**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 33 OF 2015**

**CONSOLIDATED WITH HCRA NO. 28 OF 2015**

**JAMES KAROKI MUCHIRA.....1ST APPELLANT**

**JACKLINE WANJIRU NJOKI.....2ND APPELLANT**

***VERSUS***

**PROSECUTION.....RESPONDENT**

**J U D G M E N T**

1. The appellants were jointly convicted of the offence of breaking into a building and committing a felony contrary to Section 306(a) of the Penal Code and sentenced to five years imprisonment. The second appellant was separately convicted on an alternative charge of having suspected stolen goods contrary to Section 323 of the Penal Code and sentenced to one year imprisonment.

2. Being dissatisfied of the said judgment the appellants filed separate appeals Nos. 28 and 33 both of 2015 which were consolidated on 16/08/2016 and file No. 28 of 2015 retained.

3. The appeal was argued by way of written submissions. The 1st appellant appeared in person while the 2nd appellant was represented by Ms. Anne Thungu. Ms. Nandwa was for the respondent. All the parties filed their respective submissions.

4. The first appellant relied on the grounds that the magistrate erred in convicting him whereas no stolen property was recovered from him; that it was not proved that he gave the stolen goods to the 2nd appellant; the court did not appreciate that there was a grudge between him and PW3; that the prosecution's evidence was full of inconsistencies and that his defence was rejected without reasons.

5. The 2nd appellant's grounds were that the prosecution's evidence was inconsistent, that a crucial witness being the complainant's husband was not called to testify or even interrogated to confirm who possessed the goods found in the house for 2nd appellant was not living there; that the alibi defence was not considered; that the mitigation was not given due consideration. Finally, that the sentence imposed was harsh and excessive.

6. The prosecution's evidence was that the complainant PW1 went to th church where he ministers as a pastor in Livingstone International Church Dallas Estate Embu at around 8.00 a.m. He found that the church had been broken into by breaking through a window. The 3 doors of the building were intact. On entering inside, he found some properties missing including 3 speakers, a mixer, receiver and the amplifier.

7. He reported the matter at Embu Police Station and the scene was visited the same day at around 10.00 a.m. PW1, PW2 and another person conducted a search in the neighbourhood of the church and found the box speaker hidden in the nappier grass about 100 metres from the church. A neighbour gave information that she had seen two people on a motorbike carrying things in two yellow paper bags.

8. The following day the amplifier was recovered by one of the people assisting the pastor from PW3 who had received it from the 1st appellant for repair. Acting on information, the two appellants were later arrested. The other items recovered from the house of the 2nd appellant with the help of th 1st appellant. These were the microphone, receiver and the mixer in a yellow paper bag. From the house of the 1st appellant was recovered a curtain which was part of the stolen property.

9. In a case of this nature, the prosecution must prove beyond any reasonable doubt that the appellants broke into the building and stole the properties listed in the charge sheet. The magistrate addressed himself as to the standard of proof in criminal cases in his judgment.

10. The evidence against the 1st appellant is that he took an amplifier to PW3 to repair for him. As PW3 carried it to the workshop, he was spotted by PW3 who identified the amplifier as part of the property stolen from the church. Police were called by PW2 and received co-operation from PW3 to call the 1st appellant to the shop. The appellant was informed that repair had been done and that he could come for the amplifier. When he came to the workshop, police had laid an ambush and he was arrested.

11. The 1st appellant gave PW1 information as to where the other stolen items were. He asked PW1 to refrain from involving the police in the recovery but PW1 did not take the advice and went ahead to call the police who laid an ambush at the house of the 2nd appellant. PW6 the landlady helped to call the 2nd appellant on phone to come for she had visitors.

12. On arrival PW6 identified the 2nd appellant as her tenant together with her husband who was absent at the material time. She opened the house and a mixer, a speaker, microphone and a cable were recovered. She was arrested and the items taken as exhibits.

13. The recovery of the property was made only two days after the incident. This was recent possession of the property by the appellants. The prosecution require to prove the following in a case of this nature:-

*(a) That the property of the complainant was stolen;*

*(b) That it was found in the possession of the accused;*

*(c) That it was positively identified by the complainant; and*

*(d) That the property was recently stolen from the complainant.*

14. It was held in the case of ***MATU VS REPUBLIC [2005] eKLR 510*** that:-

*(1) ….....*

*(2) Secondly, under the doctrine of recent possession, where it is proved that premises have been broken into and that certain property has been stolen therefrom and that very shortly afterwards, a person is found in possession of that property, that is certainly evidence from which it can be inferred that the person is the house-breaker or shop- breaker.*

*(3) The appellant had been in possession of goods stolen from the complainant's kiosk and he could not offer any acceptable explanation of how he had come by the property.*

*(4) In the circumstances of this case, the time lag of twenty days between the date of the robbery*

*and the discovery of the goods was not such that it would be unreasonable to hold that the appellant's possession was sufficient to found a conclusion that he had participated in the robbery. It could safely be said that the stolen goods were found in the appellant's possession shortly afterwards.*

*(5) On consideration of the entire evidence, both the trial court and the High Court on the first appeal were correct in finding the appellant guilty.*

15. In this case, it was established by PW1, PW2 and PW5 that the church had been broken into by forcing the window open to gain access. The items listed in the charge sheet were stolen from the complainant as was confirmed by PW1 who positively identified them after the recovery. There is evidence what the stolen items were recovered from the appellants within two days from the date of the incident. None of the appellants claimed ownership of the said properties or even explained how he/she came into possession.

16. The 1st appellant claimed that the case was framed against him by PW3 who was his enemy. He did not explain the grudge between them in order to assist the court to adequately interrogate the allegation. In my considered opinion, it could not possibly be true that there was a grudge for the appellant would not have agreed to go to the workshop to collect the amplifier or even take the item for repair to PW3. This was an afterthought because it was not raised in cross-examination. From the house of the 1st appellant a curtain was also recovered and positively identified.

17. It is the 1st appellant who assisted PW1 and the police to recover the other items from the house of the 2nd appellant. He did not explain in his defence how he came to know that those items were there.

18. PW1 and PW5 established from PW6 the landlady and from the 2nd appellant herself that she and her husband were the tenants and had occupied the house for about three years. In defence she admitted she had one key while her husband had the other one.

19. The 2nd appellant further said that she had traveled home on the material day and that she did not know how the properties were taken to her house. It would be expected that when she returned home, she ought to have reported that she found property in her house which did not belong to her.

20. The trial court did not find the defence of the appellants plausible. Neither do I find the defence convincing considering that the evidence of the prosecution on the theft and the recovery was overwhelming. The appellants ought to have explained possession which they failed to do.

21. It was held in the case of ***MAHINGI VS REPUBLIC [1989] KLR 225*** that :-

*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 his possession after the prosecution has proved certain basic facts. Firstly, that the item he has in his possession has been stolen; it has been stolen a short period prior to their possession; that the lapse of time from the time of its loss to the time the accused was found with it was, from the nature of the item and the 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 items. The doctrine being a rebuttable presumption of facts 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 or was a guilty receiver.*

22. I have perused the judgment and find that the magistrate considered the defences of the appellants and did not find them credible.

23. It was alleged that the prosecution's evidence was full of inconsistencies. None of the appellants pointed out the alleged contradictions. The prosecution's evidence was detailed and clear and the

magistrate who had the advantage of seeing the witnesses found it credible.

24. Concerning failure to interrogate the husband of the 2nd appellant or failure to call him as a witness, I find this ground baseless because the prosecution have the liberty to call such number of witnesses as they find appropriate to prove their case. The 2nd appellant ought to have called her husband as a defence witness to clarify the issues she wanted explained.

25. The two appellants were charged with the main count of breaking into a building and committing a felony. Each of them also faced an alternative count of having suspected stolen property contrary to Section323 of the Penal Code. The 2nd appellant was convicted of both the main count and the alternative count and sentenced accordingly.

26. This was wrong for the trial magistrate to convict on both the main charge and the alternative charge. Although the prosecution gave it a sub-heading "count II", it is clear from the phrase preceding the alternative charge against the 2nd appellant and not a second count. The phrase reads:-

*Alternative charges 1 & 2 for Count 1 and Count II.*

27. Even in the absence of this phrase, the wording and the particulars of the charge are clear that the so called count II is an alternative charge to the main charge.

28. For the foregoing reasons, I quash the conviction and set aside the sentence the alternative count against the 2nd appellant.

29. The sentence was said to be harsh and excessive. Section 306(a) of the Penal Code provides for a maximum sentence of seven years imprisonment. The two appellants were first offenders.

30. Each one of them mitigated and the magistrate indicated that he had taken into consideration the mitigation. However, he noted that the offence was rampant in the region and that a deterrent sentence should be imposed.

31. For the court to review sentence, it must be established that the court failed to take into consideration some material factors or that the sentence was based on wrong principles.

32. The facts before me do not suggest or support that the magistrate acted on the wrong principles or that he overlooked any material factor.

33. I therefore find that the sentence was within the law. The conviction and sentence in count I are hereby upheld.

34. Consequently, the appeal fails and it is hereby dismissed.

35. It is hereby so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 27TH DAY OF MARCH, 2017.**

**F. MUCHEMI**

**JUDGE**

**In the presence of:-**

**Ms. Manyal for Respondent**

**Mr. Eddie Njiru for Anne Thungu for 2nd Appellant**

**1st Appellant present in person**