



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU**

**CRIMINAL APPEAL NO. 123 OF 2014**

**Consolidated with CRA NO. 166 OF 2014**

**JOHN NJERU KATHENYA..... 1<sup>ST</sup> APPELLANT**

**KATHURU KATHENYA.....2<sup>ND</sup> APPELLANT**

**V E R S U S**

**REPUBLIC.....RESPONDENT**

*(Being an appeal from original conviction and sentence in criminal case No.225 of 2014 at Marimanti PM's Court before NYAKUNDI F.M. – RM on 5<sup>th</sup> September, 2014)*

**JUDGMENT**

The Appellants, **JOHN NJERU KATHENYA** and **KATHURU KATHENYA** were charged with the offence of **Burglary contrary to Section 304 and Stealing contrary to Section 279 of the Penal Code CAP 63 of the Laws of Kenya.**

The particulars of the offence were that on the night of 29<sup>th</sup>/30<sup>th</sup> November 2013 at Kamayuki village in Tharaka North District within Tharaka Nithi County, jointly broke into the house of **DANIEL GITONGA GAICHU** used as a dwelling house with intent to steal there in and did steal one “farm mate” knapsack sprayer pump, a TV make campus, a solar battery, a DVD playing machine, a pipe range spanner, a frying pan, a thermos flask, three bed sheets, 80 kilogrammes of dry maize, a mobile phone and a remote control all valued at Kshs 30,000/=, the property of Daniel Gitonga Gaichu.

In the alternative, they each faced a charge of handling stolen property contrary to section 322 (2) of the Penal Code in that on the 30<sup>th</sup> day of December 2013 at Muramba wa Nkunju village, 1<sup>st</sup> appellant was found in possession of one ‘farm mate’ knapsack sprayer valued at Kshs.2,500/=, while 2<sup>nd</sup> appellant was found in possession of one frying pan, a TV make campus, a bed sheet and a pipe range spanner all valued at Kshs.3,500/= respectively, knowing or having reasons to believe them to have been stolen.

The Appellants were tried, and convicted on the alternative charge of handling stolen property and sentenced to five years imprisonment without the option of a fine. They were however acquitted in respect of the main charge pursuant to section 215 of the Criminal Procedure Code.

The appellants filed CRA 166/2014 Benson Kathuru Kathenya V Rep and CRA 123/2015 John Njeru Kathenya V Rep. At the hearing of the appeals they were consolidated and the lead file is CRA 123/2014

and the appellants appear as they had in the trial court. The summarized grounds of appeal are as follows:

1. **THAT the Learned Trial Magistrate erred in both law and facts by ignoring and failing to find that there was an existing grudge between the 1<sup>st</sup> appellant and PW2 who was a sister to the complainant in this case;**
2. **THAT the 1<sup>st</sup> appellant's fundamental rights were violated by torturing him in police cells whereupon he lost one eye;**
3. **That vital witnesses were not called;**
4. **The offence was not proved to the required standard;**
5. **That the sentence is harsh and excessive.**

The appellants urge the court to quash the conviction, set aside the sentence and set them at liberty.

This being the first appellate court, It is the duty of this court to examine the entire evidence adduced before the trial court afresh, evaluate, analyse and draw its own conclusions bearing in mind that this court did not have the benefit of seeing the witnesses. I am guided on the duties of a first appellate court by the Court of Appeal decision of *Okeno V Rep (1972) EA 32.*

The appeal was opposed by Mr. Mulochi, Counsel for the State. He submitted *inter alia* that the evidence tendered in the lower court was sufficient to found a conviction the offence having been committed in broad daylight; that the appellants were properly indentified and there was no possibility of mistake. He further contended that the sentence meted out on the appellants was lenient and therefore urged the court to dismiss the appeal.

Briefly, the prosecution's case was as follows; **PW1 DANIEL GITONGA GAICHU** was at his farm at Kamachuki on 30/11/2013 when he received a call from his sister Hellen Kanono (PW2) who informed him that she had met a crowd of people following some suspects for allegedly breaking into and stealing from his house. He took a motor cycle and went back home and on reaching the house, found that indeed his house had been broken into and a TV make campus, solar battery, DVD machine, knapsack sprayer, one basin, 3 bed sheets, 80 kilogrammes of maize, thermos, mobile phone, remote control and the receipts that he had bought the goods with, had also been stolen. He later reported the incident at Gatunga police station. On 30<sup>th</sup> December 2013, he received a call from the Chief of Gatue requesting him to join the operation that was ongoing at the home of the appellants. He proceeded to the home of the 1<sup>st</sup> appellant accompanied by his sister (PW2), where he saw a police officer recover a knapsack sprayer and noticed that the same was his because inside it, he had marked on the seal "Dan Gitonga". They later went inside the 2<sup>nd</sup> appellants house and he saw a police officer recover a TV make campus, frying pan and one bed sheet and pipe range spanner which he identified as his. He later recorded his statement at Gatunga police station.

**PW2 HELLEN KANONO** testified that on 29/11/2013 at about 8.00 a.m., she was on her way home from Maragwa when she found people tracing footsteps and when she asked them where they were going, they told him that her brother's house (PW1) had been broken into that night. She followed them and on reaching her brother's house, she noticed that the padlock had been cut and the following items were missing: TV, solar battery, DVD player, knapsack sprayer, spanner, frying pan and Motorola mobile. She called her brother who came home and cofirmed that indeed his house had been broken into. On 30<sup>th</sup> November 2011, one chief Nyaga called her and told her to go and indentify some of the things that had been stolen. They went and met a lot of people with police officers and he saw the knapsack sprayer from the 1<sup>st</sup> appellant's house. They then went to the 2<sup>nd</sup> appellant's house and found the TV, frying pan and spanner tied in a bed sheet.

**PW3 PC BOAZ MARARA** a police officer stationed at Gatunga police station testified that on 30<sup>th</sup>

November 2013 with the OCS and other officers, 30 of them, they went for an operation at a village called Muramba wa Mkunju; that they first went into the 1<sup>st</sup> appellants house where they found a wheel barrow, a plough, a knapsack sprayer, solar, solar battery, bed, goats and sheep and other items he could not remember. They then brought those items in the open ground so that people could identify them. In the 2<sup>nd</sup> appellant's house, they recovered a bed, wheel barrow; plough, sheets, mattresses, frying pan, pipe, range spanner and a TV make campus. He further testified that PW1 was able to identify the sprayer which was in the 1<sup>st</sup> appellant's house and the TV, spanner, frying pan and bed sheet that was in the 2<sup>nd</sup> appellant's house.

**PW4 PC BURTON KAGUMBA** was with PW3 in the operation when they went to a village called Muramba wa Mkunju after allegations were made that 4 sons of one Stephen Kathenya had terrorised the villagers for many years and were violent. On reaching the village, one of the men challenged them prompting them to shoot and people started running away. They then started conducting a search in the appellants' houses and members of the public were informed so that they could come and identify their properties. In the 1<sup>st</sup> appellant's house, a spray pump was recovered and PW1 indentified the same to be his. In the 2<sup>nd</sup> appellant's house, they recovered a TV make campus, bed sheets, frying pan and pipe range spanner.

After close of the prosecution case, the appellants were found to have a case to answer and were placed on their defence. The appellants opted to give sworn evidence and called no witnesses.

The 1<sup>st</sup> appellant's defence was that on the material day he was with his late brother Alex Ikiura going to Maragua to pick his wife. They picked the wife and when near his home, they met the chief of Gatue who said that they should be shot. His brother was hit with an arrow and he fell down prompting the 1<sup>st</sup> appellant to run to Gatunga police station to report. He was later escorted to Marimanti where he also met his relatives in the cells and was assaulted leading to loss of one eye. He further testified that PW1 in this case cheated that he made a report to the police but did not indicate which house was broken into.

The 2<sup>nd</sup> appellant testified that on the material day, he took a container and never locked the house and at about 5:30 a.m. he saw police officers and he was hit with one bullet on the leg and fell down and that he stayed there until 2 p.m. when he went home he never found anything and the posts of the house had been destroyed. He went to report at Police Station and was later arrested and charged with this offence.

I have carefully considered and reevaluated the evidence on record, the grounds of appeal and the submissions by the appellants and the State Counsel.

PW1 was not at home when the burglary took place but was informed by (PW2) that his house had been broken into and some items stolen from his house. PW1's evidence was corroborated by the evidence Of PW2, 3 and 4 that PW1 was called to join the police and members of public who went to search the Appellant's house because the two had been arrested as suspects. PW1 identified the Knapsack sprayer recovered from 1<sup>st</sup> appellant's house in the presence of all these witnesses, also the TV and spanner. There was no contradiction in their evidence. PW1's house was broken into on the night of 29<sup>th</sup> and 30<sup>th</sup> November, 2013 and the recovery was made on the morning of 30<sup>th</sup> November. PW1 had left home on 29<sup>th</sup> and was called on 30<sup>th</sup>. PW1 identified the knapsack sprayer by the initials on it. He told the court that the receipts had also been carried away by the thieves. A TV, spanner which he identified as his were also found in 2<sup>nd</sup> appellant's house. The appellants did not offer an explanation as to how they came by the said items stolen. In fact during cross examination of the witnesses, they did not raise any of the allegations of existing grudges with PW1 and 2. I am satisfied that the two were found in recent possession of some of the goods stolen from PW1's house and hence are presumed to be the thieves.

In the case of *Arum V Rep CRA 85/2005* the Court of Appeal set out the principles to be followed in a case of recent possession. The prosecution has to prove 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.**

In the case of *Malingi v Rep (1989) KLR 225*, the Court of Appeal stated as follows as regards the doctrine:

***“By the application of the doctrine, the burden shifts from the prosecution to the accused to explain his possession of the items 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 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 is either stole or was a guilty receiver.”***

In the instant case PW1 was able to identify the stolen items as his beyond reasonable doubt, a fact which was never challenged by the appellants. In fact when the prosecution applied for the items to be returned to PW1, the 1<sup>st</sup> appellant stated ***“no objection I don’t know those items.”*** The 2<sup>nd</sup> appellant in reply stated ***“I don’t know the owner. I have no objection for the items to be refunded from the owner.”*** The appellants having been unable to explain how the stolen items came into their possession, the only logical inference that can be made is that they were the thieves.

All the principles required to prove the doctrine of recent possession have been proved and this leads to the inevitable conclusion that the appellants took part in the theft. The trial court did rightly invoke the said doctrine.

With regard to the issue raised by the 1<sup>st</sup> appellant that his fundamental rights were violated at the police cells whereby he lost one eye, whereas the court sympathizes with the 1<sup>st</sup> appellant’s predicament, in the case of *Julius Kamau Mbugua v Rep Criminal Appeal No. 50 of 2008* it was stated as follows:

***“in our view, it is not the duty of a trial court or an appellate court dealing with an appeal from a trial court to go beyond the scope of criminal trial and adjudicate on the violation of the rights to personal liberty which happened before the criminal court assumed jurisdiction over the accused. However, the trial court can take cognizance of such pre-charge violations of personal liberty, if the violation is linked to or affects the criminal process. As an illustration where the prolonged detention of a suspect in police custody before being charged affects the fairness of the ensuing trial i.e. where an accused has suffered trial related prejudice as a result of death of an important defence witness in the meantime, or the witnesses has lost memory, in such cases, the trial court could give the appropriate protection like an acquittal. Otherwise the breach of a right to personal liberty of a suspect by police per se is merely a breach of a civil right, though constitutional in nature, which is beyond the statutory duty of a criminal court and which is by section 72 (6) expressly compensatable by damages.”***

As correctly captioned in the above cited case, the appellant’s grievance can only be addressed in a Constitutional petition before a Constitutional court because it involves breach of his civil rights. He did not demonstrate that the said breach is linked to or affected his trial.

In his defence the 1<sup>st</sup> appellant alleged that he had a grudge with PW2 and that is why she framed him.

First, PW2 is not the complainant. PW2, a sister to PW1 only notified PW1 of the breakage into his house and the theft. In cross examination the 1<sup>st</sup> appellant never put to PW2 that she had framed him nor did he so allege when cross examining the other witnesses. That allegation of grudge was only raised during the defence. Likewise, the 2<sup>nd</sup> appellant alleged that they had disagreed over a woman with PW1. Again this was raised as an afterthought. The trial court did consider all these allegations of alleged disputes but disbelieved them. I have no reason to differ from the trial court's finding. In the end, I find that there was no grudge between PW1 and 2 and the appellants. PW3 and 4 who are independent of PW1 and 2 were present when the recovery was made and corroborated PW1 and 2's evidence. I am satisfied that this allegation of existence of grudge was an afterthought and contrary to the appellants' allegations that their defences were not considered, the court did consider the appellants' defences.

On the allegation that vital witnesses were not called, the appellants did not mention any specific person that should have been called as a witness. The evidence on record is that there were many members of the public present who were called by police to see if they could identify their lost property. Not all could have been called as witnesses. It is the duty of the prosecution to decide which witnesses are necessary to be called for the fair determination of the case. The prosecution can only be faulted if they fail to call a witness because of an ulterior motive. No ulterior motive has been alluded to.

As earlier noted, the trial court invoked the doctrine of recent possession. Indeed the appellants were found in possession of property stolen only a day earlier and it was positively identified as required, meaning that they took part in the theft. In my view therefore, the court erred in finding the appellants guilty on the alternative charge of handling stolen property and I hereby quash the said conviction. Instead, I find the appellants guilty of the offence of burglary and stealing contrary to section 304 as read with section 279 (b) of the PC.

The first limb carries a maximum of 10 years while the 2<sup>nd</sup> limb carries a maximum of 14 years. I sentence the appellants to 5 years in prison on each limb and the same will run concurrently from the date they were sentenced by the trial court (5/9/2014).

In the end, the appeal is devoid of merit and it is hereby dismissed in its entirety.

**DATED, SIGNED AND DELIVERED THIS 13<sup>TH</sup> DAY OF OCTOBER, 2015**

**R.P.V. WENDOH**

**JUDGE**

**13/10/2015**

**PRESENT**

Mr. Mulochi for State

Appellants – Both Present in Person

Peninah/Ibrahim, Court Assistants