REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CRIMINAL APPEAL NO 218 OF 1991

HENRY OPICHO NGOME ……………APPELLANT

VERSUS

REPUBLIC…………………………... RESPONDENT

(From the original conviction and sentence in Criminal Case No 57 of 1991

of the Resident Magistrate's Court at Nyando: Kiarie, Esq, RM)

JUDGMENT

The appellant was convicted of burglary and stealing contrary to section 304 (1) and 279 of the Penal Code.

The evidence was that on the 3rd / 4th January, 1991 in Muhoroni township Gudensia Atieno Amolo – the complainant - had her house broken into when she was not in and property worth Kshs 11,251/= stolen therein.

That early morning of the 4th Janury, 1991, one Moses Odembo was arrested with some suspected stolen property. The property found with Odembo was on the 6th January, 1991 identified by the complainant as part of her stolen property. Odembo led the police and the complainant to the house of the present appellant. This was on or about the 11th January, 1991.The appellant was found with some property also identified as part of those stolen from the complainant. In addition, he had a post office certificate of posting which later led to the recovery of some property appellant had posted to some lady. The whole of this was part of the complainant's stolen property. Odembo and the appellant were then jointly charged.

Appellant in his defence said, that the property found in his possession were pledged with him by Odembo on the 4th January, 1991 at 5 am. This was for a loan of 150/- which was supposed to be refunded after three days. He did not turn up even after six days and so the Appellant says that he decided to send the property to his mother for her use. He was arrested on the 11th January, 1991. The magistrate disbelieved the appellant because, he reasoned:-

> "He posted the clothes to his mother on the 11th January, 1991 after only six days of the purported delivery by Moses Odembo. This was too soon for a hen to be disposed of".

I am afraid that that alone would not lead only to the inference that the appellant took part in the theft. The prosecution was based on the doctrine of recent possession which states that should the accused offer an explanation which is reasonable and plausible as to how he came to be in possession of the items then

he is entitled to be acquitted. The court does not have to accept the explanation as long as it is reasonable and plausible.

We have the evidence that Odembo was arrested at 5 am on the 4th January, 1991 with some items. Appellant says that Odembo came to his house at that time. Could it be that Odembo was arrested when he had just come from the appellant's house?

Further evidence is that it is Odembo who led police to the appellant's house six or so days later. This would prop up the appellant's explanation. It is possible that the two had stolen together, but there was no evidence to that effect.

The explanation of the appellant was plausible and not unreasonable, though one would say that he ought to have been put to his guard in view of the time he says the items were brought to him. If it is true that he had no hand in stealing, he may now realize that he should have taken Odembo's approach with some suspicion. The standard, however, is not the hindsight of a fool but the foresight of a reasonable man.

One other point. The section of the law cited was wrong. Section 304(1) of the Penal Code creates more than one offence and one of them is not burglary and section 279 of the Penal Code creates several offences. It is mandatory to specify which section is intended.

For the above reasons, the appellant should have been acquitted.

I now allow the appeal, quash the conviction and set aside the sentence.

If the appellant is not otherwise lawfully held, he must be freed forthwith.

Dated and delivered at Kisumu this 15th day of October, 1993

J.A. MANGO

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JUDGE