



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT BOMET**

**CRIMINAL APPEAL NO. 31 OF 2017**

**WESLEY KIBET CHEPKWONY.....APPELLANT**

**-VERSUS-**

**REPUBLIC.....RESPONDENT**

***(Being an appeal from the original conviction and sentence in***

***CR. Case No. 1156 of 2015 PM's Court Bomet Hon P. Achieng)***

**JUDGMENT**

The appellant herein was convicted and sentenced to 4 years imprisonment for the offence of breaking into a building and committing a felony C/S 306 (a) of the penal code.

The particulars are that on the 19<sup>th</sup> and 20<sup>th</sup> day of September 2015 at Bomet Town in Bomet County broke and entered a building namely Lion of Judah Church of pastor Dennis Kipkorir Bett and committed therein a felony, namely stealing one amplifier and its memory card and two speakers all valued at Kshs.20,700/= the property of Dennis Kipkorir Bett.

This is the first appellate court. It has a duty to re-evaluate and reconsider evidence on record so as to arrive at its own conclusions.

- Okeno –vs- R- 1972 EALR

**Brief Facts**

The complainant is a pastor with the Lion of Judah Church Ministries based at Bomet. He testified that on the 19<sup>th</sup> day of September 2015 he closed the church at about 6.00 p.m. and went home. The following day in the morning when he opened the church he found 2 speakers, an amplifier memory card, Honda generator missing. Entry had been gained through a window and the front door had been opened. Upon search they recovered the Honda generator in a bush near the church. He went and reported the matter to police. While there he got information from a lady called Damaris that a memory card with his photos was being sold to her.

They proceeded there in the company of police but they found when the seller had already left. On 21/9/2015 with the assistance of chief Bomet, they arrested the accused as he was attempting to sell the memory card to Damaris. The memory card was treated as exhibit.

PW2 Damaris Kilel is a business lady at Bomet. She testified that on the 20<sup>th</sup> day of September 2015 at 6.00 p.m. the accused went to her place of work, and told her that he was hungry and was selling a memory card for Kshs.100/=. Upon inserting the memory card in her phone she saw the photographs of pastor Dennis who was their church pastor and she decided to call him. He advised her to stall him, till he arrived. Later the accused was arrested by the area chief and the memory card recovered.

In his defence the appellant testified that he is a mason and that on the day he was arrested he was seated in a hotel which is adjacent to the chief's offices. He was called by the chief who inquired whether he had sold a memory card to a certain woman. He was taken to police station and charged with this offence.

In his amended grounds of appeal it's the appellants contention that article 49(1)(f) (i) of the constitution was violated in that he was not presented in court within the 24 hour window but was done so three days later.

It is also contended that S.211 of the CPC was not complied with.

On the issue of violation of article 49(1)(f) of the constitution.

Article 22 of the constitution provides; “Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the bill of rights has been denied, violated, or infringed, or is threatened”.

The reliefs which the court may grant are

- (a) A declaration of rights
- (b) An injunction
- (c) A conservatory order
- (d) A declaration of invalidity of any law.....
- (e) An order for compensation and
- (f) An order of judicial review.

This is an appeal whereby the appellant seeks for it to succeed so as to be acquitted.

The remedies provided for in article 22 of the constitution do not include an acquittal.

On the question of non –compliance with S.211 of the CPC. A perusal of the proceedings does to show that after the close of prosecution case and after finding that the prosecution had established a prima facie case, the learned trial magistrate did proceed to explain the substance of the charge and rights of the accused under S.211 of the CPC. The accused opted to give an unsworn statement and call no witness.

It is not correct and proper to allege that S.211 of the CPC was not complied with.

The accused was charged with breaking into a building and committing a felony.

There is evidence that the complainant’s church building was broken into in the night of 19<sup>th</sup> and 20<sup>th</sup> September 2015.

Entry was gained through a window and items went missing including a memory card.

On the 20<sup>th</sup> September 2015 the accused presented himself before Damaris (PW2) and purported to sell to him a memory card. The break in took place on the night of 19<sup>th</sup> and 20<sup>th</sup> September 2015. The recovery of the memory card was on 20<sup>th</sup> September 2015 barely hours in between. The learned trial magistrate applied the doctrine of recent possession to arrive at the conclusion that he accused must have been the culprit.

In the case of David Mango –vs- R (2015) eKLR the court of appeal laid out the principles and elements of the doctrine of recent possession thus, proof

- (i) That the property was found with the suspect.
- (ii) That the property is positively the property of the complainant.
- (iii) That the property was stolen from the complainant.
- (iv) That the property was recently stolen from the complainant.

In the present case, there is no dispute that the memory card was

the property of the complainant. It is the evidence of PW2 (Damaris) that the accused was selling her the memory card which she recognized as consisting of photographs belonging to her local pastor

Between the break-in, and the recovery it was barely hours. This was recent.

I am satisfied that the elements of recent possession were proved.

The conviction was safe and the sentence lawful.

The appeal has no merit and it’s dismissed.

Judgment delivered dated and signed this 1<sup>st</sup> October 2018 in the presence of learned counsel for prosecution Mr. Wawire.

Appellant in person present court assistant Rotich.

**M. MUYA**

**JUDGE**

**1/10/2018**