



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CRIMINAL APPEAL NOS. 280 AND 281 OF 2011

(CONSOLIDATED)

BETWEEN

MOFFAT OKENO ZAKARIAH..... 1ST APPELLANT

JOHN OMONDI OPOLLO 2ND APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from the judgment of Hon. J.R. Ndururi, SRM, dated 28th November

2011 in the original Kehancha's Criminal Case No. 1123 of 2010)

JUDGMENT

Introduction

1. On the 4th December 2013 this court consolidated the 2 appeals herein being Criminal Appeal No.280 and Criminal Appeal 281 of 2011 to proceed under file No.280 of 2011 as both arose from the same trial.
2. The two appellants herein, John Omondi Opollo (2nd appellant) and Moffat Okeno Zakaria (the 1st appellant) were the 1st and 2nd accused in Kehancha Senior Resident Magistrate's Criminal Case Number 1123 of 2010. The appellants were jointly charged on count I with the offence of breaking into a building and committing a felony contrary to **Section 306 (b)** of the **Penal Code**. The 2nd appellant was charged in Count II with handling stolen property contrary to **Section 322 (2)** of the **Penal Code**. The particulars were that on the 12th day of August 2010 at 2.20 a.m. at Karamu trading Centre in Kuria District within Nyanza Province, jointly with others not before court, broke and entered into a building namely bar of one Peter Nyaiki and committed therein a felony namely theft of one Home theatre, make Sony, one TV make Aucma and various alcoholic drinks as detailed in the charge sheet, all valued at Kshs.59640/= the property of the said Peter Nyaiki.
3. In Count II against John Omondi Opollo, the 2nd appellant, it was alleged that on the same 12th August 2010 at about 2.00 p.m. at Migori Township, in Migori District, within Nyanza Province otherwise than in the course of stealing, dishonestly received and retained one Furaha Spirit, one bottle of viceroy and four bottles of African Gin having reason to believe them to be stolen goods.

The appellants pleaded not guilty to the charges.

The facts and the Evidence of the Case

4. The complainant, PW1, herein, Peter Nyaiki told the court that he runs a bar at Karamu Trading Centre in Migori District. On the 12th August 2010 at about 2.55 a.m., while in Kehancha town, he received a telephone call from his wife informing him that the bar had been broken into. The complainant immediately telephoned police at Isebania police station and made a report of the incident. He also telephoned his brother and requested him to liaise with the Maberu D.O.'s office for help.
5. At day break, the complainant went to the trading centre at Karamu and confirmed the break in and theft. He established that his Home theater, television set and an assortment of alcoholic drinks had been stolen, from the bar. Following the complainant's report, police from Isebania police station visited the scene. The complainant also found out that as the burglars were fleeing, they had dropped the television set which was subsequently run over by a bus.
6. The complainant also testified that at about 11.30 a.m. on the same day, he received a telephone call from Samuel Matiko Maseke, PW2 of Migori, who informed him that some people who he said were the 2nd appellant herein, one Sammy and Felix Okoth had approached him (PW2) and offered to sell to him a Home theatre. The complainant went to Migori police station and sought the assistance of the OCS. The OCS released two police officers who accompanied the complainant to PW2's miraa kiosk where they laid an ambush for the 2nd appellant.
7. While the complainant and the two police officers were at PW2's kiosk, PW2 telephoned the 2nd appellant concerning delivery of the Home theatre which the 2nd appellant had offered to sell to PW2. During the conversation between PW2 and the 2nd appellant, PW2's mobile phone was on speakerphone and the complainant thus heard the 2nd appellant telling PW2 that the Home theatre was too big to be taken to PW2's kiosk and that in the circumstances, PW2 would have to collect it from wherever it was. The 2nd appellant told PW2 that he (2nd appellant) was sending Okoth on a motor bike to collect PW2 and take him to where the Home theatre was.
8. After about 20 minutes, Okoth arrived on a motorbike. PW2 boarded the same after he had closed the kiosk. The complainant and the two police officers followed in a taxi. The motor bike stopped at a certain estate some 3 kilometres outside Migori town and after alighting therefrom, Okoth entered one of the houses thereat. The 2nd appellant also arrived at the said house. A little while later, Okoth emerged from the house but upon recognizing one of the police officers, Okoth took to his heels and fled. The police however managed to arrest the 2nd appellant and demanded that he (2nd appellant) takes them into the house from which Okoth had emerged. Since Okoth had locked the house, the 2nd appellant told the police that he did not have the key to the house. The police officers then broke the door to the house and entered the same. On conducting a quick search, the police recovered one bottle of viceroi and seven bottles of Furaha Gin.
9. During that time too, the 2nd appellant telephoned his wife and spoke to her in Dholuo, telling her that he was under arrest and that she should hide the home theatre. The complainant understands Dholuo, so he was able to follow that conversation between the 2nd appellant and his wife.
10. The 2nd appellant was escorted to Migori police station together with the recovered bottles of spirits. The 2nd appellant was later collected by police officers from Migori police station.
11. The complainant told the court that the 2 appellants herein were persons well known to him and that the 1st appellant herein, Moffat Okeno Zakaria was his (complainant's) cousin. The 1st appellant was arrested on information that he was among the people who had broken into the complainant's bar and stolen the items enumerated in the charge sheet. The complainant identified the viceroi bottle (**PMF1-1**), the four bottles of Furaha Gin (**PMF1-2**) and the one bottle of Furaha Brandy (**PMF1-3**).
12. The second person to testify was Samuel Matiko Maseke, PW2, who owns a miraa kiosk at Migori. He told the court that on 12th August 2010 at about 2.00 a.m. while he was sleeping he heard screams from a neighbouring bar. He armed himself and went out and found that the bar had been broken into and some items stolen. Together with the police they started tracking the

- burglars but along the way a bus came by and ran over the TV which had been stolen from the bar.
13. PW2 further told the trial court that at about 6.00 a.m. the same day, he went to his kiosk in Migori where he usually makes coffee. At about 9.00 a.m. he was approached by three young men who he knew very well namely Sammy, Okoth and Omondi and they told him that they had some things to sell. These things included spirits (Furaha, Viceroy and Smirnoff), and a home theater. Since he did not sell spirits, they offered to sell to him the home theater at a good price which was Kshs.2000/=. They told him that they got the home theater at Karamu.
 14. PW2 told the trial court that he asked the three young men whether they were the ones who had committed the burglary at Karamu and they answered in the affirmative. Since he (PW2) comes from Karamu he felt obliged that the three young men are caught, so he requested them to allow him go to the bank to withdraw the money and at the same time he took their telephone numbers. PW2 then made efforts to get the telephone number of the owner of the bar at Karamu and he got the same from the chief.
 15. The chief telephoned the owner who then came with two police officers to PW2 who explained to them about the encounter with the young men: Sammy, Okoth and Omondi. The police then told PW2 to telephone one of the three and thereafter they laid an ambush after Omondi agreed to collect PW2 and take him to where the home theatre was. They were led to a house where they recovered some Furaha and Viceroy spirit. The police carried out a search inside that house but did not recover the home theater. PW2 identified **PMF1-1, 2 and 3** namely the Furaha and Viceroy spirits in court.
 16. He told the court that during the ambush Omondi was arrested and thereafter Sammy started calling him threatening to kill him if he (PW2) came to court to give evidence. He reported the said threats to the police. He (PW2) identified Omondi and Sammy in the dock and confirmed that he knew them prior to the incident. Both were his customers at his kiosk.
 17. PW3 Joseph Kibaricho a manager at Karamu bar, told the court that on the 13th August 2010 at 10.00 p.m., he closed the said bar and took stock and left 20 pilsners, 15 tuskers, 10 Furahas, quarter Richot, half viceroy, 20 Guinness, several sodas. He also said that in the bar was a home theater and a TV set.
 18. The next morning at 8.00 .m. he was called and told that the bar had been broken into. He went to the bar, took stock and established that the home theatre TV, a Guinness, 2 tuskers, 1 pilsner. 1 Richot, 10 Furahas and 1 Viceroy had been stolen. He recorded a statement with the police. Later he learnt that some of the items had been recovered, they were one viceroy and 5 Furahas. He identified them in court as PMF1-1, 2 and 3. He did not know the suspects before, but saw them in court.
 19. PW4 Thomas Rioba Magoto a watchman at Karamu Bar told the court that on 12th August 2010 at about 7.30 p.m. he was at his place of work where there were a few customers. The bar was closed at 10.00 p.m. by the manager, PW3 Joseph Kebaricho who left him (PW4) guarding the place. At 2.00 a.m. some people came and started to break down the door. He saw three people but since he was alone he became fearful and moved at a distance before raising an alarm. By the time the neighbours came the people had already broken down the door and stolen some items. They tried to pursue the burglars but they did not find them. He also stated that the burglars dropped a TV set but the same was run over by a bus and was damaged. Later he learnt that some of the stolen items had been recovered and some suspects arrested. He only saw the suspects in court on the day he testified.
 20. PW5 NO.67259 Cpl Mathew Koech previously based at Isebania police station and presently at Kehancha police station told the court that on 12th August 2010 at about 2.03 a.m. he was in his house when he was called by the complainant who told him that his bar at Karamu area had been broken into by unknown thugs after his watchman had been chased away and some alcoholic drinks, a home theatre and other items stolen.
 21. PW5 informed the duty officer and together with other officers proceeded to the scene of crime. The following day he was minuted to investigate the case. He visited the scene; found that the main door had been broken down. On the same day he received a call from the complainant telling him that a suspect was trying to sell the home theatre within Migori area and he (PW5)

- directed the complainant to seek some assistance from Migori police station.
22. He further told the court that he later learnt that the police at Migori had arrested one suspect while others had managed to escape. He (PW5) told the court that on the same day he went to Migori police station and saw the suspect and he also learnt that the complainant was present during the arrest and he identified some alcoholic drinks which had been recovered from the suspects. These were one viceroys brandy and five bottles of Furaha Gin. He identified the same as PMF1-1, 2 and 3 respectively. He told the court that he took possession of the same and produced them as **P. Exhibit 1, 2 and 3** respectively. He further told the court that the suspect had been arrested after he approached a witness with an offer to sell the home theatre and that the suspect had lived near Karamu area and was wanted for other burglaries.
 23. PW5 thereafter recorded statements from witnesses before charging the suspect in this case. That it is PW2 who led to the arrest of the suspect as he attempted to run away. That PW2 also identified the other two suspects who were with the first suspect but one escaped on the material day. He pointed out the 1st appellant in the dock as one of the suspects who escaped during the arrest but was later arrested.
 24. PW6 No.64914 PC Gilbert Kibett attached to Migori police station also testified before court and said that on 13th August 2010 at about mid day he was at the station when he was summoned by the Deputy OCS. He found the complainant in this case in the Deputy OCS's office and was told that the complainant's bar had been broken into during the night of 12th August 2010 and some items stolen and that the matter had been reported to Isebania police station. He told court that he was told that there was information that some of the items were to be sold within Migori Town.
 25. Together with PC Muchemi and complainant they took a private vehicle and went to lay an ambush at Mombasa Hotel. That they were able to arrest one of the suspects during the ambush but the other one escaped. They then carried out a search in the house where they had arrested the suspect and recovered 5 bottles of spirits, one half viceroys, richot and 3 furaha spirits. The complainant identified them as his. They escorted the suspects and the exhibits to Migori police station. The suspect was collected by police officers from Isebania police station. He identified the 5 spirits bottle **P. Exhibit 1, 2 and 3** and also the 1st appellant who he did not know before.

The Defence Case

26. In their defence the 1st appellant who was DW2 in the trial court told the trial court that he did not commit the offence. He said that he had disagreed with the complainant over his wife. That he had moved to Mabera where he had a saloon and that in March 2009 he went to his rural home and was sent by his mother to look after his brother's houses in Migori. He found that some tenant had destroyed some windows of those houses and he then decided to report to Migori police station where he found the complainant who accused him of taking thieves to go and break into his bar and steal property. He was then arrested.
27. The 2nd appellant DW1 in the trial court told the court that he is a boda boda rider and on the 12th August 2010 he went to do service at Migori. He then took his friend Felix to his home. When he stopped the motor cycle, police officers arrested him but his friend escaped.

The Trial Court's Findings and Judgment

28. Faced with this evidence the learned trial magistrate found that the prosecution had proved their case beyond reasonable doubt against the two appellants. The appellants were found guilty, convicted and sentenced each of them to serve five (5) years imprisonment.
29. Being dissatisfied by the whole conviction and sentence imposed against them by the Senior Resident Magistrate for the offence of committing a felony contrary to **Section 306 (b)** of the **Penal Code**, Moffat Okeno Zakaria, the 1st appellant herein petitioned this court by filing the petition dated 8th December 2011 on the grounds that:-

1. *He pleaded not guilty to the charge of breaking into a building and committing a felony contrary*

- to **Section 306 (b) of the Penal Code.**
2. *The honourable trial magistrate erred in both law and fact even after the complainant claims that he was suspecting him (appellant) because of having a business house at Sirare which does not go contrary with the case he is accused of.*
 3. *The honourable trial court erred in both law and fact even after PW1 testified that he doesn't know him but he knew the 1st accused and the 2nd accused who had run away.*
 4. *That PW2 who claimed to the trial court that he (1st appellant) called him on phone and threatened him that if he came to give evidence before court about the threats did not produce the mobile phone number used but trial court despite this went ahead and sentenced him (1st appellant) to serve a huge sentence for an offence he never did.*
 5. *That the complainant went to the 1st appellant's house to make a search and he never got anything but the honourable trial court did not give this fact consideration.*
 6. *The honourable trial court erred in both law and fact in relying on the prosecution witnesses who testified that they did not know the 1st appellant and had never seen him.*
30. He prays therefore that the court intervenes by quashing the conviction and setting aside the sentence imposed because it is overly harsh and/or grant any orders it deems fit to grant.
31. The 2nd appellant also filed a 15-paragraph petition of appeal but most of the grounds are more a narration of the appellant's side of the story than grounds of appeal. The only issues he raises in the said petition are that the learned trial magistrate erred in law and fact by not considering that the house from which the allegedly stolen items were recovered did not belong to him and secondly that none of the complainant's neighbours were called to testify in the case against him.
32. The 2nd appellant prays that his appeal be allowed, the conviction quashed and sentence set aside so that he can be set free.

First Appeal

33. This being a first appeal, I am under a duty to rehear the appellant's case only remembering that I do not have the privilege of seeing and hearing witnesses. I am bound to make my own inferences in the matter after reconsidering and evaluating the evidence afresh in addition to considering and weighing the judgment of the trial court.

See **Okeno –vs- Republic [1972] EA 32.** I have now done so.

Findings

34. The 1st and 2nd appellants were not identified at the scene of the burglary and theft. It was PW2 who told the trial court that the 2nd appellant herein together with the 1st appellant and another had approached him and offered to sell him some items. PW2 also led the police to an ambush where the 2nd appellant was arrested after he came to the house where Okoth had taken PW2 to pay for and take delivery of the home theatre.

The Submissions

35. At the hearing of this appeal, the two appellants relied on their written submissions which I have carefully read and considered. The 1st appellant denied that he committed the alleged offence. He also submitted that throughout the trial, no witness told the court that they knew him and that the mere fact that he was adversely mentioned by PW2 was neither sufficient nor conclusive evidence to connect him to the alleged offence.
36. The 2nd appellant also submitted at length to the effect that the evidence that was adduced by the prosecution was not such as would connect him to the offence.
37. The appeal was opposed by Mr. Shabola, Prosecution Counsel on behalf of the DPP. Counsel

- contended that all the 6 prosecution witnesses were credible witnesses whose testimony remained unshaken throughout the trial. He submitted that some of the stolen items were recovered in the house of the 2nd appellant only some hours after the break-in and theft. Counsel also referred to the evidence of PW2 and submitted that the said evidence clearly shows how the 2 appellants approached him with a view to selling a Home theatre to him (PW2).
38. Counsel also submitted that PW2's testimony was corroborated by the testimonies of both PW6 and PW1, as well as that of PW5, Cpl Mathew Koech who carried out the investigations into the allegations against the appellant.
39. It was counsel's submission that the prosecution proved its case against both appellants beyond any reasonable doubt and urged the court to dismiss the appeals on both conviction and sentence.

Findings

40. From the evidence on record, there is no doubt that the complainant's bar at Karamu Trading Centre was broken into, and the items listed in the charge sheet stolen therefrom. PW3, the complainant's manager confirmed that the said items, which were part of the stock on the previous evening when he closed the bar at about 10.00 p.m. were indeed stolen from the bar. PW4 also confirmed during his testimony that at about 2.00 a.m., he saw some three people come to the premises and break down the door. Being single handed, PW4 had to move away to safety before raising an alarm. When PW5 visited the scene in the morning, he confirmed the break-in. The prosecution case is that the two appellants jointly with others not before the court broke into the bar and stole the items, or that by virtue of being found in possession of the stolen items the 2nd appellant was the burglar and thief.
41. It follows therefore that the conviction of the appellants was based on the doctrine of recent possession of the stolen property; namely the 2nd appellant being found in possession of spirits just a few hours after the break-in and theft from the complainant's bar.
42. The application of the doctrine of recent possession was considered in the case of **Maina & 3 others -vs- Republic [1986] KLR 301** wherein the Court of Appeal relied on what was stated in the English case of **R. -vs- Loughlin [35] Cr. Appeal R.69** in which the Chief Justice of England stated:-
- “If it is proved that premises have been broken into and certain property has been stolen from the premises and that very 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.”**
43. The above inference can be rebutted if there is a reasonable explanation from the person. In the present case, the incident took place at around 2.00 a.m. The stolen items were found in the house of the 2nd appellant the next day although the time was not specified. He (2nd appellant) was with the 1st appellant who escaped the police ambush. The 2nd appellant did not offer any explanation as to how these items came to be in his house. He has not claimed that the same were his properties.
44. In my considered view, the short duration between the burglary and the theft and the recovery of the items, and the fact that the 2nd appellant did not offer any explanation on how he came into possession of the items recovered brings into play the application of the doctrine of recent possession. I am satisfied that the doctrine is applicable in this case as against the 2nd appellant who was rightly found by the trial court to have been involved in the theft of the items from the complainant's bar.
45. As regards the 1st appellant, I find no evidence from the record to connect him to the offences charged. PW2 identified this 1st Appellant during the trial as Sammy, but the prosecution did not offer any other evidence to show that Moffat Okeno Zacharia is alias Sammy. The main count was breaking into a building and committing a felony contrary to **Section 306 (b)** of the **Penal**

Code was against both appellants, while the 1st appellant alone was charged with being found in possession of stolen items. In effect I find that the conviction of the 1st appellant on the main count was not well founded and his appeal on the same succeeds. The conviction is quashed and the sentence of 5 years imprisonment in respect of the 1st appellant is set aside.
46.I confirm both conviction and sentence in respect of the 2nd appellant.

Conclusion

47.The upshot of what I have said above is that the appeal by the 1st appellant succeeds and is allowed on both conviction and sentence. Unless otherwise lawfully held, the 1st appellant, Moffat Okeno Zacharia is to be released from prison custody forthwith unless he is otherwise lawfully held.

48.The 2nd appellant's appeal on both conviction and sentence is dismissed. R/A to Court of Appeal within 14 days.

49.Orders accordingly.

Dated and delivered at Kisii this 6th day of March, 2014

R.N. SITATI

JUDGE.

In the presence of:

Present in Court in person for 1st Appellant

Present in person for 2nd Appellant

Miss Cheruiyot (present) for State

Mr. Bibu - Court Clerk