REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CRIMINAL APPEAL NO. 38 OF 2016

SAMUEL MWITA MOGESI...APPELLANT

VERSUS

REPUBLIC... RESPONDENT

=consolidated with=

CRIMINAL APPEAL NO. 37 OF 2016

JOHN CHACHA MARWA..APPELLANT

VERSUS

REPUBLIC... RESPONDENT

(Being an appeal arising from the conviction and sentence by Hon. M.M.Wachira, Resident Magistrate in Migori Chief Magistrate's Criminal Case No. 83 of 2016 delivered on 11/05/2016)

JUDGMENT

1. SAMUEL MWITA MOGESI and **JOHN CHACHA MARWA,** the appellants in these two appeals, were jointly charged with another person who was not before court before the trial court at Migori with two main couts of **Burglary** contrary to **Section 304(2)** and **Stealing** contrary to **Section 279(b)** of the **Penal Code**, Chapter 63 of the Laws of Kenya. They also faced an alternative count of **handling stolen property** contrary to **Section 322(1)(2)** of the **Penal Code**, Chapter 63 of the Laws of Kenya.

2. The particulars of the counts of **Burglary** and **Stealing** were as follows:

> Count I: ***"On the niht of 9th and 10th day of February 2016 at Uriri Shopping Centre Uriri Sub-County in Migori County within the Republic of Kenya jointly with another person not before court broke and entered the shop of JACKLINE AKINYI OULO with intent to steal and did steal from therein clothes and sewing machines the property of JACKLINE AKINYI OULO valued at Kshs. 86,000/=. (See list of inventory attached)."***

> Count II: ***"On the niht of 9th and 10th day of February 2016 at Uriri Shopping Centre Uriri Sub-County in Migori County within the Republic of Kenya jointly with another person not before court broke and entered the hotel of SUSAN ACHIENG ODHIAMBO with intent to steal and did steal from therein Baking flour 5 pkts of 2kg and 2 pkts of 1kg, sugar 21/2kg, Baking Chapa Mandazi 2 pkts, Rice 2kg, tea leaves, tomatoes of 200/=, kitchen knife, all valued at Kshs.1,985/=the property of the said SUSAN ACHIENG ODHIAMBO."***

3. The appelants denied all the three counts (including the alternative count of handling stolen property) and a trial followed which culminated with the conviction of both appellants with the two main counts. They were sentenced to 3 years imprisonment each.

4. The prosecution called 5 witnesses. **PW1** was the complainant in respect to the first count, one **JACKLINE AKINYI OULO** wherreas **PW2** was the complainant in respect to the second count, one **SUSAN ACHIENG ODHIAMBO. PW3** was one **HANINGTON OTIENO** a conductor of the motor vehicle registration number KCB 606H make Nissan Matatu which plied along the Migori-Kisii route. **PW4** was **No. 55472 PC REUBEN GUYA** from Awendo Police Station who was the arresting officer and the investigating officer **No. 67968 Cop. FIDELIS KISIAPI** from Uriri Police Station testified as **PW5.**

5. It was the prosecution's case that in the evening of 9th day of February 2016 PW1 and PW2 securely locked their business premises at Uriri Shopping Centre and went to their respective homes for the night. Come the following morning they found their business premises broken into and several items stolen therefrom. PW1 who was a tailor lost several pieces of clothes together with her two sewing machine heads all valued at Kshs. 98,000/=. PW2 ran a hotel business. She lost several foodstuffs amounting to Kshs. 1,985/=. PW1 and PW2 reported the matter to Uriri Police Station.

6. The police moved with speed and relayed the information to their colleagues who were manning a road block near Awendo town who then intensified the search for the assailants. A motor vehicle registration number KCB 606H make Nissan Matatu was later flagged down by the said officers who asked PW3 to allow them search the vehicle. That was around 05:00am on 10th day of February 2016. PW4 led the search and at the rear of the said vehicle he found a big bag containing assorted clothings. He asked PW3 to call the owner of that bag. PW3 did so and one man truly surfaced. He was ordered by PW4 to open the bag and on being asked about its contents he informed PW4 that the goods therein belonged to himself and two of his other companinons who were inside the vehicle. He was allowed to call the two so that each would point out what beloged to them.

7. The man then went and called **Samuel Mwita Mogesi** (hereinafter refered to as **'the first appellant')** who was the second accused before the trial court. As the first appellant went to the rear of the vehicle the person who had called him escaped into the nearby sugarcane plantation. On seeing his collegue having escaped the first appellant also made a similar attempt but he was overpowered by PW4 and was arrested. The bag was offloaded from the vehicle.

8. The first appellant then informed PW4 that he was with one J**ohn Chacha Marwa** (hereinafter refered to as **'the second appellant')** who was seated at the front of the vehicle. PW4 went to the front of the vehicle and on opening the door on the left side found the second appellant seated with a basket which contained several items including hacksaw, knife, solar equipments among others. PW4 also arrested the second appellant and took both the appellants together with the bag and the basket to Awendo Police Station. As PW4 was still at the road with the appellants a police vehicle belonging to the Administration Police emerged and the officers therein informed PW4 that there had been a series of roberies at the Uriri Shopping Centre and the suspects had boarded a vehicle which they were pursuing. PW4 informed them of what had transpired. PW3 witnessed all what happened at the scene.

9. The arrest was later on communicated to Uriri Police Station where some officers went and picked the appellants from the Awendo Police Station and PW5 proceeded on with the investigations. PW5 called PW1 and PW2 who posiively identified their various items which had been stolen from their premises. PW5 then prefered the charges against the appellants.

10. At the close of the prosecution's case, the trial court placed the appellants on their defences. The appellants opted for and gave unsworn testimonies. The first appellant herein stated that he indeed boarded the vehicle at Migori in the early morning of 10th day of February 2016 as he was heading to Awendo from his home in Kuria. He did so alone and that he was the first one to board the vehicle as well. On reaching Uriri stage some people who had some luggage boarded the vehicle and when the vehicle was stopped by the police the one who had the luggage escaped. The police then asked the

appellants to assist in putting the luggage into the police vehicle and in doing so they were pushed into the police vehicle and taken to the Awendo Police Station and he was charged with offences he knew nothing about. He also denied ever handling the said stolen goods neither did he claim ownership of the same. He called no witnesses and closed his case.

11. The second appellant herein also gave unsworn defence. He also stated that he had boarded the vehicle on the material day at Migori and that he was the fourth person to board the vehicle. On reaching Uriri stage some three people who had some luggage boarded the vehicle and when the vehicle was stopped by the police the one who had the luggage escaped. The police then asked the appellants to alight from the vehicle, which they did, and were pushed into the police vehicle and taken to the Awendo Police Station and he was charged with offences he knew nothing about. He also did not call any witnesses and so closed his case as well.

12. By a judgment rendered on 11/05/2016 the trial court found both appellants guilty and convicted them of the first and second counts. The appellant was then sentenced after they tendered their mitigations.

13. Being dissatisfied with the conviction and sentence, the appellants lodged separate appeals. The appellants filed their respective Petitions of Appeal on 30/08/2016 together with applications for leave to appeal out of time. The first appellant filed Criminal Appeal No. 38 of 2016 whereas the second appellant filed Criminal Appeal No. 37 of 2016. The appeals were consolidated and the Criminal Appeal No. 38 of 2016 became the controlling file thereby **Samuel Mwita Mogesi** was the first appellant and J**ohn Chacha Marwa** the second appellant. The appellants raised the following similar three grounds:

> ***a. THAT I appeal not guilty to the whole trial.***
>
> ***b. THAT the trial magistrate erred in both law and facts by failing to observe the recovery of the items, whereby I the appellant was not found with the said items, but from one conductor of the vehicle who came and said before the court that I was in the vehicle but he didn't saw me with the items said in the court.***
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> ***c. THAT I will give more evidence when I will be given an opportunity.***

14. At the hearing of the appeals the appellants appeared in person and filed their respective written submissions wherein they expounded on the grounds of appeal. The State opposed the appeal and relied on and took the Court through the record in urging this Court to dismiss the appeals.

15. As this is the Appellant's first appeal, the role of this appellate Court of first instance is well settled. It was held in the case of **Okemo vs. R (1977) EALR 32** and further in the Court of Appeal case of **Mark Oiruri Mose vs. R (2013)eKLR** that this Court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyse it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and give allowance for that.

16. In line with the foregoing, this Court in determining this appeal is to satisfy itself that the ingredients of the offences of burglary and/or stealing, or alternatively those of the offence of handling stolen property, were proved and as so required in law; beyond any reasonable doubt.

17. A count of burglary and stealing has two limbs; that of **burglary** contrary to **Section 304(2)** of the Penal Code and that of **stealing** contrary to **Section 279(b)** of the Penal Code. **Section 304** of the Penal Code states as follows:

> ***"304(1) Any person who-***
>
> ***(a) breaks and enteres any building, tent or vessel used as a human dwelling with intent to commit a felony therein; or***

(b)having entered any building, tent or vessel used as a human dwelling with intent to commit a felony therein, or having committed a felony in any such building, tent or vessel, breaks out thereof, is guilty of the felony termed housebreaking and is liable to imprisonment for seven years.

(2) If the offence is committed in the night, it is tewrmed burglary and the offender is liable to imprisonment for ten years.

18. Therefore in respect to the offence of **burglary** it has to be proved that the appellants either broke and entered into building(s) with intent to commit a felony(ies) at night or that they so entered into such building(s) with an intention of committing a felony(ies) or actualy committed such a felony(ies) therein and at night.

19. From the evidence of PW1 and PW2, it is clear the two business ladies securely closed their respective business premises in the evening of 09/02/2016 only to find them having broken into in the morning of 10/02/2016. The break-in and entry into the premises was hence committed in the night. PW5 who visited the two scenes also confirmed that they were broken into. The offences of burglary were hence committed.

20. Section 268(1) of the **Penal Code** defines **stealing** as follows:

" A person who fraudently and without claim of right taskes anything capable of being stolen, or fraudently converts to the use of any person, other than the general or special owner thereof, any proeprty, is said to steal that thing or property."

21. PW1 and PW2 also complained that their various items were missing from the premises which had been broken into. The two managed to identify the said items when they were called by PW5 to find out if any of the goods which had been recovered belonged to them. PW1 and PW2 did not consent to give away their goods; the same were taken by people who were not either the general or special owners. Equally the offences of stealing were hence committed.

22. Having found so, the issue which now remains in contention is whether the appellants were the ones who committed the offences of burglary and stealing. The appellants denied committing the offences. They even denied being in the company of each other or in the company of the one who fled from the police at the police roadblock. It is true that there were no eye witnessses in the case. What tends to attempt to link the appellants with the offences is the recovery of the stolen goods. But the appellants also deny having been in possesion of the said goods.

23. I have carefully revisited and re-evaluated the evidence of PW3 and PW4. Whereas the appellants claim to have boarded the vehicle from Migori, PW3 who was the conductor and in-charge of controlling the picking and dropping of passengers recalled very well that the appellants together with the other person who fled from the police boarded the vehicle at Uriri stage and not at Migori and that the three were the ones who had the luggages that contained the goods in issue. PW3 did not know the three people. As they were passengers, they were very dear people to PW3 as they remained an integral part of their transport business. As such PW3 would readily speak the truth about his passenger and their remains no reasonable grounds as to why PW3 would fix the appellants. I therefore find that the version of PW3 is more convincing than that of the appellants. This Court now holds that the appellants boarded the vehicle at Uriri stage and not at Migori stage and carried with them the luggages that contained the stolen goods. The evidence of PW3 is also corroborated by that of PW4 especially on what transpired at the roadblock leading to the arrest of the appellants.

24. That being the position, could the appellants be said to have committed the offences in the main counts or the one in the alternative count? In other words were the appellants the thieves or were just handlers?

25. As the break-in and thefts were in the night of 09/02/2016 and the recovery of the items was on

10/02/2016, barely hours thereafter, I shall now venture into the realm of the **doctrine of recent possession** in a bid to find out if the recovery can connect the appellants or any of them to the offences. The Court of Appeal in this case of **David Mugo Kimunge vs. Republic (2015)eKLR** and in citing the case of **Isaac Ng'ang'a Kahiga alias Peter Ng'ang'a vs. R. Criminal Appeal No. 272 of 2005 (UR)** with approval, expressed itself as follows:-

> **"16.** ***The doctrine of recent possession has been applied in numerous decisions of this court and the High court properly cited the Kahiga case (supra) as one for the elements necessary for proof. We may reproduce the elements from that case:***
>
> > *"It is trite that before a court of law can rely on the doctrine of recent possession as a basis for conviction in a criminal case, the possession must be positively proved.*
> >
> > *In other words, there must be positive 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.*
> >
> > *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."*

26. The Supeme Court of Canada in the case of **Republic vs. Kowkyk (1988) 2 SCR 59** accepted the following summary of the doctrine of recent possession:-

> ***"Upon proof of the unexplained possession of recently stolen property, the trier of fact may–but not must-- draw an inference of guilt of theft or of offences incidental thereto. Where thecircumstances are such that a question could arise as to whether the accused was a thief or merely a possessor, it will be for the trier of fact upon a consideration of all the circumstances to decide which, if either, inference should be drawn. In all recent possession cases the inference of guilt is permissive, not mandatory, and when an explanation is offered which might reasonably be true, even though the trier of fact is not satisfied of its truth, the doctrine will not apply."***

27. Whereas the Canadian case is only persuasive, it is worth noting that there is no significant disparity between the English/Canadian position and what has been accepted as the applicable doctrine in our Courts. The Court in **David Mugo's case (supra)** went further and stated as follows:-

> ***" ....it is also clear from the decision that the truth of the explanation alluded to in the doctrine is not the standard applicable. Nor is it acceptable that a fanciful or concocted explanation will suffice. The explanation must pass the muster of reasonableness and plausity.........."***

28. The fogone clearly reveals that the doctrine of recent possession mainly relies on the facts of a particular case and that is why the Supreme Court of Canada in the **Kowlyk case (supra)** stated that the **'tier of fact'** may draw an inference of guilt of theft or of offences thereto on proof of unexplained possession of recently stolen property. The tier of fact in the case was the Chief Magistrate's Court (the trial court) which had the advantage of seeing and hearing the witness testify before it. I am reminded that the first appellate Court must of necessity always give allowance for this advantage and be slow to interfere unless where there was no evidence to support the findings or the findings were perverse.

29. On the facts recorded before "**the tier of fact**", some of the goods were recovered from the boot of the

vehicle wherein the appellants and their companion were travelling by and not in the person of appellants while some other goods were recovered from the luggage which the second appellant carried with him as he sat at the front of the vehicle. When the police questioned the person who ran away about the luggage in the boot of the vehicle, that person said the same had goods belonging to himself and the appellants. He went to call them but first started with the first appellant who did not resist but went to the rear of the vehicle where the luggage was. When the the person fled, the first appellant also attempted to escape but he was overpowewred by the police and was handcuffed, It is the first appellant who then informed the police that he was in the company of the second appellant who was seated a the front of the vehicle and who was then found with some of the stolen goods. Could the appellants therefore be construed to have been in possession of all the goods thereof?

30. Section 4 of the **Penal Code**, Chapter 63 of the Laws of Kenya defines **possession** as follows:-

> ***"Possession" –***
>
> ***(a)"be in possession" or "have in possession" includes not only having in one's own personal possession, but also knowingly having anything in the actual possession or custody of any other person, or having anything in any place (whether belonging to or occupied by oneself or not) for the use or benefit of oneself or of any other person:***
>
> ***(b) if there are two or more persons and any one or more of them with the knowledge and consent of the rest has or have anything in his or their custody or possession, it shall be deemed and taken to be in the custody ad possession of each and all of them;"***

31. From the way the evidence that led to the arrest of the appellants at the police road block unfolded, it is clear that the three people were together and were executing a common intention. In saying so I remain alive to the fact that the second appellant was arrested with some goods which had also been stolen from PW1 and/or PW2. Since the first appellant knew that the second appellant had some other goods and led PW4 to its recovery and the one who escaped had indicated to have been together with the first appellant, then all the three persons are deemed to have been in possession of the very goods in law.

32. On the issue as to whether the recovered goods belonged to PW1 and PW2, the tier of fact found that the business premises of PW1 and PW2 had indeed been broken into and goods stolen therefrom. I do agree with the trial court. The trial court was also satisfied that PW1 and PW2 were the owners of the recovered goods moreso given that the appellants denied any link to the said goods. I again agree with the trial court.

33. From the above analysis and the legal guidance from the caselaw, I find that the ingriedients of the doctrine of recent possesion rightly places the appellants as the those who broke into the business premises of PW1 and PW2 and stole the goods therefrom. The trial court was right in convicting them with the two main counts of burglary and stealing.

34. Before I look at the issue of sentencing in this appeal, I wish to highlight some issues on the part of the trial court which it needs to take into account in future. First, the appellants were charged with the two main counts of burglary and stealing. The offence of burglary and stealing has two limbs that is the offence of burglary and the offence of stealing. The court ought to have clearly recorded how the appellants pleaded to each limb. Likewise the court ought to make specific findings in its judgment on each limb since each limb defines a specific offence with a clear sentence and an accused person may be convicted on all or either of the two limbs. The trial court therefore erred in treating the main counts as a single offences both at the plea taking as well as in the judgment.

35. As above said, the trial court was to equally sentence the appellants on the two distinct limbs of burglary and stealing and since the two offences were committed in the course of the same transaction their sentences would normally run concurrently. I however note that the wholesale sentence of 3 years is well within the sentences provided for burglary and stealing and that in the circumatances of this case the sentence was fair and commensurate to the way the offences were committed.

36. I have addressed my mind to the above procedural arnormalies and I am of the very considered view that the said errors are curable by dint of **Section 382** of the Criminal Procedure Code, Chapter 75 of the Laws of Kenya as the same did not occassion any injustice to the appellants since the appellants were clear on what they faced and they took part the proceedings quite well.

37. I therefore affirm the decison of the learned trial magistrate and find that the appeals are unmerited and are hereby dismissed.

DELIVERED, **DATED** and **SIGNED at MIGORI this 23rd day of January 2017.**

A. C. MRIMA

JUDGE