REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

CRIMINAL APPEAL NO. 660 OF 1982

THATHI……..……....…… APPELLANT

VERSUS

REPUBLIC……...…….RESPONDENT

JUDGMENT

The appellant was charged with burglary contrary to section 304(2) and stealing contrary to section 279(b) of the Penal Code, and further with two alternative charges of handling stolen goods contrary to section 322(2) of the Penal Code. He pleaded not guilty to all the charges and after hearing was convicted of the second limb of the first count ie theft contrary to section 279(b) of the Penal Code. In respect of that conviction he was sentenced to twenty months' imprisonment with two strokes. Against that conviction and sentence he has now appealed.

Shortly stated the evidence was that the complainant on the night of February 16, 1982 was woken by his wife just after midnight to find that a lot of his property was stolen and that all the doors and windows in the house were open although he had locked them before going to bed and could find no sign of breaking.

Amongst the items which were stolen were a radio and a thermos flask. The police conducted inquiries and as a result of information received PW 5 went to Tiva Village at 11.30 pm on March 1, 1982 looking for the appellant about whom he had information. He went to the house of one Muthoka PW 4 and there he saw the accused standing near the door outside. He could hear the noise of a radio coming from inside the house. As he approached he said that the accused started to run away and he chased him but could not catch him.

PW 5 managed to trace a relative of the owner of the house and went with him to the house and inside it they found the radio which had been stolen from the complainant. The owner of the house came back later very drunk. The officer the following day went to a place called Nyenya where he arrested the accused and found with him a carton which had some clothes and a thermos flask which thermos flask was identified by the complainant. As a result of police enquiries PW 3 & 4 were traced. They gave clear evidence that at the end of February, 1982 they had seen the accused in possession of the radio which was stolen from the complainant on a number of occasions and in particular on March 1, 1982 they had seen the accused with the radio at the house of Muthoka and left him there whilst they went out.

The accused in his unsworn statement said that the evidence in court was false and that there was a grudge between him and the police officers.

The learned resident magistrate in his judgment reviewed the evidence and dismissed the offence under

section 304(2) of the Penal Code which was the first limb of the first count. His reason for doing so was due to some interesting assumptions and misdirection with which it is not necessary here to concern myself.

But considering the question of theft contrary to section 279(b) of the Penal Code the appellant complains in his grounds of appeal that the complainant did not know the person who stole his radio and that the radio was found with Muthoka. He added that he was arrested with nothing of the stolen things and nobody saw him stealing and that he was not at the house of PW 4 at the relevant time. Everything that the appellant says in grounds 1, 2, 3 & 4 of his grounds of appeal is of course perfectly true. Although the learned magistrate has not said so it is clear that the case of the prosecution was based on the possession by the appellant of the stolen items so soon after the theft that he must have been the thief. Therefore, whilst all those items referred to in grounds 1, 2, 3 & 4 are perfectly true, nevertheless they are not the basis upon which the learned resident magistrate came to his decision. The learned resident magistrate was satisfied and upon my own consideration of the evidence I am also satisfied that the accused was in possession of the items stolen during the night of February 16 and 17, 1982 within twelve days according to the evidence of PW 3. It would be right I think in those circumstances to apply the doctrine of recent possession. What the accused has said is that the evidence against him in court was false and that there was a grudge between him and the police officer. In his ground of appeal No 7 the accused has further alleged that the prosecution witnesses did not tell the truth as to how and when they got the radio.

The learned resident magistrate has considered all of this in full and considered the question of corroboration of the witnesses. He has had the opportunity to see the witnesses and is in a far better position than I to come to the decision which he did come, which was that these prosecution witnesses were telling the truth. For all those reasons, I can see no reason to interfere with the conviction in the matter.

Turning now to the question of sentence the sentence laid down for this offence is imprisonment for fourteen years together with corporal punishment. The sentence meted out is lenient to say the least and should not be interfered with. The learned resident magistrate whilst considering the sentence had to put before him two previous convictions while sentencing.

However when the prosecutor put the previous convictions before the court the record shows that they were not read to the accused and he was not asked whether or not he accepted them. This is quite clearly wrong in principle. The accused must know what is against him and have the opportunity to deny it. If the prosecutor wishes to continue to rely on the previous conviction then evidence can be called to confirm them. Nevertheless I am bound to say that if the learned resident magistrate was sentencing on the basis that the accused had two previous convictions both of which were relevant to the offence before him then the sentence upon which he finally decided was lenient to say the least.

In view of the prevalence of this type of offence throughout the country and the fact that the offence was committed at night of course aggravates the matter although it is not an ingredient of the charge.

In all the circumstances and ignoring the two previous convictions alleged to exist in respect of the appellant nevertheless I am of the view that the learned resident magistrate in this case although for the wrong reasons reached a proper conclusion in regard to sentence in respect of this appellant.

Accordingly the appeal against conviction and sentence will be dismissed.

Dated and Delivered at Nairobi this 28th Day of January, 1983

D.C. PORTER

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Ag JUDGE