the record before me whether the items allegedly recovered from the appellants were ever presented before the court when the two testified, whether the items were placed before the two witnesses, and whether the two witnesses were required to identify them. The court record on this is sketchy. All what PW1 is recorded to have said in examination in chief on that was: '… I went to the police and was shown the items as listed in the charge sheet. The items in the inventory for A1-No. 1-15 marked as PMFI-1 Item 16 (briefcase) is marked as PMFI-2.' PW2 is recorded as having said: 'I was later in the day called to the station to identify some items recovered. The recovered items were 12 earphones and battery. earphones marked a PMFI-3. The two phone batteries marked as PMFI-4. I was told that my items were recovered from A1.' There is therefore nothing to indicate that they identified the items in question as belonging to them. They talked of having receipts for them but they did not produce the receipts, nor attempt to do any of the things mentioned in *Elijah Ngugi Kimemia & another vs. Republic* (supra).

39. Closely related to that is the issue of the ownership of the house where the stolen goods were recovered. It was said in *Boniface Gitonga Muchira & another vs. Republic* [2013] eKLR, that the ownership of the house where stolen goods are recovered in critical for it provides an essential link between accused person and the goods allegedly recovered. It would also eliminate the possibility that the goods were in the custody or possession of persons other than the accused. See also *James ole Silanga vs. Republic* [2010] eKLR.

40. According to the record before me some of the goods were allegedly recovered from a house to which the arresting officer was directed by an informer, where he allegedly found the 1st and 2nd appellants. No evidence was led as to whom the said house belonged, and as to whether there were other individuals in the house save the two appellants. PW3 appeared to have targeted the 2nd appellant and the 1st appellant was only arrested because he happened to be at the scene. The two appellants were arrested on information of an informant who was not presented as a witness in court. It was critical in the circumstances to obtain further evidence as to who owned the particular house where those recoveries were made as that was the only way to link the 2nd appellant to it. Regarding the 1st appellant, no reason at all was advanced as to his arrest and arraignment.

41. The other ground relied on by the appellants is that the court over-relied on the inventory that had been prepared by the police. They faulted the said inventory on the grounds that the same was not allegedly prepared at the scene of recovery but at the police station. The courts have underscored the fact that the inventory is a record kept by the police of the items recovered during investigation. It is not a requirement of the criminal process that one must be prepared, and the failure to prepare or produce one at the trial cannot prejudice the trial process in any way. See *Stephen Kimani Robe vs. Republic* [2013] eKLR, *David Letera Lokai vs. Republic [2016] eKLR, Leonard Odhiambo Ouma and another vs. Republic* [[2011] eKLR, *Kamulak Shum vs, Republic* [2016] eKLR, among others.

42. Going through the record of the trial court, I am not persuaded that the court relied on the said inventory as the basis for the conviction of the appellants. In any event the same is of little probative value as it is more of an administrative tool for the investigations during the investigation process. It is not a requirement of the law and it adds little value to the trial process. Therefore, whether it was prepared at the police station or at the scene of crime is neither here nor there.

43. The appellants took issue with the fact that some persons were mentioned as having been potential witnesses, yet they were not called to testify. There was the informer who triggered their arrest, as well as Alice the first police officer to visit the scene of the crime after a report was made to the police. It is a principle of law that there is no required number witnesses to testify in criminal matters. That position is stated in section 143 of the Evidence Act. It has been restated and repeated in such cases as *Keter vs. Republic* [2007] EA 135 and *Republic vs. George Onyango Anyang & another* [2016[eKLR, where it was emphasized that the prosecution must call such number of witnesses as are sufficient to establish the charge beyond reasonable doubt. Then there is the caution in *Bukenya & Others vs. Uganda* [1972] EA 549, that where the evidence called was barely adequate the court may infer that the evidence of the uncalled witnesses would have been adverse to the prosecution.

44. In this case the prosecution called only four witnesses, the two complainants and the two police officers who arrested the appellants and investigated the matter. There was no obligation on the prosecution is part to call more witnesses so long as the ones they called were adequate to establish their case. There are of course glaring gaps in the evidence that could have been filled by the witnesses that the appellants say the prosecution did not call. The informer was said to have either witnessed the actual break in and theft or to have seen the person involved sharing the loot as it were. He was also said to have known some of the culprits and he was the one who allegedly took the police to their residence. The other witness was the police officer who visited the scene and who would have given highlights of the sight that she beheld.

45. One of the persons not called as a witness was an acknowledge police informer. The usefulness of such informers has been addressed by the courts in a number of cases, including *Kigecha Njuga vs. Republic* [1965] EA 773, where it was stated that their usefulness would diminish and their lives endangered if their identities were to become known. It is usually not necessary to call them as witnesses if there are other witnesses and where their evidence would not amount to hearsay. In the instant case, however, the failure to call the informer in this matter left a gap in the evidence of the prosecution as stated above.

46. The other ground is that the evidence of the prosecution was riddled by contradictions and inconsistencies. The first related to the date when the incident occurred. PW1 talked of discovering, on the morning of 9th April 2016, that his shop had been burgled. That would mean that the burglary happened on the night of 8th and 9th April 2016. PW2 talked of discovering his loss on the morning of 10th May 2016. The other inconsistencies were brought out with regard to the evidence of PW3 and PW4, the police officers. PW3, the arresting officer, talked of being on duty on 9th May 2016, and at about 2.30 AM, he was alerted of a burglary that had taken place at Dharau. He did not mention any other date, and therefore it can only be presumed that he was on duty at 2.30 AM of 9th May 2016. PW4, who conducted the investigations, testified that he was assigned to investigate the matter on 10th April 2016. He said that the burglary happened on the night of 9th and 10th April 2016.

47. No effort was made to correct those inconsistencies during reexamination and therefore the testimony as given by these witnesses stands. The charge states that the crime was committed on the night of 9th and 10th May 2016. The testimonies of PW1, PW3 and PW4 do not tally with the particulars set out in the charge sheet to support the charge that the appellants faced. The date of the alleged commission of the offence is a material fact. That the complainant, the arresting officer and the investigation officer in their testimonies referred to dates other than the dates of the alleged offence that they had come to court to give evidence on is critical.

48. Then PW3 talks of the informer calling him from Dharau, ostensibly at the scene where the break in happened, and telling him to wait for him there. When PW3 then went over to meet the informer, he did not say that he went to the shop but where the shoes were without disclosing where that was. He said that after that the informer led him to the residence of the 2nd appellant where he made arrests. PW4, the investigating officer narrated that the duty officer received information from an anonymous source about persons who were dividing items at a certain place. He did not talk of a break-in. The said officer, presumably PW3, then proceeded to scene, presumably where the items were being shared out, and arrested the suspects. The version by PW4 no doubt does not tally with that given by PW3. To make matters worse, at cross-examination he said the appellants were arrested at their residential house.

49. The courts have consistently held that not every inconsistency or contradiction is material. See *Richard Munene vs. Republic* [2018] eKLR. In this case, however, I believe the inconsistencies herein go to heart of the matter. Where the inconsistencies and contradictions are fundamental that would have the effect of denting the prosecution's case, and ultimately it cannot be said that such a case would have been proved beyond reasonable doubt. See *Republic vs. George Onyango Anyang & another* (supra).

50. The trial convicted on the basis of the doctrine of recent possession. The Court of Appeal in *Isaac Ng'ang'a Kahiga alias Peter Ng'ang'a Kahiga vs. Republic* CA Criminal Appeal No. 272 of 2005 (Nyeri)(unreported), said:

> *"It is trite that before a court of law can rely on the doctrine of recent possession as a basis of conviction in a criminal case, the possession must be positively proved, In other words, there must be positive proof, first; that the property was found with the suspect, secondly that; that property is positively the property of the complainant, thirdly; that the property was stolen from the complainant; and lastly; that the property was recently stolen from the complainant … in order to prove possession there must be acceptable evidence as to search of the suspect and recovery of the allegedly stolen property; and in our view any discredited evidence on the same cannot suffice no matter from how many witnesses."*

51. Going by the principles stated above, it cannot be said that the doctrine as set out in *Isaac Ng'ang'a Kahiga alias Peter Ng'ang'a Kahiga vs. Republic* (supra) applied to the instant case. I have already found that the evidence on record did not establish that the items alleged to have been found in the possession of the suspects actually belonged to the complainants, and therefore it cannot be said that the same were stolen from them. Secondly, the recovery of the items from the 2nd appellant cannot be said to have been above board.

52. There is also the issue as to whether the trial court ought to have ordered that the sentences it had imposed run consecutively rather than concurrently. The Court Appeal in *John Waweru Njoka vs. Republic* [2001] eKLR, in a case similar to the instant case, on appeal on sentence where the court had ordered consecutive sentences upon convicting for burglary and stealing, allowed the appeal and directed that the sentences be served concurrently, on the grounds that the twin offences were committed in one transaction. In *Clement Waruru Nyahuro vs. Republic* (1995) eKLR the same court held that the '… practice where a person commits more than one offence at the same time in the same transaction is, save in very exceptional circumstances to impose concurrent sentences.' See also *Victor Wambua Kaloki vs. Republic* [2018] eKLR, *Jacob Omondi Odongo & 3 others vs. Republic* [2013] eKLR and *Paul Gitau Ndungu vs. Republic* [2005] eKLR.

53. The facts of the instant case charge the appellants with acts of burglary and stealing committed in one night at two premises at more or less the same. It can be said that the offences were allegedly committed in more or less in one transactions. They qualify for sentences that ought to run concurrently rather than consecutively. That is the principle stated in the cases that are cited hereabove.

54. Finally, the offences charged are that defined in section 304(2) of the Penal Code, the felony of burglary. The offences created under section 304 are with respect to breaking into a dwelling house. The Penal Code defines 'dwelling house' at section 4 as follows:

> *"dwelling-house" includes any building or structure or part of a building or structure which is for the time being kept by the owner or occupier for the residence therein of himself, his family or his servants or any of them, and it is immaterial that it is from time to time uninhabited; a building or structure adjacent to or occupied with a dwelling-house is deemed to be part of the dwelling-house if there is a communication between such building or structure and the dwelling-house, either immediate or by means of a covered and enclosed passage leading from the one to the other, but not otherwise."*

55. It follows therefore that section 304 envisages breaking into premises used for residential or dwelling purposes. The material before me indicates that the premises alleged to have been broken into by the appellants were not dwelling places. PW1 and PW2 did not at all refer to the premises as their dwellings. Their evidence was that the same were shops from where they carried out businesses. All indications are that they resided or stayed or lived elsewhere and only came to the premises at daytime for the purpose of business. The Penal Code creates at section 306 a separate offence for offences committed with respect to shops and other non-dwelling houses. The said provision says:

"306. 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…"

56. Going by what I have stated above, it is clear that the charge that the appellants faced was premised on the wrong provisions of the law. The appellants were not alleged to have broken into a dwelling place but rather to premises where shops were operated from. They therefore should have been charged under section 306 of the Penal Code. Indeed, it would appear that burglary does not define the breaking into a shop, even where the same happens at nighttime.

57. I believe that I have said enough. Upon review of the entire evidence on record, and for the reasons that I have given above, I am not persuaded that the appellants received a fair trial and that their convictions were safe. I accordingly hereby quash the said convictions and set aside the sentences imposed on them. They shall consequently be set free from prison custody unless they are otherwise lawfully held.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 14th DAY OF June 2019

W MUSYOKA

JUDGE