



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION
CRIMINAL APPEAL NUMBER 212 & 209 OF 2014.

MARTIN KIMATA1ST APPELLANT

JOHN GATHIGE NGARUIYA.....2ND APPELLANT

VERSUS

REPUBLICRESPONDENT

(Being an appeal from the original conviction and sentence in the Chief Magistrate's Court at Makadara Cr. Case No. 1813 of 2014 delivered by Hon. E.K. Nyutu, PM ON 9th October, 2015).

JUDGMENT

BACKGROUND.

Martin Kimata and John Gathige Ngaruiya, the Appellants, were charged with the offence of breaking into a building and committing a felony contrary to Section 306(a) of the Penal Code. The particulars of the offence was that on 11th April 2014, the Appellants, at Soweto village in Nairobi East District within Nairobi county, jointly with others not before the court, broke and entered a building, namely C-Bara Electronic shop and stole therein a JBL speaker, HP laptop, an amplifier, 29" television, 32 pieces of mobile phones and a padlock all valued at Kshs. 136,000 the property of Patrick Kudia.

They were also charged in the alternative with handling stolen goods contrary to Section 322(1)(2) of the Penal Code. The particulars were that on 11th April 2014 at Soweto village in Nairobi East District within Nairobi county, otherwise than in the course of stealing, dishonestly received or retained a JBL speaker, HP laptop, amplifier and the following mobile phones; Asha 200 Nokia, HTC, ITEL 2020, Techno T340, Nokia D500, G-Fen, Samsung U8150, Samsung U8850, Nokia C2, Sony Ericsson and MBO plus a padlock.

They were both convicted for the main charge and each of them was sentenced to serve 7 years in jail. Being dissatisfied with the conviction and sentence they preferred this appeal. The 1st Appellant's grounds of appeal were as follows;

- 1. That the trial magistrate erred in convicting based on fabricated prosecution evidence.**
- 2. That the trial magistrate erred by failing to observe that the house alleged to belong to him was not his.**

3. That the trial magistrate erred by failing to observe that proper investigations were never conducted to warrant the conviction.

4. That the trial magistrate erred by admitting that the items presented as exhibits in court belonged to the complainant without any proof of ownership and that the same were recovered from his house.

5. That the learned magistrate erred in failing to consider his defence.

The 2nd Appellant, in his amended supplementary grounds of appeal raised the following grounds of appeal;

1. That the learned magistrate erred in convicting him based on fabricated prosecution evidence which did not prove the prosecution's case beyond reasonable doubt.

2. That the learned trial magistrate erred in failing to observe that proper investigations were not carried out to warrant a conviction.

3. That the learned magistrate erred by admitting the items presented as exhibits in court as property of the complainant without any proof of ownership.

4. That the learned magistrate erred in failing to consider his defence.

SUBMISSIONS.

The Appellants canvassed the appeal by way of written submissions while the Respondent, represented by learned State Counsel, Ms. Nyauncho gave oral submissions. The 1st Appellant submitted that the given that PW1 and PW2 had means of entry into the premises it was possible that PW1 had gained entry into the premise while PW2 was asleep and committed the crime. He submitted that the fact that the door was not broken into corroborated this notion. In any case, it was never explained how the theft was committed while PW2 was asleep and he never raised an alarm. He submitted that he was framed by the police as he was arrested on his way to work.

It was the 1st Appellant's submission that the prosecution never adduced evidence showing that the house the stolen property was found in belonged to him. And even if it was his house, they should have charged the lady who was found in the house or bonded her as a State witness. The 1st Appellant went on to submit that it was never established how he was identified. He submitted that the police should have dusted the door at the locus in quo to corroborate and ensure proper identification.

Further, that a proper scrutiny of the exhibits was not done and therefore they it was never established that the complainant was indeed the owner of the items. No receipts for purchase of the items or agreements of possession were produced to prove ownership. He submitted that the list of items stolen from the complainant did not tally with the exhibits produced which vindicated the fact that and the items may have been collected from the police store to frame him. He concluded by submitting that his defence was never considered.

The 2nd Appellant's submissions were identical to those of the 1st Appellant and I therefore need not duplicate them.

Ms. Nyauncho, for the Respondent opposed the appeal. She submitted that the prosecution proved that the house was broken into and that items worth Kshs. 136,000 were stolen. Further, that the Appellants were convicted on evidence of recent possession. That the Appellants also led the police officers to the scene of crime which fact incriminated them. With regard to the ownership of the goods, she submitted that PW4 gave evidence that PW1 identified the goods positively at the police station. She urged that the appeal be dismissed.

EVIDENCE.

AS is the settled law the duty of the first appellate court is to reevaluate the evidence on record and come up with its own conclusions. In the present case, the prosecution's case was that the Appellants robbed from the complainant's shop of various electronic items. This was in the presence of a sleeping PW2. They were spotted by patrolling officers who pursued them and finally caught up with them. They got the 2nd Appellant and upon searching him they found two phones on him. They asked him to lead them to the other man he had been spotted with and he led them to the 1st Appellant's house where they conducted a search and found some of the items stolen from the shop. They interrogated them on the origin of the items and the Appellants agreed to lead them to the shop that was broken into. That is how it was concluded they committed the offence.

PW1, PATRICK KUDIA WAMAMBA resided in Soweto in Kayole where he operated a retail shop dealing in mobile phones and CDs. He testified that PW2 usually slept at the shop. He recalled that on 10th April, 2014 he was at his house when at around 10.00 p.m. his brother came to pick up the keys to the shop. Later that night at around 3.00 a.m. his brother informed him that shop had been broken into. The shop was next to his house and he went and confirmed that indeed the shop had been broken into. Various things were missing including mobile phones, speakers, amplifiers, television and a laptop. The total value of the items was Kshs. 132,000.

He made a report at 9.00 am and that is when he learnt that some items had been recovered by the police. He viewed them and was able to identify his laptop, speaker, amplifier and mobile phones. He learnt that police had arrested some suspects who had aided the recovery of the items. He said that this suspects were the two Appellants who he did not previously know.

PW2, SYLVESTER KUDIA usually slept at his brother's(PW1) shop. He recalled that on 10th April, 2014 he went to sleep in the shop as usual. He was woken up at 3.00 a.m. by a police officer who asked him why he was sleeping with the door open. He looked around and realized that everything had been stolen. He went and reported to PW1. He testified that he had secured the doors before he slept and they were open when he woke up. His evidence corroborated by that of PW1 in all other respects.

PW3, No. 66311 PC WILLIAM LOSOIT YATOR of Soweto Police station recalled that on 10th April, 2014 at 6.00 p.m. he was in the company of John Kilimani and Athman Abdalla on patrol duties at Duka Moja area. The patrol was to end at 6.00 a.m. on the following morning. At around 1:30 a.m. they spotted two men carrying luggage which raised suspicion and they followed them. The men managed to disappear from their sight so they started looking for them on that street. They found one man outside a plot who was soon joined by another before they started walking away. They suspected they were the men they were trailing and therefore stopped them and carried out a quick search. They found two phones in the possession of the 2nd Appellant. They were concealed in the inner of the two trousers he was wearing. These were HTC and ITEL in make. They interrogated the men and they informed them they were from a funeral arrangement meeting. The officers were not aware of any gatherings taking place in the area and this further aroused their suspicions.

They therefore asked the men to lead them to their house. They were taken to the 1st Appellant's house. In the bedroom they found a speaker, laptop, amplifier and several mobile phones on top of the bed plus a padlock. There was also a woman sitting on the bed. They took possession of the exhibits and escorted the Appellants to the police station. On interrogation the Appellants they admitted that they broke into an electronics shop and they directed them to the place where they found a door open. They were directed by the 1st Appellant. They entered the shop and found someone sleeping, PW2. He was shocked that the shop had been broken into.

PW3 testified that they also recovered 6 other phones that are yet to be identified by anyone. They also recovered from the 1st Appellant's house a waist bag which contained tools, namely; a tinsmiths scissors, pair of pliers and two spanners. They also recovered a bunch of keys, 2 screwdrivers, a black bag and the national identity card of Brian Katiku Munyoiki, whose possession he could not explain. He also found

hospital vials with some liquid. He produced all these items in court.

PW4, No. 67753 PC JOEL BIWOT also of Soweto police Station recalled that on 11th April, 2014 he was on duty at the station when he learnt that some suspects had been arrested and items recovered in the course of the night. PW3 and his fellow police officers on patrol informed him what had transpired. PW1 identified the goods that were stolen from his shop.

PW5, No. 85836 ATHMAN ABDALLA who was on patrol duties with PC William Lesoit and PC Joel Kilimani within Duka Moja area entirely corroborated the evidence of PW3.

After the close of the prosecution case, the learned magistrate ruled that the Appellants had a case to answer and were accordingly put on their defence. The 1st Appellant testified as DW1 and 2nd Appellant as DW2. None called a witness to corroborate their defence. They gave unsworn statements of defence.

The 1st Appellant said that he was employed as a cook in a hotel. He recalled that on 10th April, 2014 he went to work at 4.00 a.m. At around 2:30 p.m. he was sent to buy flour and on his way he met a woman he used to work for who informed him that she had lost a child. He informed her he would pass by that evening to condole her. He left work at 10.00 p.m. and proceeded to the vigil where he stayed until morning. As he was headed to work he was stopped by officers, PW3 and 5 who demanded to know where he was going. He informed them he was headed to work and they arrested him. He said that he was not guilty and that he did not know the 2nd Appellant before his arrest.

The 2nd Appellant said that he resided in Kayole Soweto and worked as a porter at Marikiti market. He recalled that on 10th April, 2014 he went to work at 4:30 a.m. until 3.00 p.m. when he returned home. He slept early and the next day at around 4:30 a.m., he went to work. On his way to work he was stopped by police officers who carried out a search on him but recovered nothing. He was bundled with other suspects who had been arrested. He was taken to the police station and arraigned in court on 14th April, 2014 for an offence he did not commit.

DETERMINATION.

After summarizing the evidence and considering the respective submissions, I have narrowed down the issues for determination to be whether the doctrine of recent possession was properly applied in convicting the Appellants and whether the case was proved beyond reasonable doubt.

The learned trial magistrate convicted solely on the application of the doctrine of the recent possession. She cited the case of **R VS LOUGHLIN 35 R CR. APP. R69** in which Lord CJ of England stated that:

“if it is proved that the premises had been broken into and that certain property had been stolen from the premises, and that shortly afterwards a man is found in possession of that property, that is certainly evidence from which the jury can infer that he is the house-breaker or shopkeeper.”

She also cited the famous **Malingi vs Republic, 1989 KLR 275 at page 227** in which Bosire, J, as he then was delivered himself as follows:

“By application of the doctrine (to wit doctrine of recent possession) 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 had in his possession had been stolen; it had been stolen a short period prior to the 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 circumstances of the case, recent; that there’re are no co-existing circumstances which point to any other person as having been in possession of the item. The doctrine being a presumption of fact 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 it or was a guilty receiver. (emphasis is ours).

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As demonstrated in the case of **R-VS-LOUGHLIN 35 R CR. APP. R69**, for an accused person to be convicted for breaking into a premises, he must shortly after his arrest be found in possession of the property stolen from the premises. The statement itself implies that prove of ownership of the property is mandatory so as to link it to the owner of the premises. Otherwise, the mere fact of being arrested with suspected stolen property cannot of itself, constitute an element of breaking into a premises. In the present case, the Appellants were arrested with various items believed to belong to PW1. However, in court PW1 casually testified and identified a laptop, a speaker, an amplifier, earphones, 3 old chargers and two mobile phones which he said were stolen from his premises. Surprisingly, he did not lead evidence on how he identified the items as belonging to him, either by way of physical or documentary identification. All he stated was that the exhibits in court belonged to him. In the same spirit, PW2 who was sleeping in the shop when the offence was committed only said that his brother (PW1) positively identified his stolen property. It begs then how the learned trial magistrate made the conclusion that those items belonged to PW1.

Flowing from above, the case of **Malingi vs Republic(supra)** too places the condition that for the doctrine of recent possession to apply, the prosecution must prove that the items recovered were stolen property. Therefore, prove of ownership is mandatory. Whereas the doctrine of recent possession is a rebuttable presumption where an accused is required to explain how he came by the stolen property, the fact that ownership was not demonstrated is conclusive evidence that it could not be established that the Appellants broke into the premises. That is further to say that, merely because they were found in possession of suspected property could not found sufficient proof that they had broken into the premises and stolen the goods. Therefore, it was incumbent upon the prosecution to establish the ownership of the goods which onus they did not discharge. In that respect, I hold that the learned trial magistrate did not properly apply the doctrine of recent possession in convicting the Appellants.

But again, this court may nevertheless convict an accused person for another offence for which evidence is disclosed. Both Appellants were charged with an alternative count of handling stolen goods contrary to **Section 322(1)(2) of the Penal Code**. Sub-Section (1) provides as under:

“A person handles stolen goods if (otherwise than in the course of the stealing) knowing or having reason to believe them to be stolen goods he dishonestly receives or retains the goods, or dishonestly undertakes, or assists in, their retention, removal, disposal or realization by or for the benefit of another person, or if he arranges to do so.”

The offence equally places a rebuttable presumption requiring the accused person to explain how he came about the stolen property. But again, one of the elements as provided is that the prosecution must first and foremost establish the theft of goods before an accused is called upon to explain how he came about the said stolen goods. Where the prosecution does not demonstrate theft, then the accused person holds the title by possession against any other claim. My view is vindicated by the Court of Appeal in England in **Costello v. Chief Constable of Derbyshire Constabulary(CA) [2001] 1 WLR 1437**, which held that:

“In my view,..., as a matter of principle and authority possession means the same thing and is entitled to the same legal protection, whether or not it has been obtained lawfully or by theft or by any other unlawful means. It vests in the possessor a possessory title which is good against

the world save as against anyone setting up or claiming under a better title. In the case of a theft the title is frail, and of likely limited value(see, e.g, Rowland v Divall[1923] 2 KB 500), but none the less remains a title to which the law affords protection.

...

This conclusion is in accord with that long ago reached by the courts that even a thief is entitled to the protection of the criminal law against the theft from him of that which he himself has stolen: see, Smith & Hogam, Criminal Law, 9th Ed (1999), p 522.”

It follows then that the prosecution did not discharge their burden in proving that the recovered goods were stolen. Therefore, the Appellants in the absence of any other claim, held the first title by possession. Respectively, I do also hold that the alternative count could not stand.

In the result, this appeal must succeed. I allow the same. I quash the conviction and set aside the sentence. I order that both Appellants be and are hereby forthwith set free unless otherwise lawfully held. It is so ordered.

DATED AND DELIVERED THIS 4th DAY OF OCTOBER, 2016.

G.W. NGENYE-MACHARIA

JUDGE

In the presence of;

- 1. 1st Appellant in person.**
- 2. 2nd Appellant in person**
- 3. Miss Sigei for the Respondent.**