REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT BUSIA
Criminal Appeal 24 of 2007

CHARLES JOSEPH OYUCHO……..APPELLLANT

VERSUS

REPUBLIC……..RESPONDENT

(From the conviction and sentence of E.H. Keago, Resident Magistrate in Busia P.M. Cr. Case No. 726 of 2006

J U D G E M E N T

The appellant Charles Joseph Oyucho and one Caren Akoth, were jointly charged with the offence of Bar Breaking and committing a felony, contrary to Section 306(a) of the Penal code. They were in the alternative, charged with handling stolen property contrary to Section 322(2) of the Penal Code in two counts. They were after trial, convicted of the alternative charge of handling stolen property and sentenced to seven (7) years imprisonment.

The appellant, who was the 1st accused in the lower court, appeals against the conviction and sentence.

The facts of the case are that during the night of 23rd and 24th of March, 2006, at a place called Cool Breeze Bar belonging to one George Emodo in a market known as Adungosi Trading Centre was broken into.

The following items were stolen.

1. A Sony T.V. serial No. 2249147

2. C.D. player with a speaker

3. 3. three bottles of wine and spirits

4. One crate of beer

5. An aerial Booster

6. A coat

7. Jeans Trouser

8. Two cushions

9. Cash of Kshs. 1,445/=

The total value of the above goods was given as Kshs. 44,750/=

One Evans Wandera Ougo who gave evidence in the lower court as PW4, testified that on 25.3.2006, one Caren Akoth, the 2nd accused in the lower court, called Evans Wandera Ougo to the house where the appellant herein and the said Caren Akoth lived. Caren showed him a Sony TV which she wanted to sell. Evans Wandera Ougo got interested and agreed to purchase it at Kshs. 5,000/= subject to Caren and the appellant producing the T.V. permit or registration receipt. When by 29.3.2006 the permit promised to be produced by Caren Akoth and the appellant, had not been produced, the witness Evans Wandera Ouko testified, he informed the village elder about the deal.

In the meantime the police had been informed apparently by one Martin. On 29.3.2006 PW3 No. 61428 PC Stanley Kariuki accompanied by PW1, George Emodo went to the house of Evans Wandera Ougo. There they recovered the Sony TV which George Emodo identified as belonging to the bar earlier broken into. He said he knew it because he was the manager of the bar. The police arrested Evans Wandera Ougo who immediately explained, that he was in the process of purchasing the TV from Caren Akoth and Charles Oucho, the appellant herein. He offered to lead them to the house occupied by the two although the house apparently belonged to Caren Akoth.

At the house of Caren Akoth, the police did not find Caren, but they found Charles Oucho and two other ladies. They conducted a search and recovered the crate of beer with 3 empty bottles -exhibit 2, one coat - exhibit 3, two cushions – exhibit 4, a pair of jeans trouser- exhibit 5, a T.V. Booster – exhibit 6, 10 ladies purses - exhibit 7 and a radio cassette – exhibit 8. The jeans trouser exhibit 5 was identified by the cashier and George Emodo as Martin's. George Emodo identified the aerial booster – exhibit 6, the beer-crate exhibit 2 and the cushions as belonging to the Cool Breeze bar which he managed. He also identified the coat – exhibit 3 as his own and the jeans as martin's. The

appellant, was the accused 1 in the lower court however told the police that he had come to that house only to visit. PC Stanley Kariuki, then gathered information from relatives and other people that the house belonged to and was being rented by Caren Akoth and that Charles Oucho was a boy friend of Akoth and frequented that house often.

The investigating officer PC William Lumbashi PW6, took custody of the appellant and the goods recovered from Caren Akoth's house on 29.3.2006. He also received a photograph album – exhibit 9, which had been recovered from Caren Akoth's house together with the suspected stolen goods earlier enumerated. The photographs in the album were those of Caren Akoth. He considered the evidence gathered as sufficient to charge Charles Oucho the appellant and Caren Akoth. It is on record that Charles Oucho identified Caren Akoth before the latter's arrest.

The appellant had given a sworn statement after being placed on his defence. He said he was a mechanic and that on 29.3.06, he went to his usual business of training mechanics until 3.00 p.m. when he stated going home. He passed through premises where changaa was being sold. There he took some changaa while it rained. He was arrested by the Assistant Chief at the changaa premises. He also testified that the Assistant chief took him to some house which he did not know and collected several items which they loaded on a motor vehicle before carrying them to the police station. There he was detained along with Evans Wandera Ougo. He was later charged jointly with Caren Akoth whom he did not know. He said also that he did not know Evans Wandera Ougo until the latter testified in court against him. He testified that Evans Wandera Ougo framed him in his testimony. He also said that the properties which were exhibits were not his and he did not know whether they belonged to George Okello Emodo.

Caren Akoth also testified on oath. She said she was a solonist and left her house for work at the salon in the morning of 29.3.2006. Later she learnt that her child and Jack his neighbour had been arrested. The following day she went to Adungosi Police Station to see her child. The police demanded Kshs. 4,000/= to release her daughter. The police then released her child but arrested her and later charged her with the offence jointly with Charles Oucho the appellant, she said she did not know the appellant. She also said that she was arrested for charge of changaa which her daughter had been had been arrested for. She admitted that she knew PW4, Evans Wandera Ougo ad that he knew her as well, although they were not related. They were particularly, not cousins.

The trial magistrate considered the above evidence as well as the defences raised by the appellant and his co-accused Caren Akoth. He declined to believe the defence denials that the two accused were framed. He believed the evidence of George Emodo that he identified properly the exhibits that were recovered from the house of Caren Akoth, which included exhibits 2-9. he accepted that the jeans trouser belonged to Martin that the coat belonged to George Emodo who properly identified them. He accepted that Emodo also identified the cushions, the aerial booster, the beer crates and the Sony TV as belonging to the bar in which he was the manager. He then convicted the appellant and the said Caren Akoth of the alternative charge without stating which of them.

In his reasoning the trial Magistrate accepted that the appellant and Caren Akoth were found in possession of the several enumerated recently stolen goods including the Sony TV, the Cushions, the jeans, the crate of beer, the aerial booster and the coat. He further came to the conclusion that the two accused did not give an innocent explanation as to how they came into possession of the items.

In my understanding, the trial Magistrate was applying the principle of recent possession in which persons who

are found in effective possession of recently stolen goods and who fail to give an innocent explanation to the possession, are pressumed to be the thieves who stole the goods. In my view, once he came, to that conclusion as he clearly did, and the accused persons did not deny possession and did not give an innocent explanation of possession, then he should have convicted them of the main charge of bar breaking and committing a felony therein, contrary to section 306(b) of the penal code.

This court having examined the evidence on the record finds that there was adequate evidence before the trial Magistrate to convict on the main charge. The trial Magistrate therefore erred in law in failing to do so and in convicting of a handling which was the alternative charge.

Secondly, as earlier mentioned, there were two alternative handling charges whose ingredients are different, hence the reason for separating them in their framing. In my view conviction where there is adequate evidence on record as is herein, can only be on one of the alternative charge, and not on both at the same time. That is why the trial magistrate should have stated the particular alternative charge in respect of which he convicted. In failing to do so, the trial magistrate was vague and seriously erred in Law. However, as earlier pointed out, the error will not have much consequence as the appellant should be convicted of the main charge.

I must add that this court has considered the totality of the evidence on record and is independently satisfied that there is adequate evidence for conviction on either the main charge or either of alternative charges. Since the practice is that the court should convict on the main charge, this court requires that the appellant be convicted of the main charge.

I accordingly quash the conviction of the alternative charge of handling and set aside the sentence of seven (7) years. I instead now impose a conviction of Bar Breaking and Committing a Felony therein contrary to section 306(b) of the penal code

Noting the mitigation given by the appellant and Caren Akoth, and noting also that the maximum sentence for the offence is seven (7) years, I hereby impose a prison sentence of five (5) years. The same will run from 3rd September 3007. This judgement will affect the judgement of the lower court to both the appellant and Caren Akoth, provided that no appeal has imposed any different orders in relation to Caren Akoth as at the time of this court's present orders. Orders accordingly.

Dated and delivered at Busia this 23rd day of September 2010.

D.A ONYANCHA

JUDGE