REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CRIMINAL APPEAL NO. 43 OF 2019

KENNEDY WAFULA SIMIYU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(*Appeal against the sentence in Criminal Case No.130 of 2019*

at the Senior Principal Magistrate's Court Webuye by

Hon. B. B. Limo –SRM on 2/5/2019)

JUDGMENT

1. **Kennedy Wafula Simiyu,** the appellant, was charged with the offence of Burglary contrary to **Section 304 (2)** and stealing contrary to **Section 279 (b)** of the Penal Code. Particulars being that on the night of 12th February 2019, at Lions area, Webuye township, East Sub-County within Bungoma County, jointly with others not before court, broke and entered the house of **Jaffer Chevaiwa** with intent to steal from therein and did steal from therein: lap-top make Hp, blue mattress size 6*6 high density, woofer, cash Kshs. 16,000/- driving licence and identity card all valued at Kshs. 50,000/- the property of Jaffar Chevaiwa.

2. In the alternative he was charged with Handling Stolen Property contrary to **Section 322(1) (2)** of the Penal Code. Particulars being that on the 15th day of February, 2019, at Sweet Waters area, Webuye Township in Webuye East Sub-County within Bungoma County, Otherwise than in the course of stealing, dishonestly undertook the retention of a laptop make Hp and a blue mattress size 6*6 high density, knowing or having reason to believe them to be stolen.

3. In a nutshell, evidence adduced by the prosecution was that on the night of 12th February, 2019 **Jaffar Chevaiwa** returned to his house at midnight to find a padlock missing from the door. He entered the house and found items missing, namely, a laptop, mattress, woofer, cash, driving license and identity card. He reported the matter to the police.

4. On the 18th February 2019, the police including **PW2 No.83068 P.C. Julius Kosgei** arrested the appellant, searched a house stated to be his and recovered a laptop and mattress, items that were identified by the complainant. Investigations were concluded and the appellant was charged.

Upon being put on his defence, the appellant stated that he was at a funeral. That he returned to Kimilili on the 15th February 2019. While at Matola area he was arrested by police officers. That he had Ksh.500/- and was made to sign an inventory. He denied having knowledge of the exhibits which he saw at the police station. He called a witness **DW2 Benta Nafula** who stated that the appellant, her husband was at home on 12th April, 2019 having returned from work at 3.00 pm.

5. The trial court considered evidence adduced and found that the items were recovered from the appellant's house therefore found him guilty, convicted and sentenced him to serve three (3) years imprisonment.

6. Aggrieved, he appeals on grounds that the evidence was contradictory and the sentence imposed was excessive and harsh.

7. In his written submissions the appellant urged that the complainant contradicted himself as to what actually was stolen. That the testimony of the complainant was not reliable. That goods recovered were not related to the case that is why the main count could not be proved. That investigations carried out failed to prove that he was a tenant at the plot. That exhibits used in the case were for Criminal Case No. 81/19 which was withdrawn therefore the case was not proved.

8. The State/Respondent submitted that the doctrine of recent possession was applicable as well captured in the case of ***Eric Otieno Arum-vs- Republic (2006) eKLR*** where the Court of Appeal stated that:

"…In our view, before a court of law can rely on the doctrine of recent possession as a basis of 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; that 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. The proof as to time, as has been stated over and over again, will depend on the easiness with which the stolen property can move from one person to the other."

9. On exhibits, it was argued that the appellant was found with a laptop make Hp and a blue mattress 6*6 high density which were positively identified by the complainant and the appellant and his witness did not dispute that the items were found in their house; items that had been recently stolen from the complainant.

10. On sentence, it was urged that the law provides for imprisonment not exceeding fourteen (14) years with hard labour, therefore, the sentence meted out was within the law.

11. This being a first appellate court, it has the duty to analyze and evaluate afresh evidence adduced at trial and came to itsindependent conclusions bearing in mind that it neither saw nor heard witnesses who testified. In the case of ***Okeno -vs-***

Republic [1972] EA 32, the Court of Appeal set out the duties of a first appellate court as follows:

*"**An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya vs. Republic (1957) EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vs. R. (1957) EA. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters vs. Sunday Post [1958] E.A 424."***

12. It is not in dispute that there was no eye witness to the breakage on the material night therefore the learned trial Magistrate reached a correct decision in failing to reach a finding on the main count.

13. In the case of ***Isaac Ng'ang'a Kahiga -vs- Republic Cr. App. No. 272 of 2005 (UR)*** the Court held that:

"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:

(i) That the property was found with the suspect;

(ii) That the property is positively the property of the complainant;

(iii) That the property was stolen from the ***complainant;***

(iv) That the property was recently stolen from the complainant.

The proof as to time, as has been stated over ***and over again, will depend on the easiness with which the stolen property can move from one person to the other."***

14. In the instant case the complainant made a report to the police following breakage into his house at night. He numerated what was stolen from the house that is captured in the charge sheet. The offence was committed on the 12th February, 2019. Another complainant made a report to the police, according to evidence adduced by PW2 his case was No. 81/19.

15. Two of the items stolen from the complainant, that is, a laptop and mattress were recovered on the 18th February 2019, which was some six (6) days after the act. He identified the mattress which had a mark, a tear that occurred in the process of being transferred. The identification which was peculiar was positive. This was evidence of the property having been recently stolen from the complainant.

16. The issue to be determined is therefore whether the appellant was in possession of the property; possession is defined by **Section 4** of the Penal Code as:

(a) "Be in possession of" or "have in possession" ***includes not only having in one's 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 not) for the use or benefit of oneself or of any other person;***

(b) If there are two or more persons and any one 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.***

17. The police acted on information received and arrested him. The trial court recorded evidence of PW2 a follows:

"… We arrested them and searched his house and recovered a laptop and this mattress on 18/2/2019. I asked the accused in Cr. No. 81/2019. We also had a count for being in possession of suspected stolen items. The complainant in this matter came forward and positively identified the said items now before court. During investigations, the complainant one Jaffer Chevaiwa positively identified this laptop and mattress to belong to him.

Court - Laptop and mattress produced as Pexhibit No. 1 and 2. That is all.

PW2 cross examined by accused in Kiswahili

I knew you at the time I arrested you. Arrested at a bar and took us to your house. You could not state how you acquired the said goods. The said goods not related to this matter. I have the inventory in Cr. No. 81/2019."

18. **Section 107** of the Evidence Act provides thus:

(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

19. In criminal cases, the burden of proving the accused person's guilt is on the prosecution who must establish the

fact beyond reasonable doubt.

20. On cross examination PW2 stated that they arrested the appellant at a bar and he took them to his house where goods were recovered and he was not able to explain how he had acquired the goods. The witness' evidence in chief refers to "arrested them"… proof of ownership and/or occupancy of the house was necessary. The witness mentioned an accused person in Cr. No.81/2019, an inventory having been prepared, information that was not divulged. Had the prosecution proved that the house belonged to the appellant, then it would have been a question of actual possession, but had it been proved that the house belonged to the other suspect, then it would have been a question of having had knowledge of the possession. In that case the evidential burden would have been on the appellant to explain the possession.

21. However, in this case, the prosecution having treated the case casually as it did, it failed to prove possession, therefore, it was erroneous for the trial court to draw an inference of guilt on the part of the appellant.

22. In the result, the appeal that has merit succeeds. Therefore, I quash the conviction and set aside the sentence meted out. The appellant shall be set at liberty unless otherwise lawfully held.

23. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY, THIS 17TH DAY OF DECEMBER, 2021.

L. N. MUTENDE

JUDGE

IN THE PRESENCE OF:

Court Assistant – Immaculate

Mr. Ayekha for ODPP

Appellant