



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISII**

**CRIMINAL APPEAL NO. 18 OF 2017**

**CORAM: D. S. MAJANJA J.**

**BETWEEN**

**JOEL ONGETA ONDIEKI.....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

*(Being an appeal from the original conviction and sentence of Hon. N. Wairimu, SRM dated 22<sup>nd</sup> December 2015 at the Senior Principal Magistrates Court at Ogembo in Criminal Case No. 394 of 2013)*

**JUDGMENT**

1. Before the subordinate court, the appellant, **JOHN ONGETA ONDIEKI**, and two other accused faced a charge of breaking into a building and committing a felony contrary to **section 306(a)** of the *Penal Code (Chapter 63 of the Laws of Kenya)*. The appellant was convicted on the said charge and sentenced to 5 years' imprisonment. The particulars of the charge were that on the night of 11<sup>th</sup> March 2013 at Nyamache market, Nyamache District within Kisii County, the appellant and the co-accused jointly with others not before the court, broke into and entered a building, namely a shop of **LABAN NYABUTO ONCHANGWA** and committed therein a felony, namely theft and stole from there 8 T-shirts, 7 shirts, 4 pairs of open shoes, 1 dress, 8 kgs of beans and a blanket the property of **LABAN NYABUTO ONCHANGWA**.

2. The appellant now appeals against the conviction and sentence. The thrust of his petition of appeal is that the prosecution did not prove its case beyond reasonable doubt and that in reaching the conclusion that he was guilty, the trial magistrate wrongly applied the doctrine of recent possession to convict him. The respondent supports the conviction and urges the court to uphold it on the basis that the prosecution proved the offence beyond reasonable doubt.

3. It is the duty of this court, being a first appellate court, to subject the evidence on record to a fresh review and scrutiny and come to its own conclusions, all the time bearing in mind that it did not see the witnesses testify as to form its own opinion on their demeanour (see *Okeno v Republic [1972] EA 32*).

4. The evidence against the appellant was that the complainant, Laban Nyabuto Ochwanga (PW 1) told the court that on the night of 11<sup>th</sup> March 2013, he was attending a fundraising for the burial of a neighbour. In the morning, he found his shop had been broken into and his shoes, clothes and beans had been stolen. The padlock of the back door had been broken. He reported the incident at the Nyamache AP Office. As he started investigating, he saw one of the co-accused wearing a shirt that had been stolen. On 5<sup>th</sup> April 2013, community policing members arrested him and he led them to the appellant's house where PW 1's pair of white open shoes, 3 stripped shirts, red, brown and black were recovered. 4 tins of beans were also recovered. Among the people present at the search was Kefa Onchiri (PW 2) who confirmed that PW 1 pointed out his clothes as recovered from the appellant's house. After carrying out the search, the appellant was arrested and taken to Nyangusu Police Station where the Investigating Officer, PC Musimi Munyao (PW 5) recorded statements, took possession of the exhibits and charged the appellant.

5. In his unsworn statement, the appellant denied the offence and told the court that he was a hawker and on 8<sup>th</sup> April 2013, he went to Nyamache market where he was selling peanuts. He explained that he was arrested by people he did not know who took him to Nyamache AP Camp and then he was taken to Nyangusu Police Station after which he was charged.

6. The appellant's conviction was based on the doctrine of recent possession which entitles the court to draw an inference of guilt where an accused is found in possession of recently stolen property in unexplained circumstances. The Court of Appeal summarised the elements of the doctrine of recent possession in *Eric Otieno Arum v Republic KSM CA Criminal Appeal No. 85 of 2005 [2006] eKLR*, where the court stated as follows:

*In our view, 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. 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.*

7. Once the primary facts are established, the accused bears the evidential burden to provide a reasonable explanation for the possession. While the law is that in a criminal trial, the prosecution bears the burden of proving the case against the accused throughout the case, in a case where one is found in possession of recently stolen property like in this case, the evidential burden shifts to him to explain his possession. That explanation need only be a plausible one but one needs to put it forward for the court's consideration (see **Malingi v Republic [1988] KLR 225**).

8. The totality of the evidence is that PW 1 and PW 2 went to the appellant's house, where they found him sleeping, and recovered a pair of white open shoes, 3 stripped red, brown and black shirts which were produced in evidence. In cross-examination, PW 2 told the court that items recovered were tied together with a sack of beans. On this evidence, I am satisfied that the PW 1 identified his items and although the time between the date of the theft to the time of recovery may have been sufficient to dispose of those items, I am of the view that given the quantity of the items recovered and the manner in which they were found, the irresistible conclusion is that the appellant was the person who broke into PW 1's house and stole them. The appellant did not explain how he came into possession of the stolen items nor did he even lay claim to them. For those reasons, I affirm the conviction.

9. Turning to the sentence, the appellant was sentenced to 5 years' imprisonment. The general principles upon which the first appellate court acts are now well settled. It has jurisdiction to interfere with a sentence imposed by the trial court if it is satisfied that in arriving at the sentence, the trial court did not take into account a relevant factor or that it took into account an irrelevant factor or that in all the circumstances of the case, the sentence is harsh and excessive (see **Wanjema v Republic [1971] EA 493**).

10. In this case, the appellant's co-accused was sentenced to serve a one year suspended sentence after being convicted of the offence of handling stolen goods contrary to **section 322(2)** of the **Penal Code**. I note the offence of handling stolen goods is a serious offence that attracts a maximum sentence of 14 years' imprisonment as compared to the offence the appellant was convicted of, which attracts a maximum sentence of 7 years' imprisonment. Even though the accused were convicted of different offences relating to the same transaction and facts, the court ought to avoid disparity in sentencing as is evident in this case. The Court of Appeal, in **Marando v Republic [1980] KLR 114**, dealt with the issue of disparity in sentencing between co-accused persons and adopted the dictum in **R v Ball [1951] 35 Cr App Rep 164, 167** that;

*The differentiation in treatment is justified if the court, in considering the public interest, had regard to the difference in the characters and antecedents of the two convicted men and discriminates between them because of those differences.*

11. The trial magistrate did not set out in the sentencing notes why the 5 years' term of imprisonment was imposed, and it is also not apparent why the sentence varies substantially from that imposed on the co-accused. I note that the appellant did not offer any mitigation but he ought to have been considered a first offender and considering the sentence imposed on the co-accused, I would reduce the sentence imposed on the appellant.

12. I affirm the conviction and allow the appeal only to the extent that I reduce the sentence of 5 years' imprisonment to time served. The appellant is released unless otherwise lawfully held.

**DATED and DELIVERED at KISII this 12<sup>th</sup> day of July 2018.**

**D.S. MAJANJA**

**JUDGE**

Appellant in person.

Mr Otieno, Senior Prosecution Counsel, instructed by the Office of the Director of Public Prosecutions for the respondent.