



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT SIAYA
HIGH COURT CRIMINAL APPEAL NO. 31 OF 2015
AS CONSOLIDATED WITH CRIMINAL APPEAL NO. 32 OF 2015
AND NO. 33 OF 2015

(J.A. MAKAU – J.)

EUGIN OMONDI ODUOR.....1ST APPELLANT

MICHAEL ODHIAMBO OCHIEL..... 2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An Appeal from the Original Conviction and Sentence dated 10.4.2015 in Criminal Case No. 325 of 2014 of P.M'S Court At Siaya By M.S. Kimani (R.M.)

JUDGMENT

1. The two appellant **EUGINE OMONDI ODUOR**, herein the 1st Appellant and **MICHAEL ODHIAMBO OCHIEL** the 2nd Appellant were the 1st and 2nd accused respectively. In the trial before the lower court they were charged with five (v) counts being as follows:-
 - i. ***BREAKING INTO A BUILDING WITH INTENT TO COMMIT A FELONY CONTRARY TO SECTION 306 (a) OF the PENAL CODE: that on the night of 23rd and 24th of April 2014, at Uranga Market in Siaya District within Siaya County jointly broke into a building namely a Barber Shop of GEORGE OTIENO OCHIENG with Intent to Commit a felony therein.***
 - ii. ***STEALING CONTRARY TO SECTION 275 OF THE PENAL CODE: that on the night of 23rd and 24th day day of April 2014, at Uranga Market in Siaya District within Siaya County jointly stole 3 shaving machines, 1 Amplifier, 1 video deck, 14 mobile phones, Assorted C.D.'s all valued at Kshs.60,000/= the property of GEORGE OTIENO OCHIENG.***

ALTERNATIVE CHARGE: HANDLING STOLEN GOODS CONTRARY TO SECTION 322(2) OF THE PENAL CODE: that on the 24th day of April 2014, at Karapul sub-location in Siaya District within Siaya County jointly otherwise than in course of stealing dishonestly received or retained 2 shaving machines, 9 mobile phones and 1 Amplifier knowing or having reason to believe them to be stolen goods.

- iii. ***BREAKING INTO A BUILDING WITH INTENT TO COMMIT A FELONY CONTRARY TO SECTION 306(a) OFF THE PENAL CODE: that on the night of 23rd and 24th day of 2014 at***

Uranga village in Siaya District within Siaya County jointly broke into a building namely AZUSA WORLD MINISTRIES Office with Intent To Commit A Felony therein.

- iv. **STEALING CONTRARY TO SECTION 275 OF THE PENAL CODE: that on the night of 23rd and 24th day of April 2014 at Uranga village in Siaya District within Siaya County jointly Stole 1 Generator, 1 Television set, 1 video deck, 1 shaving machine and ½ sack of maize, 2 T.V. Remodes, 3 video cassettes and 1 white cable all valued at Kshs.170,000/= the proper of AZUSA WORLD MINISTRIES CHURCH. ALTERNATIVE CHARGE: HANDLING STOLLEN GOODS CONTRARY TO SECTION 322(2) OF THE PENAL CODE: that on the 24th day of April 2014, at Karapul sub-location in Siaya District within Siaya county jointly otherwise than in the course of stealing dishonestly received or retained 1 video deck make Sony 1 J.V.C. Television set, one butterfly sewing machine, 1 white cable, 3 video cassettes, and two remote knowing or having reason to believe them to be stolen goods.**
 - v. **BEING IN POSSESSION OF NARCOTIC DRUGS CONTRRY TO SECTION 3(2) (a) OF THE NARCOTIC DRUGS AND PSYCHOTROPHIC SUBSTANCES CONTROL ACT NO. 4 OF 1994 that on the 24th day of April 2014 at Karapul sub-location in Siaya District within Siaya County was was found in Possession of Cannabis Sative (bhang) to wit 11 stones which was not in its medical preparation form.**
2. That after full trial the appellants were found guilty and convicted on Count 1 and III and sentenced to serve imprisonment for three and half (3 ½) years on Count I and similarly on Count III to serve imprisonment for three and half (3 ½) years and the prison term to run consecutively.
 3. The 1st appellant was aggrieved by sentence whereas the 2nd appellant was aggrieved by both the conviction and sentence provoking each one of them to prefer a separate appeal. The first appellant filed **HCRA Nos. 31 of 2015 and 33 of 2015** whereas the 2nd appellant filed **HCRA No. 32 of 2015** which appeals were consolidated as they arise from the same trial in the lower Court.
 4. The 1st appellant in his petition of appeal raises several grounds which are as follows:-
 - a. **The Honourable court be pleased to appreciate that he is a first offender.**
 - b. **The Honourable court be pleased to appreciate that he is a young citizen who still has a long way in life.**
 - c. **The Honourable court be pleased to accord him lenience and review his sentence.**
 - d. **The Honourable court be pleased to order for a remission in his sentence.**
 - e. **The Honourable court be pleased to order for a concurrent run of his sentence.**
 - f. **The learned trial magistrate misdirected himself in failing to appreciate that all the essential elements of the charge as laid had not been proved beyond reasonable doubt.**
 - g. **The conviction of the Appellants was against the weight of the evidence adduced on record. The judgment does not comply with the Provisions of Section 169 (1) of the Criminal Procedure Code.**
 5. The 2nd Appellant in his petition grounds of appeal raises four grounds being as follows:-
 - a. **The learned trial magistrate failed to consider that no tangible evidence was presented for factual evidence.**
 - b. **The learned trial magistrate erred in law and facts in failing to note that the investigation done was shoddy and not conclusive.**

- c. *The learned trial magistrate failed to consider his alibi-defence that was credential in the circumstance of the case.*
 - d. *That since he could not recall what was recorded, he prays to be furnished with the true copies of court proceedings* to enable him erect further grounds.
6. The State was represented by M/s. Mourine Odumba learned prosecution Counsel, while, the 1st and the 2nd Appellants appeared in person.
 7. I have carefully considered the Appellants appeals, considered the written submissions by both the Appellants and the oral submissions by the learned state counsel.
 8. The 1st appellant submitted that he was not challenging the conviction urging that his appeal is against sentence only as he wished the sentences to run concurrently. I shall therefore deal with the 1st appellant's appeal on sentence later.
 9. The 2nd appellant submissions were brief. He stated that he was wrongfully convicted as he knows nothing about the offence and produced his written submission in which he urged the prosecution did not prove their case to the required standards, that he was not found in possession of the allegedly stolen goods, that the house from which the stolen items were recovered was not proved to be his and that the prosecution failed to produce any evidence connecting the 2nd appellant with the offence.
 10. This is a first appellate court and as such I am required to subject the entire evidence adduced before the trial court to a fresh evaluation and analysis while bearing in mind that I had no opportunity to see and hear the witnesses and cannot comment on their demeanour. I will draw my conclusion, after giving due allowance and in doing so I am guided by the Court of Appeal in the case of **Okeno V Republic [1972] E.A. 32** where the court set out the duties of first Appellate court thus:-

“An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya Vs. Republic (1957) E.A. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vs. R. (1957) E.A.. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, See Peters V. Sunday Post, (1958) E.A. 434”

11. The evidence adduced by the prosecution witnesses is readily available in the proceedings of the lower court and as such I am not going to reproduce the same as it is readily available. I am however going to summarize the prosecution's case and defence case herein below.
12. The facts of the prosecution case are that PW1, the owner of a Barbers Shop at Uranga Trading Centre closed his shop at 8.00 p.m. and went home, that on the following day when he went to his shop he found his shop's door wide open. On entry he found his work equipment were missing, and the two pad locks amongst several items as listed in the charge sheet including his customers items. PW2 a Pastor of Azusa World Ministry, with Church Headquarters at Uranga, received a telephonic call around 1.00 p.m. from Bishop Joshua Agola Obok that their Church had been broken into and several items stolen. He went to the church, found village elder and police, that PW4, a Boda Boda operator testified that on 24.4.2014 in course of his duties he ferried the 1st appellant from Uranga to Siaya and on reaching Siaya he brought a luggage which PW4 demanded to know its contents. He saw that in the carton there were T.V. Set and two sewing machines. That on the way at Mwer Centre the 1st appellant told PW4 that there was some articles which had fallen on the way and he dismounted and went to check on the same but he did not find it and told PW4 not to worry about it as it was of little value. PW4 took the 1st appellant to his destination. PW4 was paid his dues and the 1st appellant disclosed to him the item that dropped on the way was his phone. On the way back at the place where the item dropped PW4 searched for it and found the mobile phone handset. He took the phone to Uranga where he found people crowded at the Barber shop of PW1. He enquired what had happened after which he gave

information about the young man who had hired him to carry him with T.V. Set, two sewing machines and carton box. He was told by PW1 to proceed to Siaya Police Station. He volunteered to take Police Officers to the place he had dropped the young man who had hired him. He took police to the place but the T.V. Set and sewing machines were not there. That investigation was carried out and then appellants were arrested and charged with this offence. The 2nd appellant defence is that on 24.4.2014 he went to KCB Bank Siaya to do some banking when at the bank he realized he had left behind the school A/C number and his children's admission numbers at home and decided to go back for the same. That as he approached his home he saw a group of people ahead of him who were unknown to him. He overtook them and proceeded to open his house and entered, and as he was looking for the documents he noticed a stranger entered into his house who did not introduce himself. The 2nd appellant enquired from him who he was but he did not respond, making the 2nd appellant angry when a 2nd person also entered into his house, the two persons then assaulted the 2nd appellant badly, ferried him into a waiting vehicle

13. I have carefully examined prosecution evidence and have noted that no eye witness was called to connect the 2nd appellant with the offence. PW4 who took the 1st appellant to his destination did not mention seeing the 2nd appellant in the company of the 1st appellant when he returned to pay him his balance. On cross examination by the 2nd appellant he testified that he did not know anything about the 2nd appellant. PW5 on being shown the 1st appellant's house which had occupants in but locked from outside and on peeping through they saw the occupants and on breaking into the house they found a young man, sitting thus the 1st appellant, who he identified at the dock. PW6 did not go to the scene of recovery and could not state from whom the items were recovered.
14. The learned trial magistrate in convicting the 2nd appellant with the offence herein relied on doctrine of recent possession, quoting from the case of **Arum V. Republic [2006] KLR233**. That before the doctrine of recent possession is relied upon as a basis for conviction, **Possession must be positively proved, there must be direct evidence that the property was found with the accused, that the property is positively proved to be the property of the complainant and lastly that the property was stolen from the complainant (the underlying is mine to emphasize what should be proved)**, and the proof will depend on the easiness with which the stolen property can move from one person to another.
15. In the case of **WANDUE V REPUBLIC (2003) KLR 26** the court of appeal stated as follows:

“The doctrine of possession of recently stolen property could not apply until possession by the appellant was satisfactory proved.”

In the case of **MWACHANJA & 2 OTHERS V. REPUBLIC (2002) 2KLR 341** the High Court at Mombasa stated:

“Where an accused is found in recent possession of goods alleged to have been stolen, he is under an obligation to explain how he came into such possession and that such possession is innocent. Failure to do so lead to inescapable conclusion that he is a thief or robber.”

16. In the present case PW5 testified that they were directed to a certain house which had occupants in but locked from the outside. That another person, came as PW5 and his team tried to get the occupants open the house and that neighbours knew the owner of the house. That the person who found them urging the 1st appellant to open the door was the 2nd appellant. PW5 on cross-examination stated that investigation revealed that the 2nd appellant was a tenant, that the 1st accused is his relative, that the 2nd appellant lives with him, that he found PW5 and his team at his door step and that is when they knew he was the owner of the house.
17. I have carefully examined the evidence of PW1, PW2, PW3, PW4, PW5 and PW6 and none of them has satisfactorily proved that the 2nd appellant was found in possession of any of the stolen items. PW5 is categorical that the occupants of the house from where the items were recovered did not include the 2nd appellant. He did not give the basis of his assertion that the 2nd appellant as the owner and/or tenant of the house where the 1st appellant was. No agreement of tenancy was produced to confirm that the 2nd Appellant was a tenant nor receipt of payment of rent nor was the landlord called as a witness. No evidence was adduced to show the relationship between

the two appellants was tendered. PW5 was categorical that when they went to a certain house the 2nd appellant was not inside the house. No evidence was adduced to show that anything was recovered from the 2nd appellant. In absence of evidence of the 2nd appellant having been found in possession of recently stolen property or of any of the items listed in count I and count III, the 2nd appellant was under no obligation to explain anything as regards any of the stolen properties as by doing so would be violating his constitutional rights of keeping quiet as is enshrined under **Article 50 (2) (a) of the Constitution of Kenya 2010.**

18. On the sentence the 1st appellant prayed that the same be ordered to run concurrently instead of the same running consecutively, urging that he is a first offender, has a family and sentence of 7 years is harsh and excessive. The State opposed the appeal against sentence urging the section under which the 1st appellant was convicted attracts maximum sentence of 7 years. That the trial Court exercised its discretion to sentence the appellants and the sentence meted was lawful and within the law.
19. I have considered the sections under which the appellants were sentenced and indeed the maximum sentence on count 1 and count III is seven (7) years each. The trial Court exercised its discretion in sentencing the appellant and noted that the offence was serious, it is prevalent here in Siaya, quite high and as a result called for deterrent sentence. The trial Magistrate was also urged by prosecution that the accused had previous record yet none was produced. The sentencing of the appellants and for their sentence to run consecutively was in fact based on prosecution submission that the appellant had previous record. It was the duty of the prosecution to produce the alleged previous records to show the appellant had previously been convicted. The prosecution did not urge the offence was prevalent, and high in Siaya, the trial Court basing its sentence on issues not raised by the prosecution prejudiced the appellants. The appellants should have in such situation been afforded an opportunity to rebut or submit on the prevalence of the offences being high at Siaya. Failure by trial court to do so infringed on the appellants constitutional rights to a fair trial under **Article 50(2) (a) (k) of the Constitution of Kenya.**
20. I have therefore come to the conclusion that the evidence adduced by the prosecution against the 2nd appellant was insufficient and unsafe to found a conviction against the 2nd appellant. For that reason, I find merit in the 2nd Appellant's appeal and allow it. Accordingly I quash the conviction entered against the 2nd appellant, **MICHAEL ODHIAMBO OCHIEL**, set aside the sentence meted against him and order that the 2nd appellant **Michael Odhiambo Ochiel** should be set at liberty forthwith unless is otherwise lawfully withheld.
21. **The conviction against the 1st appellant is upheld, the sentence is upheld on both count I and count II but the same to run concurrently instead of consecutively from the date of judgment thus 4th May, 2015.**

DATED AT SIAYA THIS 12TH DAY OF MAY 2016.

J. A. MAKAU

JUDGE

DELIVERED IN OPEN COURT

IN PRESENCE OF:

1st Appellant in person: Present

2nd Appellant in person: Present

M/s. M. Odumba for State.

Court Clerk: 1. Kevin Odhiambo

2. Mohammed Akide

J. A. MAKAU

JUDGE