IN THE HIGH COURT AT MIGORI

Criminal Appeal No. 20 Of 2014

(FORMERLY KISII HCCR APPEALS NOS. 104 & 105 OF 2013)

BETWEEN

SAMSON CHACHA MWITA ..... 1st APPELLANT

EMMANUEL FRANGI ……..……..……..2nd APPELLANT

AND

REPUBLIC……...…....…….....…. RESPONDENT

(Being an appeal from the original conviction and sentence in Criminal Case No. 129 of 2013 of the Senior Resident's Magistrates Court at Kehancha, Hon. C.M Kamau, Ag SRM dated 27th September 2013)

JUDGMENT

1. The appellants **SAMSON CHACHA MWITA** and **EMMANUEL FRANGI** were charged together with two other accused persons with the offence of breaking into building and committing felony contrary to **section 306 (a) (b)** of the ***Penal Code (Chapter 63 of the Laws of Kenya)***. They were the 4th and 2nd accused respectively at the trial. The particulars of the charge were that on the night of 6th and 7th April 2013 at Isebania Township in Kuria West District within Migori County they jointly with others not before court, broke and entered into a building namely a store of AAM and stole therein 66 10-litre jerricans of *Ufuta* cooking oil and 30 bales of black polythene bags all valued at Kshs. 253,500/= the property of the said AAM.

2. After a full trial, all the accused were convicted and sentenced to 6 years imprisonment. The appellants have now appealed against the conviction and sentence. Before I consider the grounds of appeal, it is important to set out the material facts emerging from the testimony of the prosecution witnesses.

3. PW 1, the complainant, AAM, testified that his shop was broken into and 66 10-litre jerricans of *Ufuta* cooking oil and 30 bales of polythene bags all valued at Kshs. 253,500/00 stolen on the night of 7th April 2013. When he visited the scene he saw a mattock, drill and hacksaw which had been used to break into the shop. PW 2, a security guard at the shop, testified that it had rained heavily on the night. After the rain subsided, he decided to patrol the compound whereupon he found 12 10-litre jerricans of *Ufuta* cooking oil stacked outside. He informed the PW 1 and the landlord, PW 3.

4. PW3, the landlord of the shop, recalled that on the night of 6th and 7th April 2013, he was sleeping when PW 2 called him about the break in. When he tried to get out of his house, he discovered

that his door had been locked from outside. He called PW 2 to open for him. While waiting for PW 2 to open for him, he saw someone run to the fence. He said that he could see him clearly as the lights were on. He said that the person he saw was a male adult of average weight and that the person was putting on a black T shirt with white strips on the collar. He identified the person he saw running away that night as the 1st appellant whom he knew him as he went to they went to the same school and he had gone to the school where he teaches to seek admission for his child. He aslo confirmed that PW 1's shop had been broken into.

5. PW4, a police officer, recalled that on 7th April 2013 at around 10 am he received information that some items which had been stolen the previous night had been stored in a house near Nyamaharaga Primary School. He went to the house accompanied by other officers and found a young man who opened the door and allowed them to search the house. He testified that two other young men were asleep in the house. They recovered 6 10-litre container of *Ufuta* cooking oil which matched the description of the goods stolen. The three suspects were arrested and charged. The 2nd appellant was among the persons he arrested in that house.

6. PW 5, the investigating officer, testified that on 7th April 2013 at 3.50 am, PW 1 reported to him that his shop had been broken into. He accompanied PW 1 to the shop and confirmed that the shop had been broken into. He also found the tools used to break into the shop. He also found 10-litre jerricans of Ufuta cooking oil and bales of polythene paper. He recorded statements from some witnesses. He stated that PW 2 identified the 1st appellant by his nickname *Kipepeo*. He was later informed that some officers had arrested other persons in connection with the theft.

7. PW 6, the landlord of the premises where the suspects were arrested, testified that the 1st appellant and the 3rd accused were his tenants. He testified that the 1st accused was a regular visitor of the 3rd accused and 1st appellant. He denied knowing the 2nd appellant.

8. The appellants elected to give unsworn statements when put on their defence. They all denied the charges. The 1st appellant testified that he was arrested on 26th April 2013 and charged but the charges were withdrawn only for him to be charged alongside the other accused. He testified that there was a grudge between him and PW 3.

9. On his part, the 2nd appellant testified that he was a scrap metal dealer and that on 8th April 2013 he had gone to look for a house as his own house was leaking. While he was with the 3rd accused in the house, police officers came in, arrested and charged him, the 2nd and 3rd accused.

10. In considering this appeal, this Court, as the first appellate Court, is enjoined to conduct its own evaluation of the evidence and come up with an independent conclusion taking into account that it neither heard nor saw the witnesses testify (see ***Okeno v Republic*** **[1972] EA 32**).

11. Like the learned magistrate, I find that the prosecution conclusively established the PW 1's shop was broken into and various items stolen. The testimony of PW 1, PW 2, PW 3 and PW 5, which was not contested by the appellants at the trial, establish that the shop was broken into and the felony of stealing committed. The testimony was supported by the physical items recovered from the scene like the mattock, drill and hacksaw used to gain entry into the shop. The main issue at the trial and in this appeal is who broke into the complainants shop and stole the items.

12. The conviction against the 1st appellant was as a result of the fact that he was identified by PW 3 at the shop premises on the material night in circumstances which led the learned magistrate to conclude that he had been involved in the felony. The conviction of the 2nd appellant rested on the fact that he was found in possession of recently stolen property.

13. In support of the appeal, the 1st appellant relied on written submissions which were contained in supplementary grounds of appeal. He argued that the learned magistrate did not consider the fact

that he was convicted on hearsay evidence of PW 1 and PW 3 and that the evidence against him was fabricated. He submitted that the first report made by the complainant did not identify him. The 2nd appellant argued that PW 1, PW 2, PW 3 and PW 4 did not identify him and that there was no evidence implicating him in the offence. He contended that he was caught in a place where he had gone to seek a place to rent.

14. Ms Owenga, learned counsel for the State, supported the conviction on the ground that there was sufficient evidence to implicate the appellants in the offence and that they were properly convicted. She submitted that the sentence was proper in law and should not be interfered with.

15. The 1st appellant conviction was based on the fact that he was identified indeed recognized by PW 3. In convicting the 1st appellant the learned magistrate stated as follows;

With regard to the fourth accused person, he was arrested because he was mentioned by an eye witness … PW 3. I wish to state I observed him keenly as he testified. From his demeanour, I formed the opinion that he was a credible and reliable witness. He was certain of what he saw. He has known the fourth accused for many years. He described the lighting which enabled [him] to recognise the accused person. The accused went over the wall of the plot. He is not a tenant at the premises or even nearby. The only inference that can be drawn from his being spotted running away at that odd hour is that he was involved in the break in. I am therefore satisfied that he participated in the breaking of the building and the theft thereafter.

16. The issue of identification based on the testimony of one witness has been the subject of judicial decision. In ***Francis Kariuki Njiru & 7 others v Republic*** **NRB CA CR. Appeal No. 6 of 2001 [2001]eKLR** the Court of Appeal stated as follows:

*The law on identification is well settled, and this Court has from time to time said that the evidence relating to identification must be scrutinised carefully, and should only be accepted and acted upon if the court is satisfied that the identification is positive and free from the possibility of error. The surrounding circumstances must be considered (see **R v Turnbull [1976] 63 Cr. App. R. 132**). Among the factors the court is required to consider is whether the eye witness gave a description of his or her attacker or attackers to the police at the earliest opportunity or at all. This Court, in **Mohamed Elibite Hibuya & Another v R. Criminal Appeal No. 22 of 1996 (unreported)**, held that: "…..If is for the prosecution to elicit during evidence as to whether the witness had observed the features of the culprit and if so, the conspicuous details regarding his features given to anyone and particularly to the police at the first opportunity. Both the investigating officer and the prosecutor have to ensure that such information is recorded during investigations and elicited in court during evidence. Omission of evidence of this nature at investigation stage or at the time of presentation in court has, depending on the particular circumstances of a case, proved fatal – this being a proven reliable way of testing the power of observation, and accuracy of memory of a witness and the degree of consistency in his evidence.*

17. The basis of the 1st appellant's conviction rested on the fact that he was recognized by PW 3. I am now called upon to scrutinize the evidence carefully before I conclude that the 1st appellant is guilty of the offence of which he is charged. I note that PW 2, the security guard, in his testimony did not allude to seeing anyone on the premises at the time he went to open the door for PW 3. He stated that PW 3 called to inform him he could not open the door and asked him to come and open the door from the outside. PW 2 did not refer to the fact that when PW 3 called him he said that he had seen a thief in the compound yet PW 3 testified that when he called PW 2, he informed him that the thief was still in the compound. PW 2 was a security guard and had he been informed that the thief was still in the premises, he would have reacted to the information or at least testified about it.

18. Since PW 3 knew the alleged thief very well, in all likelihood he would have reported the identity of the thief to the police. PW 5, the investigating officer, stated PW 2 identified the 1st appellant and he started looking for him. However, he admitted in cross-examination that he did not record

the name of the person identified by the witness. PW 5 also testified as DW 5 when the 1st appellant called him to produce the Occurrence Book ("OB") which is a contemporary account of the investigation. The first item in the OB extract showed that the 1st appellant was arrested on 26th April 2013 after a tip-off from members of the public. The OB extract summarises the events of 7th April 2013 and contains 4 entries from 0350hrs, 0414hrs, 1040hrs and 1055hrs. I have examined the entries and according to the entry OB 9 7/4/12 1055hrs, *"It was established that one Jackson Wanjoro, Emmanuel Frangi and John Samuel Mwita broke into the store ….."* There is no reference to the 1st appellant either by his name or alleged nickname *Kipepeo*, the fact that PW 5 started looking for him or the fact that PW 3 identified him as the thief he recognized in his compound.

19. This issue was raised specifically by the 1st appellant in his evidence but the learned magistrate did not deal with this important evidence which would assist in assessing the credibility and consistency of the testimony of PW 3. In regard to the identity of the assailant, the Court of Appeal in ***Maitanyi v R*** **[1986] KLR 198** stated as follows;

There is a second line of inquiry which ought to be made and that is whether the complainant was able to give some description or identification of his or her assailants, to those who came to the complainant's aid, or to the police. In this case no inquiry of any sort was made ... If a witness receives a very strong impression of the features of an assailant; the witness will usually be able to give some description.

The same point was emphasized in ***Simiyu & Another v R*** **[2005] 1 KLR 193** where it was held,

In every case in which there is a question as to the identity of an accused, the fact of there having been a description given and the terms of that description are matters of the highest importance of which evidence ought always to be given first of and by the person or persons to whom the description was given."

20. In this case the identity of the alleged thief who was known to the owner of the premises was a material and important fact particularly in light of the *dicta* I have quoted above. Having regard to the fact that PW 1 had stated that the 1st appellant was a "notorious thief" and the 1st appellant alleged that there was a grudge between him and PW 3, the court had to be cautious in scrutinizing the evidence.

21. In the same vein the testimony of PW 3 was not particularly helpful. He stated as follows, *"I went to the window and realized the door was locked from the outside. I called [PW2] by phone and asked him to come and open the door for me. Two minutes later, I saw someone run to the fence. I saw the person clearly. I was at the window. Two security light were on …."* PW 3 did not elaborate where the window was in relation to the security lights and the fence. These facts would have assisted the court assess the credibility of his testimony. As PW 2 was in the compound, it would have been necessary to establish whether he could have seen the alleged thief.

22. I conclude the recognition of the appellant was not free from error. I therefore quash his conviction.

23. The 2nd appellant's complaint is that he was convicted on the basis of circumstantial evidence. Indeed, no one saw him break into PW 1's shop and steal. None of the prosecution witnesses knew him. The learned trial magistrate relied on the doctrine of recent possession to convict him. The learned magistrate cited the case of ***Morris Kinyalili Liema v Republic*** **[2012] eKLR** where the doctrine was explained as follows;

To invoke the doctrine of recent possession, the prosecution must prove beyond reasonable doubt each of the following four elements: First, that the property was stolen; Second, that the stolen property was found in the exclusive possession of the accused; Third, that the property was positively identified as the property of the complaint; and Fourth, that the possession was sufficiently recent after the robbery.

24. Once the facts are proved, the accused is called upon to provide a reasonable explanation of his possession. In ***Malingi v Republic*** **[1989] KLR 225,** the Court of Appeal observed that;

By the application of the doctrine the burden shifts from the prosecution to the accused to explain his possession of the item complained about ……. The doctrine 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 or was a guilty receiver.

25. Possession can be either actual or constructive under **section 4 (a)** of the ***Penal Code*** which defines possession as follows;

'be in possession' or ' have in possession' includes not only having one's personal possession, but also knowingly having anything in the actual possession or custody of any other person, or having anything in any place (whether belonging to or occupied by oneself or not) for the use or benefit of oneself or of any other person."

26. According to the totality of the evidence, the stolen items were found the morning after the theft had occurred in the house where the 2nd appellant was arrested. Accordingly he was in the possession of the items with the other accused. He was therefore required to furnish a reasonable explanation of his possession of the items found in the house.

27. The 2nd appellant stated that he was arrested on 8th April 2013 with the other accused at the house. PW 4 testified that the accused were arrested on 7th April 2013. The testimony of PW 4 regarding the date of arrest is confirmed by the extract of the OB produced by PW 5. I therefore agree with the conclusion of the learned magistrate that the accused denied that they were arrested on 7th April 2013 to avoid explaining their possession of the stolen goods. In the circumstances, the 2nd appellant did not offer any reasonable explanation why he was found in possession of the stolen items on 7th April 2013. I therefore affirm his conviction. In the circumstances the appellant's conviction cannot be supported and is unsafe.

28. In sentencing the 2nd appellant the learned magistrate noted that the offence was rampant, serious and had implications for growth in Isebania Town and therefore a deterrent and rehabilitative sentence was called for. He thus imposed a sentence of 6 years imprisonment. The maximum sentence for the offence under **section 306 (b)** of the ***Penal Code*** is 7 years imprisonment.

29. The appellate court should not lightly interfere with the discretion of the lower court in imposing the sentence unless there has been an error in principle or the sentence was manifestly harsh or excessive (see ***Wanjema v R*** **[1971] EA 493**). In this case the learned magistrate emphasized the effects of the offence on the community. He failed to consider the individual circumstances of the 2nd appellant in imposing the near maximum sentence. The 2nd appellant was a first offender and had expressed remorse. In the circumstances, I find that the sentence imposed was harsh. I reduce the same to 4 years imprisonment.

30. In the result I find as follows;

a. I quash the conviction and sentence of the 1st appellant. He is set free unless otherwise lawfully held.
b. I affirm the conviction of the 2nd appellant but reduce the sentence to 4 years imprisonment.

DATED and DELIVERED at MIGORI this 13th October 2014

D.S. MAJANJA

JUDGE

Appellants in person.

Ms Owenga, Principal Prosecuting Counsel, instructed by the Office of Director of Public Prosecutions for the respondent.