



**REPUBLIC OF KENYA**

**IN THE HIGH COURT**

**AT BUNGOMA**

**CRIMINAL APPEALS NOS.93 AND 94 OF 2010 (CONSOLIDATED)**

***(Being appeal from the conviction and sentence by the Senior Resident Magistrate Hon. J. O. Magori***

***at Sirisia in Cr. Case No.300 of 2010)***

**STEPHEN WANYONYI WEKESA.....1<sup>ST</sup> APPELLANT**

**MESHACK WANJALA SIKENYI.....2<sup>ND</sup> APPELLANT**

**~VRS~**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

The Appellants were charged along with the others with the offence of breaking into a shop and stealing contrary to section 306 (a) of the Penal Code whose particulars were that on the night of 25<sup>th</sup>/26<sup>th</sup> April 2010 at Myanga Market in Siombe Sub-location of Kimaeti Location of Bumula District within Western Province they jointly with others not before the court broke and entered into the shop of Lawrence Wabwire (PW1) with intend to steal and stole from therein shop goods worth Ksh.150,000/= the property of PW1. The 1<sup>st</sup> Appellant faced an alternative charge of handling stolen goods contrary to section 322 (2) of the Penal Code, that on 30/5/2010 at Myanga Village in the same Sub-location he otherwise than in the cause of stealing dishonestly received or retained one blanket knowing or having reasons to believe it to be stolen. The Appellants were convicted of the offence in the main charge and

each sentenced to 4 years in jail. They were aggrieved by the conviction and sentence and preferred this appeal. Mrs Leting for the State conceded the appeal.

The evidence on which the Appellants were convicted was that PW1 operated a shop at Myanga. He closed the shop for the day on 25/4/2010 and went home. Next morning he found it broken into and goods worth Ksh.150,000/= were missing. He reported to Myanga Administration Police Post and to Malakisi Police Station. The 1<sup>st</sup> accused came to PW1 to say he knew who had broken into the shop. He wanted Ksh.100/= to provide the information. He went away but did not return as promised. PW1 caused his arrest. He led to the 2<sup>nd</sup> accused who was found with a mattress (exhibit 1). The 2<sup>nd</sup> accused told the police that the mattress belonged to the 2<sup>nd</sup> Appellant who had pledged it for a credit of Ksh.300/=. The police recovered a blanket (exhibit 2) from the house of the 1<sup>st</sup> Appellant. The 1<sup>st</sup> Appellant denied in unsworn defence that he was found with the blanket. The 2<sup>nd</sup> Appellant gave sworn defence and denied having been found with the mattress. Both denied breaking into the shop or stealing from there. The trial court found the Appellants guilty of the main charge on basis of the doctrine of recent possession.

It is the responsibility of this first appellate court to subject the entire evidence to fresh and exhaustive scrutiny to be able to determine whether the conviction was safe. (**Okeno v Republic [1972] EA 32**).

The Appellants complained that the conviction was against the weight of evidence; the prosecution evidence was contradictory; and that the defence evidence was not considered. The record shows that, although PW1 stated that blankets and mattresses were some of the items stolen from his shop when it was broken into, he was not led to say that the mattress and blanket recovered were among his stolen goods in the sense that there were any peculiar features on them. This issue was raised by Mrs. Leting in conceding the appeal. Secondly, it was the 2<sup>nd</sup> Appellant who was found with the mattress. If this was stolen property then he was an accomplice. The evidence of an accomplice has to be materially corroborated (**M'inanga v Republic [1985] KLR 294**). The court did not look for any corroborating evidence, and none existed. If the police believed the 2<sup>nd</sup> Appellant that he got the mattress from the 2<sup>nd</sup> accused then they should not have charged him but instead used him as a prosecution witness. They did not believe him, I find, and that is why he was also charged. Thirdly, the 2<sup>nd</sup> accused gave sworn defence. He was cross-examined by the prosecutor. The record does not, however, show that an opportunity was given to the 2<sup>nd</sup> Appellant to cross-examine him. He had given evidence incriminating the 2<sup>nd</sup> Appellant. That evidence was required to be tested by the 2<sup>nd</sup> Appellant on cross-examination. The action by the court is not allowing the cross-examination was prejudicial to the Appellant who was not represented.

PW2 Antony Kundu Khaemba testified that he had gone to cut sugarcane in his shamba when he found a mattress and two blankets. He took them home. Later the 1<sup>st</sup> Appellant came to claim them. They were released to him by PW2's mother Agnes Nabangala Khaemba (PW3). Strictly, PW2 and PW3 are accomplices if they were found with stolen property. Even if they are not, PW2 testified that exhibits 1 and 2 were two of the items handed over to the 1<sup>st</sup> Appellant. If the Appellant had both the two items then how come one of them (the mattress) is being attributed to the 2<sup>nd</sup> Appellant. Had the 1<sup>st</sup> Appellant given the mattress to the 2<sup>nd</sup> Appellant" Can it then be said both Appellants are therefore guilty of the offence in the main charge"

I have considered the evidence as recorded and have come to the conclusion that the conviction was not safe. I allow the appeal, quash the conviction and set aside the sentence. The Appellants

are ordered to be set at liberty immediately unless they are otherwise being lawfully held.

Dated and delivered at Bungoma this 6<sup>th</sup> day of December, 2011 in the presence of the Appellant, Mrs Leting the State Counsel and Lilian Gimose the court clerk.

**A. O. MUCHELULE**

**JUDGE**



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