REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL APPEAL NO. 32 OF 2017

ERICK MUKUNDI NDWIGA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

1. The appellant was dissatisfied with the judgment of Embu Senior Resident Magistrate delivered on 3/08/2017 where he was convicted of two offences. In count 1 he was charged with house breaking contrary to Section 304(1) and stealing contrary to Section 279(b) of the Penal Code. He was sentenced five (5) years imprisonment for the offence of house breaking and seven (7) years for stealing from a dwelling house.

2. In his petition of appeal, the appellant relied on several grounds which may be summarily stated:-

i. That crucial witnesses were not called to testify.

ii. That evidence was full of contradictions and was uncorroborated;

iii. That the case was not proved beyond any reasonable doubt.

iv. That the charge sheet was defective.

v. That he was not given time to prepare for his defence.

vi. That the case was determined before the appellant's application No. 8 of 2017 was determined.

3. The appeal was argued by way of written submissions.

4. The brief facts of this case are that on 26/03/2014 at Blue Valley Estate the house of the PW1 the complainant was broken into and several household items stolen. PW1 reported the matter to the police and engaged some people including PW2 and PW3 to help him look for the stolen goods. Information received led them to Dallas Estate where they spotted a motor bike bearing the name of "City Boy" registration No. KMDE 633A make Skygo which was carrying a pillion passenger holding a yellow paper bag. The said motor bike had been seen at the compound of PW1 earlier in the day probably at the time the house was broken into. The search party followed the motor bike heading towards Majimbo Estate.

5. The motor bike stopped outside a certain house and the two men entered inside carrying the yellow paper bag. The police joined the search group which resulted in the arrest of the appellant and his accomplice as well as recovery of some of the stolen goods including one DVD sony, 2 speakers and 2 remote control gadgets. The complainants identified the goods as his property.

6. The appellant argued that the charge was defective because it did not contain his alias name "City Boy" which was used to arrest him. The offence was said to have taken place at Blue Valley as indicated in the charge sheet. Although PW4 said that the offence took place at Kiambuthi, the evidence of PW1 and PW3 left no doubt in the mind of the trial magistrate that the offence took place at Blue Valley Estate. After all PW4 was the investigating officer who may not have been familiar with names of various estates and villages which were closely situated.

7. The appellant claimed that the items said to be stolen as per the evidence of PW1 differed from what is in the charge sheet. In addition to what was in the charge sheet, PW1 told the court that Kshs.6,000/= cash concealed in the bible was stolen. A Yecho phone was also found missing. PW1 explained that the items listed in the charge sheet were in the sitting room while the other two were in the bedroom. It appears that the police only included the first list that was given to them by PW1 before he discovered theft of other items in the bedroom.

The concern of the court are the items listed on the charge sheet but not the additional items not brought to the attention of the investigating officer.

8. As for the charge sheet, it contains all the particulars and ingredients of the offences in my view. It was held in the case of ***ISAAC OMAMBIA VS REPUBLIC [1965] EKLR*** that the contents of the charge sheet shall be in compliance with the provisions of Section 134 of the Criminal Procedure Code.

9. Section 134 provides:-

> Every charge or information shall contain, and shall be sufficient if it contains a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may b*e necessary for giving reasonable information as to the nature of the offence*.

10. The appellant was identified by PW2 who knew him before the incident as a boda boda operator popularly known as "City Boy" registration number KMDE 633A make Skygo at Blue Valley while PW2 operated at Dallas. The name of the appellant was correctly stated in the charge sheet as Erick Mukundi Ndwiga. It was not necessary to give the alias name of "City Boy" in this regard.

11. From the evidence of PW1 it is clear that he had moved to Dallas Estate at the time of hearing of the case. He said "I live in Dallas now". PW3 testified that he was a neighbour of the complainant at Blue Valley Estate at the time of the offence which was on 26/03/2014. This explains that the complainant lived at Blue Valley Estate at the time of the offence but had moved to Dallas estate at the time of his testimony on 13/10/2016. I find no contradiction concerning the place of residence of the complainant.

12. It is my considered opinion that the charge was drawn in accordance of the provisions of Section 134 of the Criminal Procedure Code with all the required particulars. It gave particulars of the appellant, the date, the place and the description of the property allegedly stolen. It is my finding that the charge was not defective as claimed.

13. The appellant alleged that there were contradictions in the evidence of PW1, PW2 and PW3. The particulars he gave were in respect of the place and date of the offence, the description of the property allegedly stolen, the place of residence of the complainant and the place of recovery of the exhibits. I have already dealt with those issues in the foregoing paragraphs.

14. The appellant claimed that crucial witnesses were not called to testify. The only witness he named was the informer of PW3. The respondent submitted that informers play a vital role in prevention of crime and would be endangered if they were to be called to testify.

15. In the case of ***JOHN OTIENO JUMA VS REPUBLIC [2011] eKLR*** the Court of Appeal stated:-

> *Whether the informer should have been summoned to testify, we are aware of the fact that their protection springs from public interest considerations, because were they to testify, their future usefulness in the same role could be extinguished or their effectiveness in their work considerably impaired .. in the circumstances of this case, their evidence was not necessary to determine the innocence or otherwise of the appellant because the prosecution's other evidence served the purpose.*

16. In that case the court appreciated the need to preserve the identity of an informer given the role played by them.

17. It must be appreciated that the prosecution is at liberty to call such number of witnesses it deems fit to prove any offence. The appellant need not bother about those witnesses who are not called to testify. He is at liberty to call the witnesses in his defence if he so wishes.

18. Contrary to the assertion of the appellant that he was not booked in the OB as one of the suspects in possession of the items recovered, it was not necessary that such booking be done. The evidence of PW1, PW2, PW3 and PW4 on the recovery was overwhelming.

19. It was argued that the appellant was not given sufficient time to prepare his defence. The matter came for defence hearing the first time on 28/02/2017 when the appellant said he was not ready to proceed. The case was adjourned to7/07/2017 when the appellant requested for typed proceeding to enable him prepare for his defence. He was served with the proceedings on 21/03/2017. The defence case was fixed for hearing on 26/04/2017 but the trial court was not sitting on that day. On 16/05/2017 the appellant told the court that he was not ready to proceed with his defence. The same case applied to the next hearing date of 3/06/2017 when the trial magistrate rejected his application for adjournment.

20. It is clear on record that after the appellant was supplied with typed proceedings, the case was adjourned three times on his application and the trial magistrate was justified to refuse any further adjournment. I am of the considered opinion that the appellant was given sufficient time to prepare for his defence but he failed to utilize that time. When adjournment was denied the appellant opted not to proceed with his defence and the case was set for judgment. Having been given more than sufficient time to prepare for his defence, I find that the rights of the appellant were not violated by the trial court.

21. The appellant argued that the prosecution did not establish that the house where the property was recovered belonged to him. This was a case where PW3 received information that the motor cycle inscribed "City Boy" had been spotted by PW1's neighbour at PW1's compound at the material time. PW3 knew the appellant as the rider of the said motor bike. He then led PW1 and another towards Majimbo Estate where they met the appellant on the motor cycle with a pillion passenger.

22. The appellant was trailed up to a certain house in which he entered with his passenger. The two were arrested in possession of most of the stolen items. There was no other person found in that house.

23. PW3 said that when the search party entered the house, the two men were already connecting the speakers to the sub-woofer. Both the speakers and sub- woofer were part of the stolen property. This was proof of possession which cannot be attributed to any other person but on the appellant and his accomplice. His accomplice is said to have been tried to conclusion after the appellant absconded in this case. He was brought to Embu Chief magistrate's court from Runyenjes Principal Magistrate's court where he was facing another offence.

24. The failure by PW4 the investigating officer to establish who owned or rented the house does not affect the overwhelming evidence of the prosecution on possession. Further more, the property was recovered in the hands of the appellant and his accomplice.

25. The trial magistrate had no direct evidence before him. No one saw the appellant steal the items from the house of PW1 save for the informer who saw the motor bike inscribed the words “City Boy”. He was not a witness and that evidence coming through PW3 was hearsay.

26. The magistrate relied on the doctrine of recent possession to convict the appellant. The evidence of PW1, PW3 and PW4 established recent possession on the part of the appellant.

27. It was held in the case of ***ISAAC NGANGA KAHIGA VS REPUBLIC Criminal Appeal No. 82 of 2004*** that :-

> 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. 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.

28. In this case, the stolen household goods were found in possession of the appellant. The complainant positively identified the stolen property. It was established that the property was stolen from the complainant and that the property was recently stolen.

29. The incident took place on 26/03/2017 during the day and the property was recovered in the possession of the appellant around 9.00 p.m. which was only hours after the theft.

30. The appellant did not claim ownership of the goods. Neither did he make any attempt to explain how he came into possession of the goods. It was held in the case of ***MALINGI VS REPUBLIC [1989] KLR 225*** that:-

> By the application of the doctrine, the burden shifts from the prosecution to the accused to explain his possession of the items complained about. He can only be asked to explain his possession after the prosecution has proved certain basic facts. Firstly that the items 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 items. The doctrine being a presumption of 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.

31. In view of the holding in the ***Malingi case*** (supra), the magistrate correctly applied the doctrine of recent possession in this case.

32. PW1, PW2 and PW4 gave evidence that the front door of the house had been broken and property listed in the charge sheet stolen. The appellant was found in possession of the stolen items the same evening and failed to give any explanation as to possession. He actually gave no defence against the charges.

33. I find that the prosecution proved the case beyond any reasonable doubt. The conviction by the trial magistrate was safe and it is hereby upheld.

34. The sentences imposed were within the law. I find no justification to interfere with them and are hereby upheld.

35. I find that this appeal lacks merit and I hereby dismiss it accordingly.

36. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 11TH DAY OF JUNE, 2018.

F. MUCHEMI

JUDGE

In the presence of:-

Ms. Mate for respondent

Appellant present