REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NO 78 OF 2013

RODGERS ODHIAMBO.....…….……APPELLANT

VERSUS

REPUBLIC…….……RESPONDENT

(Appeal against Judgement, sentence and conviction in Criminal case number 693 of 2012, R vs Rodgers Odhiambo at Nyeri, delivered by V. O. Nyakundi, R.M. delivered on 7.6.2013).

JUDGEMENT

On 27.7.2012, Rodgers Odhiambo (hereinafter referred to as the appellant) was arraigned before the Magistrates court at Nyeri charged with the offence of stealing from a locked motor vehicle servant contrary to Section **279 (c)** of the Penal Code.[1] The particulars of the offence were that on the 7th day of May 2012, at Nyeri Town in Nyeri County, with others not before the court stole a laptop make IBM Think Pad R61 serial number L3-C5943 valued at Ksh. 72,480/= the property of Safaricom Company Ltd from a locked motor vehicle re no KBD 763 Toyota Hilux Double cab of the said Safaricom.

The appellant faced second count of Stealing from a locked Motor Vehicle contrary to Section 279 (c) of the Penal Code[2] the particulars of which were that on the 7th day of May 2012 at Nyeri Town in Nyeri county with others not before court stole a Safaricom modem serial number 861976009902478 valued at Ksh. 1,999/=, from the same motor vehicle the property of Henry Kareigi Irungu.

The appellant faced an alternative count of handling stolen property contrary to section 322 (2) of the Penal Code[3]the particulars of which were that on the 17th July 2012 at Nakuru Town in Nakuru County otherwise than in the course of stealing dishonestly retained a Safaricom modem serial number 861976009902478 knowing or having reasons to believe it to be stolen property.

In determining this appeal, this court fully understands its duty as stated in the case of **Okeno v. R.[4]** This duty was authoritatively stated by the Supreme Court of India in the recent decision in the case of *K. Anbazhagan v. State of Karnataka and Others*,[5] where a three-Judge Bench addressing the manner of exercise of jurisdiction by the appellate court while deciding an appeal ruled that:-

> *"The appellate court has a duty to make a complete and comprehensive appreciation of all vital features of the case. The evidence brought on record in entirety has to be scrutinized with care and caution. It is the duty of the Judge to see that justice is appropriately administered, for that is the paramount consideration of a Judge. The said responsibility cannot be abdicated or abandoned or ostracized, even remotely,.....The appellate court is required to weigh the materials, ascribe concrete reasons and the filament of reasoning must logically flow from the requisite analysis of the material on record. The approach cannot be cryptic. It cannot be perverse. The duty of the*

Judge is to consider the evidence objectively and dispassionately. The reasoning in appeal are to be well deliberated. They are to be resolutely expressed. An objective judgment of the evidence reflects the greatness of mind – ***sans passion and sans prejudice****. The reflective attitude of the Judge must be demonstrable from the judgment itself. A judge must avoid all kind of weakness and vacillation. That is the sole test. That is the litmus test."*

PW1 No. Henry Kareithi Irungu testified that he parked his car outside a hotel at Nyeri Town, but upon returning he found the items were missing, he reported to the police the next day and provided them with the serial number of the modem. The following day they told him they had traced it a Nakuru. On 14.7.2013 in the company of police they travelled to Nakuru and traced the person who was using it. He led them to the shop where he bought it, two persons were arrested who later brought the person who sold to the item to him.

PW2 Duncan Mwangi Gacheru testified that he was arrested using the modem at Nakuru and he led the police to the shop where he bought it. PW3 confirmed that he sold the modem to PW2 and led them to the accused who sold it to him while PW4 confirmed that he purchased the modem from PW3. PW5 was the investigating officer.

At the close of the prosecution case the trial magistrate was satisfied that a *prima facie* case had been established and put the accused person on his defence. The provisions of section 211 of the Criminal Procedure Code[6] were complied with and the appellant herein opted to give unsworn evidence. He denied the offence and insisted that on the material day he was at Bondo not Nyeri and that he was never involved in the alleged theft

After evaluating the prosecution and the defence case, the trial magistrate found the appellant guilty of stealing from a motor vehicle and sentenced him to serve 9 years imprisonment.

Aggrieved by the said finding, the appellant appealed to this court against the conviction and sentence imposed and raised three grounds of appeal which in my view can be conveniently reduced to one namely; ***(i)*** *Whether the learned magistrate erred in law in concluding that the prosecution had proved its case beyond reasonable doubt.*

To my mind the rule that the prosecution may obtain a criminal conviction only when the evidence proves the defendant's guilt beyond reasonable doubt is basic to our law. It is necessary that guilt should not only be rational inference but also it should be the only rational inference that could be drawn from the evidence offered taking into account the defence offered if any. If there is any reasonable possibility consistent with innocence, it is the duty of the court to find the defendant not guilty.

In my view, whatever is thought to be the purpose of criminal punishment, one fundamental principle seems to have evolved in the jurisprudence of the common law legal tradition; that, before an accused person can be convicted of a crime, his/her guilt must be proved beyond reasonable doubt. Perhaps the most eloquent statement of reason for this is to be found in the opinion of **Brennan J** in the United States Supreme Court decision in *Re Winship*[7] where the court stated:-

"The accused during a criminal prosecution has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatised by the conviction……Moreover use of the reasonable doubt standard is indispensable to command the respect and confidence of the community. It is critical that the moral force of criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned"

The key question that this court seeks to answer is whether or not the appellant offered any other explanation that could exonerate him from the offence or whether there exists any other co-existing circumstances which could weaken or destroy the inference of guilt which is a necessary test before arriving at a conviction on the evidence tendered. This calls for close examination of the ingredients of the offence of stealing and the doctrine of recent possession.

The principles to be followed in recent possession were laid down in the case of *Arum vs. Republic**[8]* where it was held that the doctrine of recent possession is applicable where the court is satisfied that the prosecution have proved the following:-

a) that the property was found with the suspect;

b) that the property was positively identified by the complainant;

c) that the property was stolen from the complainant;

d) that the property was recently stolen from the complainant.

The chain of events as disclosed by the evidence irresistibly pointed to the accused as the source of the stolen modem. The defence tendered did not in my view rebut the said evidence. The appellant did not deny that he sold the modem, nor is there anything to create doubts on the said evidence. The chain of events is clear and consistent and leads squarely to the appellant.

In the circumstances, I agree with the reasoning of the magistrate that the doctrine of recent possession was established. In the absence of any explanation as to how the appellant came into possession or a clear rebuttal of the said evidence, I find that the magistrate was correct in applying the doctrine of recent possession.

In the present case and after carefully considering the defence and prosecution evidence, I find that there were reasonable basis for arriving at the conviction. Consequently I see no basis to interfere with the conviction.

Regarding sentence, sentence is essentially an exercise of the trial court and for this court to interfere, it must be shown that in passing the sentence, the court took into account an irrelevant factor or that a wrong principle was applied or short of those the sentence was so harsh and excessive that an error in principle must be inferred.

Sentencing is an important task in the matters of crime. One of the prime objectives of the criminal law is imposition of an appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of the crime and the manner in which the crime is done. There is no straightjacket formula for sentencing an accused on proof of crime. What sentence would meet the ends of justice depends on the facts and circumstances of each case and the court must keep the gravity of the crime, motive for the crime, nature of the of the offence and all other attendant circumstances.

Thus, while exercising its discretion in sentencing, the court should bear in mind the principles of proportionality, deterrence and rehabilitation and as part of the proportionality analysis, mitigating and aggravating factors should also be considered.[9]

I have carefully considered the facts of this case, the severity of the offence and the above principles, the appellants mitigation and his age of 24 years at the time of conviction, and take the view that the appellant has learnt from his mistake and that 9 years in jail will affect his most productive age of his life. I have also considered the period the appellant has been in jail.

For the reasons stated above, i hereby uphold the conviction but reduce the sentence of 9 years imposed upon the appellant to the period already served and order that the appellant *Rogers Odhiambo* be released forthwith unless otherwise lawfully held**.**

Right of appeal 14 days

Dated at **Nyeri** this **3rd** day of **February** 2016

John M. Mativo
Judge

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[1] Cap 63, Laws of Kenya

[2] Ibid

[3] Ibid

[4] {1972) E.A, 32at page 36

[5]Criminal Appeal No. 637 of 2015

[6]Cap 75, Laws of Kenya

[7] 397 US 358 {1970}, at pages 361-64, see also the more recent elaboration of the rationale of the principle in R VS Oaks 25 D.LR (4^{TH}) 200 {1987} at pp 212-214

[8] Court of Appeal at Kisumu Criminal Appeal No. 85 of 2005

[9] See Somanvs Kerala {2013} 11 SC.C 382 Para 13, Supreme Court of India