REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KABARNET

HCCR NO. 72 OF 2017

(FORMERLY ELD HCCR. NO. 42 OF 2015)

REPUBLIC........................PROSECUTOR

VERSUS

ELVIS KIBET............................ACCUSED

[Appeal from the original conviction and sentence in Kabarnet Principal Magistrate's Court Criminal Case No. 140 of 2015 delivered on the 29th day of September, 2015 by E. Kigen, RM]

JUDGMENT

1. The appeal herein relates to the application of the doctrine of recent possession by the trial court in a case of breaking and stealing contrary to section 306 (a) of the Penal Code. The appellant were charged with another (2nd accused) who was acquitted of the charges which were set out in the charge sheet as follows:

> ***CHARGE****: Breaking into a building and committing a felony contrary to section 306 (a) of the Penal Code.*
>
> ***PARTICULARS****: (1) ELVIS KIBET (2) KOMEN LAGAT. On the night of 14/15/2/2015 at unknown time at Kiboino village, Baringo central sub-County within Baringo County, jointly broke into a kiosk of one Judy Cheruiyot and did steal 30kg of Sugar, 2 pants bar soap, Colgate 6 sodas, 9 small torches, all valued at Ksh.6,233/= the property of the said Judy Cheruiyot.*
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> ***ALTERNATIVE CHARGE****: Handling stolen property contrary to section 322(2) of the penal code.*
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> ***PARTICULARS*** *:(1) ELVIS KIBET (2) KOMEN LAGAT*
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> *On the 15th day of February 2015 at 8:30 am at Kabarnet town in Baringo Central Sub county within Baringo County jointly, otherwise than in the course of stealing dishonestly handled 4 kgs of sugar two inner wears, one small torch, one mobile phone make Bird, two mobile phone batteries, one bar soap, one packet of Colgate, knowing or having reason to believe them to be stolen property.*
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> ***Count 2:*** *Breaking into a building and committing a felony contrary to section 306(a) of the Penal Code*
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> ***PARTICULARS*** *:(1) ELVIS KIBET (2) KOMEN LAGAT*
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> *On the night of 14/15/2/15 at unknown time at Kiboino trading Centre, Baringo central Sub-county, with in Baringo county, jointly broke and entered a building namely shop of one Anita Kiptum and did steal one mobile phone make bird all valued at Ksh.4000/= the property of the said Anita Kiptum.*

2. The prosecution called four witnesses to prove the charge and the accused when placed on their defence gave sworn evidence and the appellant herein called 2 witnesses.

3. The trial court convicted the appellant relying on the doctrine of recent possession found the appellant to have been the thief and discharged the 2nd accused for want of evidence linking him to the offence, as follows:-

> *"The doctrine of recent possession is invoked by the courts "if it is proved that premises have broken into and that certain property has been stolen from the premises and that shortly afterwards a man is found in possession of that property, that is certainly*

evidence which the jury can infer that he is the house breaker or shop breaker" [see Republic versus Loughlin, 35 Criminal Appeal and Maina and 3 Others versus R [1986] KLR301 the following ingrediences must be established for recent possession to be applicable: that the item in question was stolen from the owner; that the said item was recovered in possession of the accused person so soon after the theft and that the accused did not offer reasonable explanation as to how he came to be in possession of the stolen item.

In the present case the said items had been stolen on the night of 14th and 15th and the same had been recovered on 15th at about 8:30 am. The 1st accused stated that he had brought the said items from home. ***However, looking at the evidence, the accused had been arrested with other items including ladies panties which were stashed on his pocket, 1 torch, 1 bunch of keys and phones and batteries which were positively identified by the complainants. The 1st accused witnesses could not establish how the above items had been found with the 1st accused yet they had not given them to him as alleged.***

I find a lot of contradictions on the evidence of the 1st accused as according to him he was to join a friend who had come home and invited him as he had secured work for him but the testimony of DW3 was that he had connected the accused to a cousin who was in Nakuru. Clearly the said person was non-existent and had not set foot on the accused's home as alleged by the accused. DW2 and DW3 being sisters to the accused had come to court to exonerate the brother and defeat the ends of justice. I dismissed their evidence as being contradictory and uncorroborated with lots of lies.

As to the 2nd accused it is clear from the evidence that nobody saw him with the stolen items and after conducting a search on his pocket and his house there were no recoveries that were made. That all the prosecution witnesses did not identify him as he was unknown to them unlike the 1st accused who lives in Kiboino and is also known by PW1 and PW2 who are his neighbours. In the circumstances, I do not find any evidence either directly or indirectly linking the 2nd accused to the committal of the offence and I do proceed to acquit him under section 215 of the CPC in all the counts and in alternative.

As for the 1st accused, I do find that there is overwhelming evidence pointing to him as the main suspect who had committed the said offences in count I and count II.

I do find that the prosecution witnesses lined up before court were credible witnesses who have proved the prosecution case beyond reasonable doubt.

I do find it safe to find the accused guilty of the offence in count I and count II. That is breaking into a building and committing a felony contrary to section 306(a) of the Penal Code.

E. KIGEN [RM]

4. I have considered the appeal and the evidence presented before the trial court in accordance with the duty of first appellate in court (**Okeno v. R** [1992] EA 32).

5. There is an obvious error in the charge sheet in that the offence that is alleged to have taken place on the night of 14/15 February 2015 is charged as *"breaking into and committing a felony contrary to section 306 (a) of the Penal Code*." The correct charge in the circumstances of the particulars of the offence and evidence presented is "Burglary" offence which ought to have been charged as house breaking and stealing contrary to section 304(1) (a) read with section 304(2) of the Penal Code, and section 275 of the Penal Code.

6. Burglary carries sentence of 10 years imprisonment and the sentence of general theft under section 275 of the Penal Code is 3 years.

7. The appellant and the co-accused were not prejudiced in any way in the misstatement of the offence as both offences of burglary and house breaking involve the breaking into the premises, vehicle or residence, and the particulars of the offences in this case were clearly set out in the charge sheet. In addition, the penalties would have been stiffer if the charge of burglary was preferred. The court will, therefore, consider the appeal on the basis of the charge of house breaking contrary to section 306 (a) of the Penal Code not withstanding that the particulars and the evidence support the more serious offences of burglary and stealing. The defect is without doubt curable under section 382 of the Criminal Procedure Code.

8. The prosecution case was that the two complainants, PW1 and PW2, had in the evening of 14/2/15 closed their respective shops and on the following morning were called by neighbours notifying them that their shops had been broken into. The complainants lost shop items including 30 kg of sugar 12 pieces of mini torches, milk, sodas 6 packets of Colgate and assorted pants for the 1st complainant and mobile phone, phone batteries bunch of keys and cash in coins for the 2nd complainant.

9. On the same day of discovery of theft, 15/2/15, the appellant and the co-accused were arrested by members of the public who reported to PW3, AP Police officer at GTI gate that they had suspects with items suspected to be stolen. On proceeding to where the appellant and his co-accused were, PW3 found the two surrounded by members of the public and recovered from them 5kg of sugar, in ½ kg, 3 phones, bunch of keys, 2 pants, 1 ATM card, 1 identity card and sheets. On interrogation, they said "the items were from mother's burial."

10. The appellant, as 1st accused, testified that he had been arrested on 15/2/15 while on his way to Nakuru where a friend had offered to help him secure a job at the KPLC. He agreed that he had with him sugar 2kg, Colgate and some other items which he said his sister had packed for him for the journey, and suggested that the items were for donations made by well-wishers following the death of his mother on 7/2/15. On his way to Nakuru, he had passed by Kaprogonya centre where he met one Ken who asked him to buy him alcohol. When the appellant refused, the said Ken started beating him and shouted that he was a thief and then took him and the 2nd accused who had identified the appellant as a person from Kiboino to his shop where Ken asked his wife Faith Ngetich to call the Police officers as he suspected that he had

stolen from him. The appellant called his 2 sisters DW2 and DW3 as witnesses.

11. The second accused said he had gone to Kaprogonya to drink Busaa and "the appellant had come with a black paper bag and shortly there had been shouts and the accused had been pushed outside. They were asking him where he was from and I told him that he was from Kiboino…I checked the paper bag which I saw sugar, colgate and soap. They asked where the items were from and the 1st accused confirmed that they were from home. On searching the 1st accused, they found 2 panties in his pockets and keys, batteries and phones".

12. The principle for application of the doctrine of recent possession are well known. See **Arum v. R** (2006) 1 KLR 233 where the test from application of the doctrine is set out as follows:

1. The property was found on the suspect;

2. The property was positively identified by the complainant;

3. The property was stolen from the complainant; and

4. The property was recently stolen from the complainant.

13. With regard with the offence of house breaking **R v. Loughlin** 35 CR APP R 69, cited in Maina and 3 Others v. R (1986) KLR 301 relied on by the trial court, sets out the principle in the words of the Lord Chief Justice of England, that;

> " *if it is proved premises have been broken into and that certain property has been stolen from the premises and that shortly afterwards a man if found in possession of that property that is certainly evidence from which the jury can infer that he is the house breaker or shop-breaker*".

14. The evidence of the appellant and the investigating officer who visited the scene proved that the two premises had been broken into during the night of 14/15 February 2015, and various shops items were stolen therefrom. The question remained only whether the said stolen goods were found on the appellant and his co-accused.

15. PW3, the arresting officer testified as to the recovery of the alleged stolen items as follows:

> "*I recall on 15/2/15 I was on duty at GTI gate when members of the public came and requested that they had seen suspects with items suspected to be stolen. We proceeded to Kaprogonya and on reaching we found the suspects surrounded by members of the public. They had sugar 5 Kg in ½ Kg, 3 phones, bunch of keys, 2 panties, I spotlight, I ATM, 1 identity card and sheets. The identity card belonged to Kipsise. We interrogated them and they told us that they were from the mother's burial."*

16. The members of the public including Faith Ngetich who reported the matter to the arresting officer and who could positively testify to the recovery of the items on the appellant and his co-accused was not called as witnesses.

17. In his defence, the appellant only admitted recovery of the items and lamented that "all the exhibits were never availed in court including shoes" and confirmed that "I informed the officers that I had bought the items from home and even called my sisters to confirm the same.

18. As evidence of a co-accused, the confirmation of the recovery of the goods on the appellant by the DW2 could not be used as a basis for conviction of the appellant since it was not a confession and he was not cross - examined on it by the appellant. See ***Odongo v. R*** (1983) KLR 301,304 where the Court of Appeal held as follows;

> "*The second accused's evidence supported the prosecution's case in material respect. It undermined the appellant's defence. It was therefore evidence against a co-defendant (Murdoch v Taylor AC 574 [1965] 1 ALL ER 406). The second accused's statement was not a confession nor was it evidence on oath which could be tested by cross-examination. In Patrisi Ozia v R [1951] EA 36 the Court of Appeal for East Africa held that an unsworn statement by an accused cannot be used against another co-accused. The same view was expressed in Ezera Kyabamanamaizi v R [1962] EA 309. Also in Usin and Another v Republic [1973] EA 467 where the appellants were convicted of murder and the judge stated that he took into account the words in which the appellant pleaded not guilty and he relied upon the unsworn statement of the second appellant as evidence against the first appellant, which statement was entirely exculpatory and was not a confession. The Court held that: (i) an unsworn statement is not evidence against a co-accused and (ii) as the statement was not a confession it could not be taken into consideration against a co-accused.*
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> *The three cases were referred to and followed in Chaama Hassan Hasa v The Republic [1976] KLR 6 in which the Court criticized the magistrate for using which what one accused had told the police against his co-accused when what that accused had told the police was not in the nature of a confession. In fact, even where ne accused gives evidence on oath, such evidence must be regarded with extreme caution when it is to be used against a co-accused.*
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> *As the second accused's statement was unsworn and was not a confession, it was not evidence against his co-accused, the appellant, and the trial magistrate should not have used it."*

19. There remains, therefore, only the evidence of PW3 the arresting officer to prove the recovery of the allegedly stolen items. The investigating officer PW4 however confirmed receipt of the exhibits from the Abstract Police officer as follow:

"*I wish to produce the exhibits*"

Sugar MFI- 1 Produced as exhibit No.1,

1 bar soap MFI-2 Produced as exhibit No. 2,

2 panties MFI 3 a b produced as exhibit No. 3a, b

Colgate MFI 4 produced as exhibit No.4,

1 red torch MFI 5 Produced as exhibit 5,

1 phone make bird MFI-6 produced as exhibit No. 6,

2 batteries MFI 7 a, b produced as exhibit no. 7 a, b,

A bunch of keys MFI-[8] Produced as exhibit no.8

1 identity card MFI[9] Produced as exhibit no. 9,

1 KCB card MFI-[10] Produced as exhibit No. 10

Assorted safaricom cards MFI-11 produced as exhibit No. 11

20. The Investigating officer testified that the 2 complainants positively identified the items as their stolen items. The Prosecution has proved the theft and recovery. It was for accused to explain possession.

21. Weighing the evidence presented by the Prosecution and by the Defence as a whole, I do not find reasonable doubt in the testimony of the Defence witnesses DW1, DW2 and DW3 explaining that the items were provisions from home made for the appellant who was on journey to take up a job in Nakuru. On cross examination, the appellant explained that his bag of clothes had been transported ahead of him to Nakuru. While some of the items like sugar and milk could be explained as donations at a burial ceremony, the panties, mobile phones, batteries and torch identified by the complainants were not explained at all.

22. I find that the Prosecution proved the case against the appellant on the basis of recent possession doctrine: that the items were stolen; and that they were recovered from the appellant who had no explanation for their possession of the items which were found in his possession less than 24 hours after the theft.

23. There was no evidence to link the 2nd accused to the theft or recovery of the stolen goods, and the Court upholds his acquittal by the trial court.

Orders

24. Accordingly, for the reasons set out above, the appeal by the appellant is without merit and the same is dismissed.

DATED AND DELIVERED THIS 2ND DAY OF JULY 2018.

EDWARD M. MURIITHI

JUDGE

Appearances

Appellant in Person.

Ms. Kenei, Prosecution Counsel for DPP.