



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT EMBU**  
**CRIMINAL APPEAL NO.141 OF 2012**

JAMES MUGENDI .....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

**From original conviction and sentence in Cr. Case No. 504 of 2012 at the Resident Magistrate's Court at Runyenjes by HON. J.P. NANDI – RM on 29<sup>TH</sup> AUGUST 2012**

**J U D G M E N T**

JAMES MUGENDI was charged with the following offences;

***Burglary contrary to section 304(2) and stealing contrary to section 279(b) of the Penal code***

The particulars of the charge were that;

**JAMES MUGENDI alias KAMUSINJE: On the night of the 14<sup>th</sup> and 15<sup>th</sup> June 2012 at Runyenjes Township in Embu County jointly with others not before Court, broke and entered the dwelling house of SHINA MOHAMMED, with intent to steal therein and stole therein, one mattress, three bed sheets, one bed cover, one flask (thermos), two sufurias, two shoes (different types), three tissue papers, uji flour all valued at kshs.5,645/= the property of the said SHINA MOHAMMED.**

**Alternative Count**

***Handling stolen goods, contrary to section 322(1) (2) of the Penal Code***

The particulars of the charge were that;

**JAMES MUGENDI alias KAMUSINJE: On the 18<sup>th</sup> June 2012 at Runyenjes Township in Embu County otherwise in the course of stealing, dishonestly retained one mattress, three bed sheets, one bed cover, one flask (thermos), one sufuria, two shoes (different types), uji flour knowing or having reason to believe them to be stolen goods.**

He pleaded not guilty and the matter proceeded to full hearing as a result of which he was convicted of the main count and sentenced to four (4) years imprisonment. He appealed raising the following grounds;

1. ***That the learned trial Magistrate erred in law and facts by not considering that the Appellant***

- pleaded not guilty.*
2. *That the learned trial Magistrate erred in law and facts by not considering that the house from which the exhibits were collected was not the Appellant's.*
  3. *That the trial Magistrate did not consider that nobody saw the Appellant at scene and even PW1 did not see him.*
  4. *That trial Magistrate did not consider that the Appellant's rights were violated by staying in police cell for three (3) days.*

The Prosecution called two witnesses. PW1 found her house broken into on the night of 14<sup>th</sup> – 15<sup>th</sup> June 2012. She lost the items mentioned in the charge sheet. She reported the matter and on 19/6/2012 she was called to the station to identify some items. She was able to identify EXB 1 – 7. PW2 on 17/6/2012 at 6.52pm received the Appellant at the station. At 8pm PW2, P.C. Langat and I.P. Njogu left with the Appellant upto his house from where they recovered EXB1 – 7. He said the landlord confirmed to them that the house shown to them by the Appellant belonged to him.

The Appellant in his defence denied the charge. He said he was arrested and police took him to a house in town which they broke and removed several items. It was not his house he said.

When the appeal came for hearing the Appellant presented the Court with written submissions. He raises the issue of the ownership of the house from which the items were recovered. The State though the learned State Counsel Mr. Miiri opposed the appeal saying the Appellant was found in possession of the stolen items.

Being a first appeal this Court is enjoined to reconsider and reevaluate the evidence adduced and arrive at its own conclusion. This Court is alive to the fact that it did not have the opportunity to hear or see the witnesses. The Court of Appeal in the case of *AJODE –V- REPUBLIC [2004]2 KLR 81* held thus;

***“It is trite law that before such a parade is conducted, and for it to be properly conducted, a witness should be asked to give the description of the accused and the police should then conduct a fair identification parade”.***

I have carefully considered the submissions by the Appellant and the State together with the grounds of appeal. I have equally considered the evidence on record. The evidence shows that the Appellant was arrested by members of the public on 17/6/2012 evening. Elsewhere in Embu HCRA No.140/12 it was said this same Appellant was arrested on 18/6/12 evening. He was arraigned in Court on 20/6/2012. There was no explanation for the delay in arraigning him in Court within 24 hours. It's true that his constitutional right was violated. This violation does not however lead to an automatic acquittal. It can be addressed at a different forum for purposes of compensation. Ground 4 therefore fails. Ground 3 also fails because he was convicted on the basis of the doctrine of recent possession. Ground 2 is very crucial in this case. The Appellant says the house from which the exhibits were recovered did not belong to him. The case of *ARUM –V- REPUBLIC [2006]1, KLR 233* lays down pertinent issues the Court must address before founding a conviction on the doctrine of recent possession. These are;

1. ***Before a Court can rely on the doctrine of recent possession as a basis of conviction in a criminal case, there must be positive proof.***
  - a. *that the property was found with the suspect*
  - b. *that the property was positively the property of the complainant*
  - c. *that the property was stolen from the complainant*
  - d. *that the property was recently stolen from the complainant*
2. ***In case the evidence as to search and discovery is conflicting, then the Court can rely on the adduced evidence analyzing it and accepting that it considers it to be correct and honest version.***

In this case the evidence of PW2 is that the Appellant led him and two other officers to his house where

the items were recovered from. Further he said that the Landlord confirmed to them the Appellant was the owner of the house. Indeed if it was proved that the Appellant was the owner of that house then it would be said he was found in constructive possession of the items. Was the Court positively satisfied that this was the case?

First and foremost the Landlord who allegedly confirmed the ownership of the house was not called as a witness. So how did PW2 convince the Court that the items were recovered from the Appellant's house? If indeed the Appellant led them to his house and he has denied it, then it's his word against that of PW2. Therefore PW2's evidence on this required corroboration. And the only people who could have offered that kind of corroboration were P.C. Langat and IP Njogu. The two officers were also not called by the Prosecution. The only inference I can make is that had they been called (i.e. Landlord and the two officers) their evidence would have supported that of PW2 **REF: JUMA NGONDIA –V- REPUBLIC [1982-1988] 1 KAR 454.**

That being the only basis upon which the Appellant was convicted my finding is that had the learned trial Magistrate properly analysed the evidence and applied the law he would have arrived at a different conclusion. I do find that the appeal has merit and I allow it. The conviction is quashed and sentence set aside. The Appellant to be released unless otherwise lawfully held under a separate warrant.

**DATED AND DELIVERED AT EMBU IN OPEN COURT THIS 11<sup>TH</sup> DAY OF MARCH 2014**

**H.I. ONG'UDI**

**J U D G E**

**In the presence of;**

**M/s Ingahizu for State**

**Appellant – PIP**

**Njue – C/c**