REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA

AT KITALE.

CRIMINAL APPEAL NO. 26 OF 2010.

(From original conviction and sentence in Criminal Case No. 525 of 2009 before the Snr. Resident Magistrate – Mr. T. Nzioki at Lodwar)

PATRICK KULUNYA .....APPELLANT.

VERSUS

REPUBLIC.....RESPONDENT.

J U D G M E N T.

The appellant was charged with two counts of the offence of breaking into a building and committing a felony contrary to section 306 (a) of the Penal Code. The particulars of the offence stated that on the night of 4th/5th August, 2009 at Kakuma Refugee camp in Turkana West District within Rift Valley

Province, jointly broke and entered a building namely kitchen of Fashoda primary School and stole therein 3 large sufurias, 2 drums, 2 basins, 2 jugs, 107 cups and one bucket all valued at Ksh. 109,710/= the property of the said Fashoda Primary School. The appellant faced an alternative charge of handling stolen goods contrary to section 322 (2) of the Penal Code. The particulars of the offence states that on the 7th day of August, 2009 at Kakuma Refugee camp in Turkana West District within Rift Valley province, otherwise than in the course of stealing, dishonestly retained one large sufuria, knowing or having reasons to believe it to be stolen good. The appellant pleaded not guilty and after trial he was convicted and sentenced to four (4) years imprisonment. Being dissatisfied with the conviction and sentence, the appellant appealed on the grounds that he was convicted based on the evidence of a single witness. The appellant also faulted the conviction which was based on insufficient evidence and moreso lack of evidence by the investigating officer. The appellant also contended that his defence was not taken into consideration although it was plausible. The appellant also relied on written submissions and urged the court to allow the appeal and set aside the sentence and conviction.

This being a first appeal this court is mandated to reconsider and re-evaluate the evidence before the trial court and arrive at its own independent determination on whether or not to uphold the conviction and sentence. In so doing this court should bear in mind that it never saw or heard the witnesses give evidence and give due allowance for that. See the case of ***Njoroge vs. Republic [1987] KLR pg. 19.*** I now wish to set out albeit briefly the evidence before the trial court which led to the conviction and sentence of the appellant.

On 4th August, 2009, the kitchen of Fashoda Primary School in Kakuma was broken into and several items that are recorded in the charge sheet were stolen. Martha Achuke Deng (PW2) testified that she was employed as a cook at Fashoda Primary School. She washed the dishes and kept them in the store. When she reported to work on 5th August, 2009, she found the door of the gate had been broken into and the utensils stated in the charge sheet were missing. She enquired from the watchman what could have happened and also reported the matter to Berehanu Siefere Fujaka (PW1). Pw1 inspected the kitchen and established the items were missing. He immediately reported to LWF Security personnel and on the following day he made a report to Kakuma police station. Michael Mariar Aborch (PW3) the store keeper of Fashoda Primary School also testified that the store was broken into. He was present on 4th August, 2009 when the watchman locked the door and all the items were there but on the morning of 5th August, 2009, the store was broken into and the items were missing. The matter was reported to the police station who visited the scene. Three days later the three witnesses PW1, PW2 and PW3 were called at the police station and were able to identify one of the stolen sufurias which was allegedly found in possession of the appellant and another co-accused person. The other evidence was by P.C. Paul Sum Busio attached at Kakuma police station and who was the investigating officer in this case. He testified that on 6th August, 2009 while in the company of the O.C.S. on patrol duties at the refugee camp they received information that there were two boys who were trying to sell a large sufuria. They traced the appellant and his co-accused and recovered the sufuria. The appellant and the co-accused person were trying to run away but they were arrested by the members of public. Later on the headmaster of Fashoda Primary School, the cook and the store keeper were able to identify the sufuria which was produced as an exhibit. PW4 then charged the appellant and his co-accused person with the offence. The appellant was put on his defence and gave evidence of an alibi. He claimed that on 4th August, 2009, he was at a place called Letea where he was looking for charcoal to sell and that is where he spent the night. It was not until 7th October, 2009 when he brought the charcoal at Kakuma and at about 9 p.m. some customers came looking for charcoal. He sold to them when four men came and surrounded him, arrested him and he was kept at Kakuma police station. He said none of the witnesses

identified him. The learned trial magistrate evaluated the evidence before him and convicted the appellant with the alternative count of being in possession of stolen goods so soon after the theft had taken place and in circumstances which the appellant could not explain. The court invoked the doctrine of recent possession as espoused in the case of ***R. Vs. Hassani s/o Mohammed [1948] in EACA 121*** and found the charge against the appellant was proved to the required standards.

This appeal turns on whether the prosecution proved the case against the appellant to the required standard. PW1, PW2 and PW3 testified that they identified a sufuria at the Kakuma Police station as one of the items that were stolen from Fashoda Primary School. PW4 who was the investigating officer in this case testified that he arrested the appellant with the co-accused person when they were caught when trying to sell the sufuria which had been reported stolen a few days earlier. On the part of the appellant he gave an alibi that he had gone to look for charcoal and was arrested while trying to go about his business of selling charcoal. The trial magistrate who heard and saw the witnesses testify believed the evidence of PW4. That they arrested the appellant with the co-accused person when they were trying to sell the sufuria. The learned trial magistrate relied on the doctrine of recent possession to find the appellant was guilty of the alternative charge of handling stolen goods.

The issue of the so arresting and identifying witness was raised by the appellant and it was argued the accused should be allowed because this was not sufficient evidence to prove the charge against the appellant. I have read the proceedings before the trial court. It is evident that the arrest was effected during the day. There was no issue regarding the circumstances surrounding the identification of the appellant being difficult. Upon evaluation of the entire evidence, I find no merit in this appeal. I did not see any reason why PW4 would frame up the appellant if he was not found in possession of the sufuria which was positively identified as having been stolen 2 days earlier. The appeal is disallowed and the appellant will serve a sentence of 4 years.

Judgment read and signed on 16th December, 2010.

MARTHA KOOME.

JUDGE.