Case Number:	Criminal Appeal 18 of 2016
Date Delivered:	20 Dec 2016
Case Class:	Criminal
Court:	High Court at Voi
Case Action:	Judgment
Judge:	Jacqueline Nancy Kamau
Citation:	Allan Asah Mapenzi v Republic [2016] eKLR
Advocates:	Miss Anyumba for State
Case Summary:	-
Court Division:	Criminal
History Magistrates:	G. M. Gitonga
County:	Taita Taveta
Docket Number:	-
History Docket Number:	Criminal Case 113 of 2015
Case Outcome:	Appeal allowed
History County:	Taita Taveta
Representation By Advocates:	One party or some parties represented
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT VOI

CRIMINAL APPEAL NO 18 OF 2016

ALLAN ASAH MAPENZI…….... APPELLANT

VERSUS

REPUBLIC…… RESPONDENT

(**From original conviction and sentence in Criminal Case Number 113 of 2015 in the Senior Principal Magistrate's Court at Wundanyi by Hon G. M. Gitonga (RM) on 8th April 2016)**

JUDGMENT

INTRODUCTION

1. The Appellant herein, Allan Asah Mapenzi, was tried and convicted by Hon G.M. Gitonga Resident Magistrate for the offences of house breaking and stealing contrary to Sections 304 (1)(a) and 279 (b) as read with Section 275 respectively of the Penal Code Cap 63 (Laws of Kenya). He was sentenced to five (5) years imprisonment for Count I and another five (5) years imprisonment for Count II. He had also been charged with the alternative charge of handling stolen property contrary to Section 322 (1) and 322 (2) of the Penal Code.

2. The particulars of Count I were as follows :-

"On the 27th day of March 2015 at Mwatate Township within Taita Taveta County, broke and entered the building used as a dwelling house by ALFRED WANJARI MADEDO with intent to commit a felony therein namely theft.

COUNT II

"On the 27th day of March 2015 at Mwatate township within Taita Taveta County, stole a Radio Woofer make SONASHI valued at Kshs 5,500/= and Zuku Decoder valued at Kshs 4,600/= the property of ALFRED MWANJARI MADEDO from the dwelling house of the said ALFRED MWANJARI MADEDO."

ALTERNATIVE CHARGE

"On the 28th day of March 2015 at around 4.30 pm at Mwatate Township within Taita Taveta County, otherwise than in the course of stealing dishonestly received or retained one Radio woofer knowing or having reason to believe it to be stolen good or unlawfully obtained."

3. Being dissatisfied with the said judgment, on 29th July 2016, the Appellant filed a Notice of Motion application seeking to be allowed to file an Appeal out of time. The said application was allowed on 9th November 2016 and the Petition Grounds of Appeal were deemed to have been duly filed and served. The Grounds of Appeal were **THAT**:-

1. The learned trial magistrate did not consider the evidence adduced in court by the prosecution side which showed that he was not involved in the crime.

2. The learned trial magistrate did not consider that he was not known to the witnesses and there was no exhibit produced in court to prove he was guilty (sic)**.**

4. Both the Appellant's Written Submissions and those of the State were filed on 9th November 2016. When the matter came up on the same date, both parties asked this court to deliver its Judgment based on their respective Written Submissions. This Judgment is therefore based on the said Written Submissions.

LEGAL ANALYSIS

5. As this is a first appeal, this court analysed and re-evaluated the evidence afresh in line with the holding in the case of **Odhiambo vs Republic Cr App No 280 of 2004 (2005) 1 KLR** where the Court of Appeal held that:-

"**On a first appeal, the court is mandated to look at the evidence adduced before the trial afresh, re-evaluate and reassess it and reach its own independent conclusion. However, it must warn itself that it did not have the benefit of seeing the witnesses when they testified as the trial court did and therefore cannot tell their demeanour".**

6. It appeared to this court that the only issue that was before it for determination was really whether or not the Prosecution had proven its case beyond reasonable doubt. It was the Appellant's argument that the Prosecution did not adduce any evidence to show that he was the one who indeed committed the offences he had been charged with.

7. He was emphatic that there was no witness who could testify to the fact that he had broken into the house of the Complainant, Alfred Manjari Madedo (hereinafter referred to as "PW 1"). He also contended that no photos were produced in evidence to show that PW 1's house had actually been broken into. In addition, he submitted that the sub-woofer PW 1 alleged to have been stolen did not have a serial number and its value had not been given.

8. He said that the evidence of Flora Chigale Mwashigadi (hereinafter referred to as "PW 3") who had contended that her house had been broken into was doubtful because she never reported the same.

9. On its part, the State argued that the Prosecution had proved its case beyond reasonable doubt for the reasons that PW 1 confirmed that he was a resident of Mwatate Township, that he had locked his house on 27th March 2016 (sic) but when he came back, he found his house broken into, that his sub hoofer and Zuku decoder that were stolen had a value of over Kshs 100/= and that the Appellant was arrested on 28th March 2015 but had no receipts to prove his ownership of the sub hoofer.

10. It added that PW 3 confirmed that PW 1's house had indeed been broken into, that her house had also been broken into but she did not file a report because nothing was stolen therefrom and that she positively identified the Appellant herein as she had spent about an hour with him at the plot where PW 1 resided about a week before the theft when he had gone to look for a rental house.

11. It contended that the period the Appellant had spent at the said premises was sufficient for him to have assessed the perimeter **(sic)** of the neighbourhood and adequately staged a plan on how to carry out the theft. It was its submission that it was not coincidental that the Appellant was spotted on the

same day trying to sell the sub hoofer to Anderson Kisombe (hereinafter referred to as “PW 2”).

12. It placed reliance on the case of **Criminal Appeal No 272 of 2005 Isaac Ng’ang’a Kahiga vs Republic** in support of its argument that in the absence of any alibi by the Appellant herein, the doctrine of recent possession was applicable in the circumstances of this case.

13. It pointed out that the penalty under Sections 304(1)(b) and 279(b) of the Penal Code provided for a maximum sentence of seven (7) years and fourteen (14) years imprisonment respectively. It submitted that the Learned Trial Magistrate considered the Appellant’s mitigation that he was a first offender and consequently sentenced him to five (5) years imprisonment for each Count. It was its argument that in the circumstances of this case, these penalties were reasonable and not excessive and were well within the said Learned Trial Magistrate’s discretion.

14. Notably, the Appellant did not provide any alibi for the 27th March 2015. He also adduced unsworn evidence. This had no probative because the Prosecution was not given an opportunity to test the veracity of the same during cross-examination. Even so, the burden of proof still lay with the Prosecution to prove that indeed the Appellant had committed the offences he had been accused of. In that respect, this court therefore analysed the evidence that was adduced by the Prosecution witnesses to establish where the truth of this matter lay.

15. According to PW 1, he left his house on 27th March 2015 at about 8.00 am and went to his place of work. When he came back at about 7.00pm, he found the latch of his wooden door removed and his Zuku Decoder and Sub Hoofer missing. He reported the matter at Mwatate Police Station and recorded his statement.

16. The following day, which was 28th March 2015, he went to Mwatate Township and alerted his neighbours who had with businesses there to be on the lookout for any person who would be selling the said items. It was then that PW 2 called and informed him that a person had left a sub hoofer at his premises and had promised to bring a receipt for the same.

17. He said that he went to PW 2’s shop the following day, which was 29th March 2015 and saw the Sub Hoofer and recognised it as having been his. Later that evening, PW 2 called and informed him that the seller of the items had come. He went to PW 2’s business premises and found the “suspect” and on interrogating him, the said “suspect” did not give him satisfactory answers. He called the police who came and re-arrested the “suspect” from his Kinyozi (barber) shop. He identified the Sub Hoofer in court.

18. PW 2 said that the Appellant went to his shop at about 2.00pm on 27th March 2015 with the intention of selling a sub hoofer. He asked him to bring the receipt which he promised to bring the following day, which was 28th March 2015. It was his testimony that PW 1 informed him of the stolen items on that day. He said that the Appellant returned to his shop at about 3.00pm and he called PW 1 who came. They arrested the Appellant and called the police who came and re-arrested him.

19. PW 3 testified that on 21st March 2015, a young man came to their plot looking for a place to rent and she referred him to the Landlord. She said that on 27th March 2015, three (3) houses were broken into but only PW 1’s Sub Hoofer and Zuku Decoder were stolen. She told the Trial Court that she was later informed that the Appellant had been arrested whereupon she went to the police station and identified him.

20. When she was Cross-examined by the court, she stated that she had spent an hour with the

Appellant and she was therefore able to identify him on 28th March 2015 at the police station. She explained that on both the 21st and 27th March 2015, the Appellant had worn a red T-shirt, blue jeans, blue slippers and a black cap.

21. No 88391 PC David Masinde (hereinafter referred to as "PW 4") reiterated PW 1's evidence. He added that he interrogated PW 3 and she informed him that her house had been broken into but nothing had been stolen. He said that PW 1 informed him that the Appellant had been arrested by members of the public who wanted to lynch him. Police officers moved in to rescue him and arrested him. He further testified that the Appellant was arrested with an Anama Sub Hoofer and a small radio whose ownership he could not prove. Although he brought these items to the court, the same were not tendered in evidence as they did not form the subject matter of the case herein.

22. During Cross-examination, PW 4 admitted that neither the Sub Hoofer the Appellant was alleged to have stolen nor the receipt he adduced in evidence to prove ownership by PW 1 had a serial number.

23. On analysing the evidence that was adduced by PW 1 and PW 2, this court noted that there was a material contradiction of the date the Appellant was said to have been arrested. According to PW 2, he called PW 1 on 28th March 2015 at about 3.00 pm and they arrested the Appellant after PW 1 went to PW 2's shop.

24. From PW 1's evidence, this date appeared to have been 29th March 2015. Notably, his evidence appeared to tally with PW 4's evidence who had testified that PW 1 called him on 28th March 2015 at about 10.00 pm and informed him that there was someone who had told him a sub hoofer had been taken to his shop by a seller.

25. Ordinarily, this court could have ignored this minor contradiction regarding the date of the Appellant's said arrest as it was not in dispute that he was indeed arrested and accepted the Prosecution's evidence that the Appellant had tried to sell a sub hoofer. However, the reliance on PW 3 to identify the Appellant as the one who had come to the plot a week before the alleged theft and thus connect the Appellant to the said theft made this court very uneasy.

26. In the mind of this court, PW 3's evidence sounded fanciful and appeared to have been an attempt to place the Appellant at PW 1's premises, a week before the alleged break in into PW 1's house and on the date of the alleged break in.

27. Notably, this court's curiosity was piqued because in the plot which appeared to have had several other tenants, only PW 3 seemed to have interacted with the Appellant herein more than once if PW 1's evidence was anything to go by. He told the Trial Court that PW 3 saw the Appellant at the premises twice. In her evidence, she only said that she saw the Appellant on 21st and 28th March 2015.

28. It was worthy of note that in her evidence when she was Cross-examined by the Trial Court, she was very specific on what the Appellant was wearing on both days and the length of time she stayed with the Appellant at the said premises. It is highly improbable, but not impossible, that a person who was looking for a house would remain in a premises for an hour bearing in mind that she testified that she directed the "young man" to the Landlord who lived nearby. What is more improbable is that a person who interacts with a stranger to answer general enquiries would remember with so much precision, the clothes such a person would be wearing.

29. Additionally, since no one saw the Appellant at PW 1's premises on the date of the alleged incident, this court was unable to comprehend under what circumstances PW 3 found herself at the Police Station

to identify the Appellant on 28th March 2015.

30. Indeed, she would not have known that the person who had been arrested at Mwatate was the same "young man" she saw on 21st March 2015 because she did not appear to have given his description either to PW 1 or PW 4. It would reasonably be expected that the plot where she stayed was not only visited by that "young man." There was a gap as how she zeroed down to the young man she saw on 21st March 2015 as having been the person who broke into PW 1's house on the material date.

31. This court was also puzzled why PW 4 interrogated PW 3 only yet there appeared to have been other tenants in the said plot. Notably, she never testified that her house had been broken into as PW 4 had contended. She had only stated that three (3) houses had been broken into and made no mention of her house having been broken into. If she was the one who volunteered to come up with the information, then the Prosecution failed to demonstrate why PW 4 also zeroed in on her as the best person to have identified the Appellant herein.

32. This was one instance where an Identification Parade ought to have been conducted due to the passage of time between the time when the "young man" was said to have gone to the plot and the date the Appellant was arrested. The "young man" was a stranger to PW 3 hence greater care ought to have been exercised in her identification of the Appellant herein. Failure to conduct an identification parade weakened the Prosecution's case to a very great extent.

33. Noting that this court could have made a mistake regarding PW 3's evidence, it was still its view that PW 1 did not adequately identify the Sub Hoofer that had been left at PW 2's business premises. Indeed, PW 4 had said that neither the Sub Hoofer nor the receipt PW 1 relied upon to prove ownership had any serial number.

34. While it would be difficult for any prudent man to know a serial number of any electronic gadget, which this court takes judicial notice are always on such gadgets, the importance of identification is a critical and fundamental aspect of the doctrine of recent possession. A peculiar mark or any mark or description would have sufficed because gadgets of a particular make all look the same. PW 1 did not identify it by any peculiar mark.

35. In the case of **Reuben Nyakango Mose & Another vs Republic [2013] eKLR,** the Court of Appeal addressing its mind to the doctrine of recent possession held as follows:-

"…We have carefully considered the totality of the evidence as relates to recent possession and are satisfied that the two courts were entitled to reject the defences offered by the appellants. The stolen items were sufficiently described and identified by PW 1, PW 2 and PW 3 and were recovered so soon after the robbery that the trial court was entitled to draw an inference that the appellants stole the items."

36. In this regard, this court found that the evidence that was adduced before it was not sufficient for it to have concluded that the Sub Hoofer that was found at PW 2's shop belonged to PW 1 or if the Appellant was indeed the person who broke into PW 1's house and stole his Sub Hoofer and Zuku Decoder.

37. In addition, the circumstances under which the Appellant came to have the Anama hoofer, amplifier and USB which PW 4 confirmed to have been given to him at the time of his arrest were hazy and it was not clear whether or not he was carrying the same at the material time of his arrest.

38. Accordingly, having considered the evidence that was adduced by the Prosecution, the State's

Written Submissions and the case law it relied upon and the Written Submissions by the Appellant herein, this court found that there were glaring gaps in the Prosecution's case. It was its considered opinion that if it was to find that the Appellant had committed the offences he had been charged with, it would be proceeding on a balance of probability. Indeed, the standard of proof in criminal cases is one of proof beyond reasonable doubt but in this case which it found had not been met in this case.

39. Going further, this court formed an opinion that the Appellant may have suffered prejudice due to the manner in which his case was handled at different times during the trial. Notably, on 10th June 2015, he made an application for the recall of PW 1 and PW 2 for Cross-examination purposes. Although the Learned Trial Magistrate allowed the said application and adjourned the matter to 22nd July 2015, the two (2) witnesses did not appear to have ever been recalled for the said Cross-examination.

40. On that date, after taking the evidence of PW 3 and PW 4, the Learned Trial Magistrate said that he would not hear any more witnesses as it had other cases that were awaiting hearing. The matter was adjourned to 21st September 2015. However, on the said date, the Prosecution closed its case after indicating that it would not recall PW 1 to produce an exhibit. The Appellant was thereafter put on his defence after having been found he had a case to answer.

41. Whilst the Appellant may have proceeded to give his defence, one may well argue that he may have had legitimate expectation that the witnesses would be recalled to enable him Cross-examine them. This is, however, a supposition that this court made as he never protested when he was put on his defence. Nonetheless, failure to have given him an opportunity to Cross-examine the said witnesses when the order had been duly given could be construed as having not accorded him a fair trial as contemplated in Article 50 of the Constitution of Kenya, 2010.

42. Further, after the Learned Trial Magistrate Cross-examined PW 3, he did not give the Appellant an opportunity to revisit the issues of his identification with PW 3. A court that cross-examines or seeks further clarification from a witness must as a matter of course give the parties before it an opportunity to seek further clarification from such witnesses in the event new issues emerge from such examination by a trial court. Notably, during her Examination-in-Chief, PW 3 never mentioned how she had managed to identify him.

DISPOSITION

43. For the foregoing reasons, this court was very hesitant to affirm the conviction and sentence that was meted upon the Appellant herein. Accordingly, this court hereby quashes the conviction and sets aside the sentence that was meted upon him by the Trial Court as it would be clearly unsafe to confirm the same.

44. The upshot of this court's decision was the Appellant's Petition of Appeal that was lodged on 29th July 2016 was successful. The court hereby orders that the Appellant be set free forthwith unless he be held or detained for any other lawful reason.

45. It is so ordered.

DATED and **DELIVERED** at **VOI** this **20TH** day of **DECEMBER** 2016

J. KAMAU

JUDGE

In the presence of:-

Allan Asah Mapenzi…… Appellant

Miss Anyumba..……for State

Josephat Mavu– Court Clerk