REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARISSA

CRIMINAL APPEAL NO. 20 OF 2014

(From Original Conviction and sentence Cr. 458 of 2013 at Wajir – Rogocho –RM)

PAUL IRUNGU NJERI.....APPELLANT

V E R S U S

REPUBLIC.....STATE

J U D G M E N T

The appellant was charged with housebreaking contrary to Section 304(1)(b) and stealing contrary to Section 279(b) of the Penal Code. The particulars of the offence were that on 23rd October 2013 at Wagberi Location Wajir East District within Wajir County broke and entered the building used as a dwelling house by HOTHAN IBRAHIM HUSSEIN and stole therein one fan, Sony Decoder, Beddings, Curtains, Pairs of shoes, Bedsheets, Perfumes, Clothing and Household goods valued at Kshs 150,000/= the property of HOTHAM IBRAHIM HUSSEIN. He was also charged with a second count of handling stolen goods contrary to Section 322 (1)(2) of the Penal Code. The particulars of the offence were that on 24th October 2013 at Township Location in Wajir East District within Wajir County otherwise that in the course of stealing dishonestly received or retained one Sony decoder, a fan, through wire, spring file with envelopes, one mart, one carpet, nine curtain box covers, one bed sheet cover, pillow case, two door curtains, one frying pan and a scissor knowing or having reasons to believe them to be stolen goods.

He denied both charges. After a full trial he was convicted of house breaking and theft. He was sentenced to serve 5 years imprisonment on the first limb of the charge and 10 years imprisonment on the second limb of the charge, the two sentences to run concurrently.

Dissatisfied with the decision of the trial court, the appellant has come to this court on appeal. He filed his initial petition of appeal on 7/4/2014. On 11th August 2015 however, he filed an amended petition of appeal on the following grounds:-

1. The he pleaded not guilty to the offence.

2. The trial magistrate erred in convicting him without considering that the charge was defective.

3. The trial Magistrate erred in convicting him without considering that the arresting officer did not wear uniform as required by law.

4. The Magistrate erred in convicting and sentencing him without considering that arresting officers

never attended the court proceedings to present the evidence contrary to section 109 and 110 of the Evidence Act.

5. The learned Magistrate erred in sentencing him for 10 years which was harsh and excessive.

6. The learned magistrate failed to note that crucial witnesses were (not) brought to ascertain the allegations of the prosecution.

7. The trial Magistrate erred to convict and sentence him without considering that the evidence of PWI that since 24th October he heard rumours from members of the public of someone selling household goods, but the complainant did not accompany them to establish who was selling the sacks and the reporter did not record any statement.

8. The trial Magistrate erred in law and facts in convicting and sentencing him without considering that the mode of arrest was poorly administered.

9. That the trial magistrate erred in conviction and sentencing him while the officers denied him his rights by detaining him in police custody for seven days while the case was not robbery or murder.

10. The trial magistrate erred in convicting and sentencing him without considering that the witnesses came from one family PW4 was the mother of PW3 and PW1 was also a relative, and the village boys did not testify.

11. The trial Magistrate erred in law and practice to convict and sentence him without considering his defence.

The appellant also filed written submissions, which I have considered. In the submissions he relied on a number of cases, that is ***SIMON MUCHIRI & ANOTHER –vs- REPUBLIC – CRIMINAL APPEAL NO. 11/87 and MUNGAI –VS- R – CRIMINAL APPEAL NO. 1 of 1994.***

During the hearing of the appeal, the appellant relied on the written submissions. He elected not to make oral submissions.

Learned Prosecuting Counsel Mr. Orwa opposed the appeal. Counsel submitted that the charge was not defective as the appellant understood the allegations against him and participated fully in the trial by cross-examining witnesses. Counsel relied on the case of Pappyton Ngui –vs- R- A Machakos High Court Criminal Appeal. Counsel also relied on the provisions of Section 382 of the Criminal Procedure Code (Cap. 75) and stated that any minor defects in the charge sheet could be cured under that Section.

With regard to ground 3, counsel submitted that there was no requirement that an arresting officer be in uniform. Counsel also stated that there was no irregularity in the mode of arrest.

On ground 5, counsel argued that the sentence was that allowed by law and was thus not excessive.

Counsel also submitted that the alleged violation of the Constitution was dealt with by the trial court satisfactorily and the prosecution explained the delay adequately. In any event counsel argued, the remedy for such violation, if any was by compensation not an acquitted.

With regard to ground 10 the prosecuting counsel argued that calling PC Maranga as a witness would merely be to seek repetition of the evidence of PW5. Counsel emphasized that PW2 was an independent witness, so it could not said that the appellant was convicted on the evidence of only relatives.

Lastly, counsel submitted that the defence of the appellant was considered and that the doctrine of recent possession applied in that case.

In response to the prosecuting counsel's submissions, the appellant submitted that the Prosecuting

Counsel was paid for opposing the appeal, and urged the court to do justice.

During the trial, the prosecution called 5 witnesses. PWI was Abduaziz Ibrahim Hussein a KDF Officer at Wajir Town. It was his evidence that on 23/10/2013 at 2.00Pm while at his house, his mother Amina Ibrahim Edin called and informed him that his sister's house had been broken into. He proceeded there and confirmed the breakage of the house of Hodhan Ibrahim Hussein his sister. He noted that the main door was broken as well as the window for the thieves to get inside. A number of items had been stolen including curtains, floor mat, praying mat, bed sheets, fan, shoes and other items. He stated that the previous night the sister had slept in his mother's house about 100 meters away. He thus phoned his sister and informed her about the incident.

According to him, the sister reported the incident at Wajir Police Station the next day, 24th October 2013. They also heard rumours that someone was selling items that appeared to be the stolen items, and traced the person and found him at 10.00 am in his house. He then called the police who went and arrested him after they found a mart, praying mat, fan, bedsheets, shoes, video tape player and clothes in the house. When interrogated by the police officers, the suspect said he had sold some of the items and took them to the buyer where they recovered curtains. He identified the suspect as the appellant.

In cross – examination, he stated that he did not witness any person stealing from his sister's house. He stated that when they saw him, the appellant was lying on a bed with the items on the floor. He did not have documents to prove ownership of the items, and had no documents to prove that the house belonged to the appellant. He stated that he did not take a photo of the items in the house.

In re-examination he stated that the appellant was all alone in the house.

PW2 was Joseph Odopo Oungo an electrician at Wajir town. It was his evidence that on 23rd October 2013 at 6.00 Pm as he was going home, he met a person selling items. He bought curtains, bed sheets, and a mart. On 24/10//2013 around 12.30 Pm, he was called by police officers and went to his house where he met the police and members of the public. He opened the house and the police asked him where he got the items he had bought and he pointed to them the seller who was with the police. The police took away the items. It was his evidence that the agreed to a price of Kshs 8,000/= and he had paid the seller Kshs 2,000/=.

In cross-examination, he stated that he met the appellant on the road and that they did not enter into a written agreement on the purchase.

In re-examination, he stated that it was normal for hawkers to sell items without issuing receipts.

PW3 was Hodhan Ibrahim a teacher at Ramu High School Mandera. It was her evidence that on 23/10/2013 as she invigilated exams at Wajir High School, her mother called her on phone at 2.00 Pm and told her that her house had been broken into. She then proceeded to the scene arriving at about 4.00 Pm and confirmed that the door and window to her house had been broken into, curtains, 3 carpets, bed sheets, bedcovers, shoes, personal clothes, VCR, Fan, prayer mat, even Koran CD's had been stolen. According to her, the stolen items were valued at approximately Kshs 100,000/-. She proceeded to Wajir Police Station and reported the incident. On 24/10/2013, PWI informed her that the stolen items had been recovered. She went to the police station where she confirmed that the recovered items were hers. She identified them in court.

In cross-examination, she stated that she did not see the person who stole her goods.

PW4 was Amina Ibrahim Adan the mother of PW3. She stated that on 23/10/2013 at 9.00 am she went to PW3's house and found it locked from inside. She went back at 2.00 Pm with her son Mustart Ibrahim and still found it locked. She then asked her son to jump over the wall to check why the house was locked from inside. When the son did so and opened the gate, she discovered that the house had been broken into – doors and windows broken and some things stolen including the curtains. She then called PW3 her daughter and PWI her son and informed them about the incident. She also reported the incident

to the police.

On 24/10/2013 she heard rumours that a person had been seen selling the items. Her husband, her son and village boys and herself proceeded to Bulla Hodhan and found a young (appellant) man sleeping in a house, with her daughters goods in that house. They then alerted the police who came and arrested the appellant.

In cross-examination, she stated that she did not witness the theft but maintained that the items belonged to her daughter.

PW5 was Cpt Benjamin Kimeli. It was his evidence that on 24/10/2013 PC Maraga and himself proceeded to the scene of the alleged breaking and observed broken windows. The doors were intact.

Then the family of the complainant later called and they proceeded to a house where they found the items and the

appellant. Initially the appellant refused to cooperate but later took them to various houses and showed them where he had sold the items. They thus arrested and charged him.

In cross-examination, he stated that he was the investigating officer and found the appellant alone in the house.

When put on his defence, the appellant tendered sworn testimony. He stated that he came from Ikinu in Kiambu but lived in Wajir. He stated that on 23/10/13 he was in the house of his friend Peter who had travelled out of town. At 4.00 Pm two Somali young men came carrying sacks and one of them told him he wanted to put the sacks in the store, but there were keys. He then requested to put the sacks in Peter's room and that promise to come on 24/10/13 in the morning to put them in the store and he allowed him.

On the 24/10/13 the young man did not come but three people came and saw the were which sacks left there and left while calling him a thief. He denied stealing the said goods.

In cross-examination, he stated that on 24/10/13 he was at his friend Peter's house. He stated that he knew the young man who left the sack.

This is a first appeal. As a first appellate court, I am duty bound to re-evaluate the evidence on record and come to my own conclusion and inferences – see ***Okeno –vs- Republic (1972) EA 32.***

I have re-evaluated the evidence on record.

The appellant has complained that his Constitutional rights were infringed as he was kept in custody for more than 24 hours before charge. Indeed, that happened. However, the prosecution gave an explanation for the delay in the trial court. Part of the delay was caused by the fact that the court was not sitting. In my view the explanation given for the delay was satisfactory.

The appellant has complained that the main witnesses in the trial were relatives. Indeed three relatives testified for the prosecution. However, none of them knew the appellant before, nor did they have any reason to implicate him. I dismiss that ground.

The appellant has also stated that some key witnesses were not called to testify. In this regard, he has referred to the members of the public or youths who arrested him. In my view the youth would not add any crucial evidence to what was on record. The appellant himself said he was found in the house or room where the items were found. So the youth were not expected to give a contrary position.

As for defect in the charge sheet, I find none.

The appellant was found guilty of housebreaking and theft. The evidence of the prosecution was that the

house of the complainant was found to have been broken on 23rd October 2013 and items stolen. The said items were found in a room the next day which was 24/10/13, where the appellant was lying on a bed. The appellant did not deny that he was found in the said room with the items, but said that the room belonged to a friend and the items were brought by two Somali young men for storage the previous day. The prosecution evidence was also that some of the items were sold to a witness by the appellant. The appellant denied theirs.

Having re-evaluated the evidence on record, I am of the view that the Magistrate was correct in finding that the appellant was the thief or one of the thieves. His defence was certain by not believable.

In my view, the doctrine of recent possession applies in the case. The appellant was found with the stolen items shortly after the theft. He did not give a satisfactory explanation as to how he came to be in possession or sold the items. I will therefore uphold the conviction.

With regard to sentence, the appellant was sentenced to serve 5 years imprisonment for the first limb of the offence and 10 years imprisonment for the second limb of the charge. The sentences were ordered to ran concurrently.

In my view, because the stolen items were recovered, the sentence on the second limb of the charge is on the higher side. The maximum sentence for the second limb of the charges, it should be noted was 14 years imprisonment. I will reduce the sentence to 5 years imprisonment since the appellant was also treated as a first offender, on top to recovery of the stolen items.

Consequently, I dismiss the appeal on conviction and uphold the conviction of the trial court.

With regard to sentence, I uphold the sentence of 5 years imprisonment for the first limb of the charge. I however set aside the sentence on the second limb of the charge and order that the appellant will serve 5 years imprisonment for theft contrary to section 279 (b) of the Penal Code. The two sentences will run concurrently, from the date of sentencing by the trial court which means a total of 5 years imprisonment from the date on which he was sentenced by the trial court.

Dated and delivered at Garissa this 19th day of October 2015.

GEORGE DULU

JUDGE