REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUSIA

CRIMINAL APPEAL NO. 16 OF 2018

JOHN OPAMA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the original conviction and sentence in Criminal case No.3010 of 2016 of the

Chief Magistrate's Court at Busia by Hon. W.K. Chepseba–Chief Magistrate)

JUDGMENT

1. **John Opama,** the appellant herein, was convicted for the offence of house breaking contrary to section 304 (1) (b) and stealing contrary to section 279(b) of the Penal Code.

2. The particulars were that on the 8th November 2016 at Busia Township Location, within Busia County, jointly with others not before court broke and entered into the dwelling house of **Emmaculate Nanzala** with intent to steal and did steal from therein One LG flat screen TV, one super sound hoofer, 3 speakers, LG DVD, gas cylinder with burner, one Philips iron box, 3 bags,13 baby inner pants, 8 pairs of socks, a child's cap and Kopa solar radio all valued at Kshs. 55,200/= the property of the said **Emmaculate Nanzala.**

3. The appellant was sentenced to serve four years' imprisonment in the first limb and three years' imprisonment on the second limb. The sentence was ordered to run concurrently. He now appeals against both conviction and sentence.

4. His grounds of appeal can be summarised as follows:

a) The learned trial magistrate erred in law and in fact by convicting him on contradictory evidence.

b) The learned trial magistrate erred in law and in fact by convicting him on insufficient evidence.

c) The learned trial magistrate erred in law and in fact by disregarding the defence evidence.

5. The appeal was opposed by the state through Mr. Gacharia, learned counsel who contended that there was sufficient evidence that connected the appellant to the offence. He urged the court to find that the sentence was not excessive.

6. This is a first appellate court. As expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court and I have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated case of **Okeno vs. Republic [1972] EA 32.**

7. Before I analyse the evidence on record, I wish to point out that the learned trial magistrate did not specifically state whether he was convicting on the substantive or the alternative charge. This is important for the accused to know with certainty which offence he has been found guilty of. I however find that the appellant was not prejudiced for at the sentencing stage the magistrate made it clear as to which offence he was being sentenced for. It is desirable after conviction on the substantive charge for the trial court to indicate on record that he/she makes no finding on the alternative charge. This omission is however curable under section 382 of the Criminal Procedure Code.

8. The evidence at the disposal of the learned trial magistrate was that when **Emmaculate Nanzala** (PW1), the complainant left her house locked, upon her return she found the house having been broken into and a number of her items as captured in the particulars of the offence were missing. She went and reported to the police.

9. Meanwhile God was working in her favour. Musa Ochieng (PW2) saw a man, carrying bags, who boarded a motor cycle taxi. He and his colleagues became suspicious and pursued him in a vehicle they were driving. When he alighted at the Guardian stage, they interrogated him. He did not satisfy them and they took him to the police station. It turned out the items belonged to the complainant (PW1).

10. There was no direct evidence that the appellant was seen breaking into the house of the complainant. This was therefore a case apt for invoking the doctrine of recent possession. In the case of Isaac **Ng'ang'a Kahiga alias Peter Ng'ang'a Kahiga vs. Republic Criminal Appeal No. 82 of 2004** the principles of the doctrine of recent possession were laid as follows:

> **... 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 the 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. 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. 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.**

In the instant case, the appellant was found in a position the English would describe as" to be found with hand inside the cookie jar". The burden was on him to show how he came into his possession of the items of the complainant. In **Malinga v R [1989] KLR 225 Bosire, J** (as he then was) expressed himself thus at page **227**:

> **By the application of the doctrine the burden shifts from the prosecution to the accused to explain his possession of the item complained about. He can only be asked to explain his possession after the prosecution have proved certain basic facts. Firstly that the item he had in his possession had been stolen; it had been stolen a short period prior to the possession; that the lapse of time from the time of its loss to the time the accused was found with it was, from the nature of the item and circumstances of the case, recent; that there are no co-existing circumstances which point to any other person as having been in possession of the item. The doctrine being a presumption of the fact is a rebuttable presumption. That is why the accused is called upon to offer an explanation in rebuttal, which if he fails to do an inference is drawn that he either stole it or was a guilty receiver**.

I agree with the learned trial magistrate that the defence of the appellant amounted to mere denial and the explanation he offered was clearly an afterthought. His defence was considered before it was dismissed.

11. Section 304 (1) (b) of the Penal Code provides:

> **(1) Any person who—**
>
> **(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.**

While section 279(b) of the Penal Code provides:

> **if the thing is stolen in a dwelling-house, and its value exceeds one hundred shillings, or the offender at or immediately before or after the time of stealing uses or threatens to use violence to any person in the dwelling-house; the offender is liable to imprisonment for fourteen years.**

Considering that the appellant was not a first offender, the sentence was extremely lenient. I will therefore not disturb it.

12. The upshot of the foregoing analysis of the evidence on record, I find that the appeal lacks merit and it is accordingly dismissed.

DELIVERED and **SIGNED** at **BUSIA this 19th Day** of September**, 2019.**

KIARIE WAWERU KIARIE

JUDGE