



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CRIMINAL APPEAL NUMBER 85 OF 2014

JOHN KEYA MALIKA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal against conviction and sentence in Criminal Case Number 482 of 2013 in the Senior Principal Magistrate's Court at Butere delivered by Hon. E.S.Olwande (Ag. SPM) on 20th June, 2014)

JUDGMENT

Background

1. **JOHN KEYA MALIKA**, the appellant herein has filed this appeal against conviction and 5 year sentence on an alternative charge of handling stolen goods contrary to Section 322 (1) (2) of the Penal Code. The particulars of the charge are that:-

“On 12.12.13 at Maisha Estate shirotsa sublocation in Butere District within Kakamega County otherwise than in the course of stealing dishonestly retained one Sony Woofer speaker knowing or having reasons to believe them to be stolen goods.

The prosecution's case

2. The prosecution called 2 witnesses in support of the case. **PW1, Praxeded Agutu Netia**, the complainant herein stated that on 13.11.13, she locked her bar and salon but found it broken into the following day. That several goods were stolen among them a Sony woofer speaker and she reported the matter to police. She recalled that on 12.12.13, her woofer was recovered from a wooden box that was covered with a cloth in the appellant's house as a result of which the appellant was arrested and charged. **PW2 Jackson Wanyama**, the investigating officer stated that the appellant was arrested on 11.12.13 in connection with offences of house breaking and stealing. He recalled that on 12.12.13, he went to the appellant's house in company of his colleagues and the complainant and upon conducting a search recovered complainant's woofer speaker among other items and the appellant was later charged. He produced the inventory of recovery duly signed by the appellant on 12.12.13 as PEXH. 2

3. When put on his defence, the appellant gave sworn testimony in which he denied the offence.

4. In a judgment 11.7.13, appellant was convicted and sentenced to serve 5 years imprisonment.

The Appeal

5. The conviction and sentence provoked this appeal. In his grounds of appeal filed on 3.7.17, appellant raised 10 grounds of appeal which I have summarized into 4 grounds as follows:-

1. Breach of constitutional right under Article 50(2)(j) of the Constitution

2. That the prosecution case was not proved beyond reasonable doubt

3. That his defence was not considered

4. That the sentence was excessive

6. When the appeal came up for hearing on 5.9.18, the appellant relied wholly on the grounds of appeal and submissions filed on 5.9.18.

7. Mr. Juma, learned State Counsel opposed and relied on the evidence on record.

Analysis and Determination

8. The duty of the 1st appellate court was explained by the Court of Appeal in the case of *Kariuki Karanja Vs Republic [1986] KLR 190* that:-

"On first appeal from a conviction by a judge or magistrate, the appellant is entitled to have the appellate court's own consideration and view of the evidence as a whole and its own decision thereon. The court has a duty to rehear the case and reconsider the material before the judge or magistrate with such materials as it may have decided to admit."

9. I have considered the appeal in the light of the evidence on record, the grounds of appeal and submissions by the appellant.

10. In dealing with this appeal, I will address the 4 grounds summarized above as follows:-

Breach of constitutional right under Article 50(2)(j) of the Constitution

11. Appellant argues that his right to a fair hearing was breached since he was not supplied with the statements in support of the prosecution case. I have considered the evidence on record and I find that this issue would have been better addressed by the trial court but it was not raised. This ground of appeal therefore fails.

Was the prosecution case was not proved beyond reasonable doubt

12. PW1 and PW2 categorically stated that complainant's woofer was recovered concealed in the appellant's house on 12.12.13 which was one month from the date it was stolen.

13. Their evidence was well corroborated by the inventory of recovery duly signed by the appellant on 12.12.13 which was produced as PEXH. 2 and I therefore agree with the trial magistrate that the prosecution case was proved beyond a shadow of doubt.

Was the appellant's defence considered?

14. In the case of *Malingi vs Republic (1989) KLR 225 at pg 227* Bosire J (as he then was) rendered himself as follows:-

"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 the possession after the prosecution has proved certain basic facts. Firstly, that the item he had in his possession had been stolen a short period prior to the possession, that the lapse of time 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 a 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."

15. This was the same holding in the cases of *Isaac Ng'ang'a Kahiga alias Peter Ng'ang'a Kahiga vs Republic [2006] eKLR* and *Reuben Nyakango Mose & Another vs Republic [2013] eKLR* where the Courts of Appeal affirmed that the aforesaid circumstances must exist before doctrine of recent possession could be invoked.

16. In his defence, the appellant merely denied the offence but failed to explain **his possession of the complainant's complained about after the prosecution proved that it was recovered from his house**. The defence was duly considered and I wholly agree with the trial magistrate ruled that such a defence was hard to believe.

Was the sentence was excessive

17. I have considered the provisions of Section 322 (2) of the Penal Code and it provides for a maximum sentence of 14 years for the offence of handling stolen goods.

18. Although the appellant had two previous convictions for similar offenses, the learned trial magistrate in her discretion sentenced the appellant to serve only 5 years. Appellant should be grateful for the trial magistrate's leniency.

19. As a result, I find that the sentence imposed on the appellant is lawfully and there would be no reasonable cause to interfere with it.

20. From the above analysis, I have come to the conclusion that the prosecution discharged its burden and proved the case against the appellant beyond any reasonable doubt. Accordingly, I find that this appeal has no merit. It is dismissed and the conviction and the sentence are upheld.

It is so ordered.

DATED AND SIGNED AT KAKAMEGA THIS 7th DAY OF September.2018

T. W. CHERERE

JUDGE

In the presence of-

Court Assistants - George & Erick

Appellant - In person

For the State - Mr. Juma