Nduati v Republic (Criminal Appeal E069 of 2022)
[2025] KEHC 675 (KLR) (31 January 2025) (Judgment)

Neutral citation: [2025] KEHC 675 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NANYUKI

CRIMINAL APPEAL E069 OF 2022

AK NDUNG'U, J

JANUARY 31, 2025

BETWEEN

FRANCIS KAMAU NDUATI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(From original Conviction and Sentence in Nanyuki
CM Criminal Case No 1523 of 2017– V. Masivo, SRM)

JUDGMENT

1. The Appellant, Francis Kamau Nduati, was convicted after trial of house breaking contrary to Section 304(1) (b) and stealing contrary to Section 279(b) of the *Penal Code*. The particulars were that on 06/09/2017 at around 1400hrs at Muthaiga Estate of Nanyuki in Laikipia County, jointly with other not before court, broke and entered a dwelling house of Annah Nyaguthii Mwangi with intent to steal therein and did steal therein the items attached all valued at Kahs.116,900/- the properties of Annah Nyaguthii Mwangi. He also faced an alternative count of handling stolen good contrary to Section 322(1) as read with Section 322(2) of the *Penal Code*. The particulars were that 13/09/2017 at Majengo area of Nanyuki within Laikipia County, otherwise than in the course of stealing dishonestly retained an Acer laptop knowing or having reason to believe it to be stolen good.

2. On 17/06/2022, he was sentenced to six (6) years imprisonment on the first limb and seven (7) years imprisonment on the second limb. The sentences were ordered to run concurrently.

3. He was dissatisfied with the conviction and the sentence hence his appeal to this court. He filed a petition of appeal and raised the following grounds;

    i. The learned magistrate erred imposing a harsh and excessive sentence without considering that he was the sole bread winner of his family.

ii. That he wishes to benefit from less severe punishment as provided in Article 50(2)(j) of the *Constitution*.

iii. The learned magistrate erred rejecting his defence without any convincing reason.

iv. The learned magistrate erred by failing to note that the prosecution did not prove their case beyond reasonable doubt.

v. The learned magistrate erred by failing to note that the evidence tendered by the prosecution was insufficient to secure a conviction.

4. The appeal was canvassed by way of written submissions. In his submissions, HE argued that the evidence was that the police seized suspected stolen items from the owner of the shop Simon Mwangi and his brother Daniel Mwangi and they were arrested. They were however released and he was charged without a good reason. That the said items were not found in his possession. That the allegation by PW3 that he admitted that he steals from shops and led them to one of his houses in Majengo was not proved. The claim that Simon Mwangi received the items from him was not proved and the said Simon Mwangi did not testify. The allegation that he led the police to Majengo where they recovered some items was not correct as he testified that he was not removed from cell since his arrest and no temporary removal order was produced to show that he was indeed removed from cells and took the police to Majengo. Prosecution further failed to avail the landlord to prove that he was a tenant there. That the inventory was prepared at communication shop which PW3 testified that it belongs to Simon Mwangi and failure to produce the inventory was fatal. That the prosecution's evidence lacked credibility, was contradictory and inconsistent and the trial court shifted the burden of proof on him.

5. In rejoinder, the Respondent's counsel submitted that the Appellant conceded that the complainant's house was broken into and items stolen. Further, PW1 and PW2 found the door to the house open, padlocks and items recorded in the charge sheet missing and this was confirmed by the investigating officer hence the ingredients of housebreaking and stealing were proved. That there was no direct evidence but the doctrine of recent possession was applicable. That the evidence on record was that items were recovered from a shop belonging to Simon Mwangi who informed the police that he had received the items from the Appellant. Upon his arrest, the Appellant led the police to his house in Likii and Majengo where other items were recovered among them PW1's acer laptop. Since the items were recovered in his house, the burden was on him to show how he came into possession of the same as was held in *Malings v R (*1989) KLR 225.

6. As to whether his defence was considered, counsel submitted that the trial court duly considered his defence and found it to be a mere denial and an afterthought for he only testified about his arrest and that the officer demanded for a bribe. That the issue of bribe was not raised during cross examination of the alleged officers. On the sentence, she submitted that the trial court considered his mitigation and considering that he was not a first offender, the sentence was lenient in the circumstances. Further, the Appellant has not demonstrated that the sentence was excessive, or trial court overlooked some material factor or considered some wrong material or acted on a wrong principle.

7. This being the first appellate court, my duty is well spelt out namely; to re-evaluate the evidence tendered before the trial court and subject it to a fresh analysis so as to reach an independent conclusion as to whether or not to uphold the decision of the trial court. See *Okeno v Republic* [1972] EA 32.

8. I have therefore considered the submissions and the authorities relied by the parties. I have also read through the record of the trial court in order to evaluate all the evidence placed there and arrive at my own conclusions regarding the same. I have borne in mind however, that I neither saw nor heard the witnesses myself, and I have given due allowance for that fact.

9. The evidence before the trial court was as follows. PW1, the complainant testified that on the material day, she left for town and was later contacted by PW2 who asked whether she had relocated since household items were missing except the seats. She went home and noticed that the door was broken and the padlock was missing. She noticed the gas cylinder, Sony TV, iron box, Acer laptop, fuji camera, tablet compact, handbag with her documents, carpet, cash of Kshs.5,500/-, modem, microwave, card reader, subwoofer, DVD player, pen knife, table stand, web camera and TV remote were missing all valued at Kshs.166,000/-. She reported the matter to the police and informed her friends. On 15/09/2017, she was contacted by a pastor who informed her that some items have been recovered and she went to police station where she was able to identify her laptop which she switched on and keyed in her password. Nothing else was recovered. She identified the photographs of the said laptop.

10. She testified on cross examination that she had not seen the Appellant prior to the incident. That she had all the receipts of her stolen items.

11. PW2, complainant's daughter testified that she got home and noticed things in the house were scattered. She noticed the television set and the carpet were missing and the fridge was moved from its location. She contacted her mother who rushed to the house. She noted some items were missing from the house as listed by PW1. The matter was reported and later on they learnt that some stolen properties had been recovered and PW1 was able to identify her laptop. She also identified the laptop as they have used it for long. She testified that she did not know the Appellant and she did not witness him breaking into the house. She identified the photographs of the laptop.

12. PW3, IP Peter Kamau testified that he was informed by deputy DCIO that a shop known as Rent Communication was storing stolen good. They proceeded to the shop and they found its owner Simon Mwangi and Daniel Maingi. They searched the shop and seized 32 items which they could not explain. They were arrested and Simon Mwangi informed them that he received the items from the Appellant. Through the help of Simon Mwangi, they arrested the Appellant. He admitted that they steal together with James Maina and James Maina was also arrested. The Appellant led them to his house in Likii and 17 items were recovered and an inventory was prepared. James Maina also led them to his home and five items were recovered. On the following day, the Appellant led them to another house in Majengo and they recovered 16 items. That the items were paraded at the police station and several people identified them. He produced the inventory for 12/09/2017 as Pexhibit 2(a) and (b). He also produced an inventory for 13/09/2017 as Pexhibit4 and among the items recovered in the said inventory was Roll Ace laptop which was positively identified by the complainant. He identified the photographs of the said laptop.

13. He testified on cross examination that the houses where the Appellant took them were rental houses. That he signed the inventory as well as the Appellant. That he did not have information that he was employed at Rent communication shop.

14. PW4 IP Francis Kairu testified that they received a report of breaking in and stealing. They visited the scene and ascertained that the padlock was broken to gain access and items were stolen. That intel was received that the Appellant was keeping suspected stolen items at his residence in Majengo. The house was visited and some items were recovered and a notice was given to the public of the recovered items and the complainant was able to identify her laptop. That he prepared an exhibit memo Exhibit6 and the photos were processed and he produced them as exhibit1(a)-(d) and certificate as exhibit7. That the complainant availed a receipt of the laptop which matched the serial number in the laptop. He produced a copy of the receipt as exhibit8. She also availed ownership documents for other stolen items.

15. On cross examination, he testified that he did not know where the DCI got the intelligence report from and he did not meet Simon Mwangi. That he visited the complainant's house and nothing was found in her house to link the Appellant to the offence. That he was not present when the recoveries were made.

16. In his sworn testimony, the Appellant testified that he deals in electronic repairs. That he picked his children from school and on his way back, his car developed mechanical problem and the police arrived and inquired what he was doing and he was arrested. They took him to police station where they asked for money but he could not afford and therefore they placed him in custody. He denied the charges.

17. On cross examination, he testified that he did not know Simon Mwangi, Daniel Maina and James Maina. That he did not sign the inventory of 13/09/2017 and he did not take the police to where the items were recovered. That at the material time he was staying near the bridge next to Majengo. That he owns an electronic shop but could not avail the permit since he was in custody.

18. That was the totality of the evidence before the trial court. The Appellant has denied committing the offence. His case is that the shop where the items were recovered belonged to Simon Mwangi and Daniel who were released by the police. That the claim that Simon said he received those items from him was not proved, the claim that he led the police to his house in Majengo was false, that the said house was not proved that it belonged to him and that he was not found in possession of the stolen items.

19. There is no dispute that the complainant's house was broken into and her properties were stolen. The Appellant conceded to this fact. PW1, PW2, PW3 and PW4 confirmed that her house was broken into and some items were stolen. What is in dispute is whether the Appellant was found in possession of the complainant's stolen items.

20. The evidence on record was that an Acer laptop was recovered from the Appellant's house in Majengo. PW3 testified that the Appellant, upon his arrest led them to his house in Likii where some items were recovered and another house in Majengo where the laptop and other items were recovered. The complainant was able to identify her laptop at the police station and she testified that she switched it on and keyed in her password. A copy of the receipt of the said laptop was produced by PW4. The Appellant did not object to the production of the said copy and the trial magistrate found it to be properly produced. The Appellant did not claim ownership and he did not explain how he came into possession of the said laptop. An inventory was produced as Pexhibt4 and amongst the items recovered was an Acer laptop which PW4 confirmed that it matched the serial number in the receipt given by the complainant, Pexhibit8.

21. The trial court while convicting the Appellant applied the doctrine of recent possession and found the Appellant culpable.

22. The principles governing the application of the doctrine of recent possession were laid out in *Isaac Ng'ang'a Kahiga alias Peter Ng'ang'a Kahiga v. R* Nyeri CA Criminal Appeal No. 272 of 2005 as follows;:

> "It is trite that before a court of law can rely on the doctrine of recent possession as a basis for conviction in a criminal case, the possession must be positively proved. In other words, there must be positive proof, first; that the property was found with the suspect, secondly that the property is positively the property of the complainant; thirdly, that the property was stolen from the complainant and lastly, that the property was recently stolen from the complainant..."

23. Was the Appellant found in possession? Section 4 of the *Penal Code* defines possession as follows:

a. be in possession or have in possession includes not, only having in ones own 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 of any other person.

b. If there are two or more persons and anyone or more of them with the knowledge and consent of the rest has or have anything in his or their custody or possession, it shall be deemed and taken to be in the custody and possession of each and all of them."

24. It is the Appellant who led the police to his house in Majengo where the laptop belonging to the complainant was recovered. His claim that the landlord was not called as a witness to confirm that he had rented out the house is neither here nor there since he is the one who led the police there. It therefore follows that he was indeed found in possession of the stolen property and having being found with the said laptop, he was bound to provide an explanation how he came into possession of the same. This is in line with section 111 of the *Evidence Act*. See also the case of *Malingi v Republic* [1988] KLR 225" where the court held that:

> " Once the primary facts are established, the accused bears the evidential burden to provide a reasonable explanation for the possession. This burden is evidential only and does not relieve the prosecution from proving its case to the required standard. That explanation need only be a plausible.

25. He did not offer any plausible explanation when he was given a chance in his defence. He only testified on how he was arrested and that the police asked for money which defence was considered by the trial court and found to be a mere denial and an afterthought.

26. As regards the sentence, he was sentenced to six (6) years imprisonment on the first limb and seven (7) years imprisonment on the second limb. While sentencing the Appellant, the trial court duly considered his mitigation. The court further considered the fact that he was not a first time offender and that only a laptop was recovered amongst the items the complainant lost.

27. As submitted by the prosecution counsel, sentencing is a discretion of the trial court and that discretion can only be interfered with by an appellate court in accordance with the principles set out in the case of *Shadrack Kipkoech Kogo v Republic* Eldoret Criminal Appeal No. 253 of 2003 where the Court of Appeal stated;

> " sentence is essentially an exercise of discretion by the trial court and for this court to interfere it must be shown that in passing the sentence, the sentencing court took into account an irrelevant factor or that a wrong principle was applied or that short of these, the sentence itself is so excessive and therefore an error of principle must be interfered (see also S*ayeka - vs – R.*(1989 KLR 306)".

28. I have had the advantage of reading the trial court's elaborate ruling on sentencing. The court duly considered the aggravating as well as mitigating factors. The court then reached the sentence that it deemed fit. Sentence is at the discretion of the court and this court can only interfere with the discretion within the parameters set in *Shadrack Kipkoech Kogo v Republic* Eldoret Criminal Appeal No. 253 of 2003, supra and the appellant has established none of those.

29. With the result that the appeal herein lacks merit and is dismissed in its entirety.

DATED SIGNED AND DELIVERED AT NANYUKI THIS 31ST DAY OF JANUARY 2025

A.K. NDUNG'U

JUDGE