Case Number:	Criminal Appeal 65 of 2018
Date Delivered:	16 Jan 2020
Case Class:	Civil
Court:	High Court at Malindi
Case Action:	Judgment
Judge:	Reuben Nyambati Nyakundi
Citation:	Geofrey Komora Mtihani v Republic [2020] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Criminal
History Magistrates:	Hon. S. R. Wewa (Senior Principal Magistrate)
County:	Kilifi
Docket Number:	-
History Docket Number:	Criminal Case 43 of 2017
Case Outcome:	Appeal dismissed
History County:	Kilifi
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CRIMINAL APPEAL NO. 65 OF 2018

GEOFREY KOMORA MTIHANI ..... APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

(Being an Appeal from original conviction and sentence in

Malindi Criminal Case No. 43 of 2017 as presided over by Hon.

S. R. Wewa (Senior Principal Magistrate) at Malindi Law Courts dated on 31ST July 2019)

CORAM: Hon. Justice R. Nyakundi

Appellant in person

Ms. Sombo for the State

JUDGMENT

The appellant was tried and convicted of the offence of shop-breaking contrary to Section 306 of the Penal Code and sentenced to serve seven years imprisonment. He appeals out of time and was granted leave to prefer an appeal against the entire Judgment of the trial court.

Being dissatisfied with the decision which saw him sentenced to seven (7) years imprisonment he presented the following grounds in the memorandum of appeal:

1. That the Learned trial Magistrate erred in Law and fact by failing to consider that both the conviction and sentence is founded on a defective charge sheet.

2. The Learned Magistrate erred in Law and fact by failing to consider the sharp contradictions in evidence of the prosecution.

3. The Learned Magistrate erred in Law and fact by failing to consider that no evidentiary documents were produced to the discharge of the burden of ownership of the exhibits.

4. The Learned Magistrate erred in Law and fact by failing to consider that the appellant was arrested without any exhibits recovered in his possession.

5. That the Learned Magistrate erred in Law and fact by failing to consider the defence offered in answer to the charge.

It is clear from this memorandum and grounds of appeal that the answer to the questions which forms the theme of this appeal is a structural analysis on whether the prosecution did discharge the burden of proof on the charge beyond reasonable doubt.

Looking at the facts in light of the charge the prosecution called seven witnesses to proof the essential elements of the offence summarized as follows.

The complainant – **Mohamed Ali Swahleh (PW1)** testified that he is a business man at Barani – Malindi area where he operates an electric shop dealing in mobile phones and other accessories.

PW1, gave evidence that on the night of 26th 27th December 2016 his shop which had been safely locked was broken into and various models of mobile phones and accessories charted away by the thieves. He therefore, reported the matter to Malindi Police Station as confirmed by **PW7 – CPL Kennedy Musyoka.**

According to PW7, an investigations was commenced to unravel the breaking into the shop and theft of the mobile phones as alleged by the complainant PW1. In the testimony of PW7, the basis of the investigations revolved around the sale of phones by the appellant to several persons within Malindi Sub-County.

According to PW7, the mobile phones recovered from **PW2 – James Salim, PW4 – Abdalla Bakari, PW5 – Jane Charo and PW6 – Japheth Muhindi** were positively identified by the complainant (PW1) to be part of the consignment stored in the shop as up to the time of the offence was committed.

With regard to PW2, a bodaboda rider testified that on 27.12.2016 while on duty at Watamu, the appellant hired his motor cycle to carry luggage packed in a sack destined to Mambui. It was pointed out by PW2 that on arrival the appellant paid him Kshs.1,000/= as a hire charges and in addition gave him a mobile phone as payment.

In a span of three days, the police traced him in connection with the mobile phone given to him by the appellant following the complaint made to the police by (PW1).

PW2, further told the court that he could positively identify the phone gifted to him by the appellant and subsequently recovered by the police. During the course of investigations **PW3 – Abdrahaiman Ali Swaleh** a brother to the complainant (PW1) testified to the effect that he joined hands with PW1 to trace for the suspect who might have broken into the shop and carried away the mobile phones.

The intelligence gathering resulted in the arrest of the appellant and the mobile phones in his possession happened to be some of those stolen from the complainant's shop.

Further on interrogation of the appellant by the police PW3 told the trial court that they were taken to several people who purchased mobile phones or given free as a gift by the appellant.

PW4 – Abdalla Bakari - testified that on 1.1.2017 he met the appellant in company of another man unknown to him offering several mobile phones for sale.

Finally, upon recovery the complainant positively identified them as part of the property stolen from his shop on the night of 26th 27th December 2016.

It also transpired from the testimony of **PW5 Jane Charo** that on 1.1.2017 the appellant in company of two other boys sold a mobile phone to her at a cost of Kshs.2,000. Further on 14.1.2017 PW5 gave evidence that it was a case of her being arrested by the police for being in possession of stolen mobile phone. The particular mobile phone sold to him by the appellant was identified by the complainant (PW1) as part of the consignment stolen from his shop.

PW6 – Japheth Muhindu, runs hawking clothes business at Majengo – Malindi, Sub-County while in his house the appellant went there with some other boys offering mobile phones for sale. According to PW6, he offered to purchase one of them at a price of Kshs.1,300/= with no receipt issued by the seller. After a while PW6, told the court that the same seller went to his house accompanied by police officers demanding return of the mobile phone.

As for PW6, he had no otherwise except to hand over the mobile phone and he assisted the police with investigations by recording the statement. He was able to identify the mobile phone sold to him by the appellant.

As a result of the investigations PW7 recovered the mobile phones simcards stolen, and speakers from the shop of the complainant. These stolen items positively identified by the complainant, duly recovered from PW2, PW4, PW5 and PW6 were all produced and admitted in evidence as exhibit 1, 2, 3, 4, 5, 6, 7, 9, 10, 11 and 12 (a) (b) respectively.

The remaining evidence concerns, the appellant's defence. In his statement of defence, appellant's makes no mention of evidence adduced by the prosecution witnesses.

Analysis and determination

In this appeal the appellant mainly challenges the finding of the Learned trial Magistrate that he erred in law and fact in failing to consider that the charge was defective and the elements not proved beyond reasonable doubt.

As to the duty of the 1st appellate court, the principles are to be found in the case of **Okeno v R {1972} EA 32.** The burden of proof in matters of this nature are vested in the state that every element of an offence ought to be proved beyond reasonable doubt.

The relevant provision is Section 107 (1) of the Evidence Act. In **Woolmington v DPP {1935} UKHL the court stated inter alia:**

"That throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoners guilt subject to the defence of insanity and statutory exception."

The elements of the offence will be noted is that the charge of shop breaking and stealing is straight forward. The conviction on it depends on proof of breaking in and out of the premises with intent to commit an act of stealing.

The offence of shop breaking and committing the felony of stealing would generally comprise the following ingredients:

(i). That there was a break in into the shop of the complainant.

(ii). That there was property capable of being stolen.

(iii). That the property was fraudulently taken away by the appellant without the consent of the complainant.

(iv). That the intention of the appellant was to permanently deprive the complainant of the use and right of claim over the property.

(v). That the prosecution presented both direct and or circumstantial evidence to place the appellant at the scene.

Taking into account, the testimony of PW1, there is clear evidence that he has shop located at Barani dealing among others mobile telephones and accessories. According to PW1 on the night of 26th 27th of December 2016 the shop was broken into and the stored electronics and mobile phones stolen without his consent.

As part of the investigations carried out by PW7, several witnesses happened to have purchased some of the mobile phones from the appellant.

The totality and material evidence of PW2, PW4, PW5 and PW6 rested the prosecution case that each did purchase a new mobile phone from the appellant. In some of the occasions the appellant was accompanied with some other men not known to the witnesses. The appellant assured some of the witnesses that the mobile phones were from his brother who stays out of the country.

The evidence referred to by the witnesses PW2, PW4, PW5 and PW6 presumably places the appellant under the doctrine of possession as defined in Section 4 of the Penal Code. By possession the code provides as follows:

"To 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."

The evidence by the prosecution witnesses PW2, PW4, PW5 and PW6 on how the appellants sold them the new mobile phones was uncontroverted. There is no reason given by the appellant as to the source of the mobile phones he was offering for sale to several people soon after the shop-breaking and theft that occurred at the shop owned by the complainant.

The test on the doctrine of recent possession was restated by the Court of Appeal Case in **Isaac Nganga Kahinga alias Peter Nganga Kahinga v R CR Appeal No. 272 of 2005** where the court held:-

"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, first that the property was found with the suspect, secondly, that the 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."

I am of the considered view that the prosecution proved the element on the doctrine of recent possession in relation to this particular offence. The offence of shop-breaking occurred allegedly in the night of 26th 27th of December 2016 and by 27th December 2016 PW2 confirmed to the court that he was hired by the appellant to deliver a luggage in a sack at Mamburui area. What is more after the appellant paying the requisite fare he also gave PW2 a new mobile phone. The mobile phones were received and purchased by the respective witnesses for value but they were all stolen properties of the complainant.

There is identification evidence by PW2 as the key witnesses who moved the luggage containing the complainants from one location to another at Mambweni. From the review of the evidence put together, the appellant was the mastermind of the shop-breaking and theft of mobile phones some of which were recovered from the various prosecution witnesses.

That being the position, the law places a burden on the appellant to explain how he went about acquiring the mobile phones and accessories he offered for sale to the witnesses found in possessing stolen phones.

Section 111 of the Evidence Act Cap 80 Laws of Kenya, provides as follows:

"When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the Law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him."

This provision has been construed in the case of **Stephen Njenga Mukira v Another v R – Criminal Appeal No. 175 of 2003** where the court held:

"The burden shifts from the prosecution to the accused to explain his possession of the item complained about. He can only be asked to explain his possession after the prosecution has proved certain basic facts, firstly, that the item he had in his possession had been stolen a short period prior to the possession, that the lapse of time from the time of the loss, to the time the accused was found with it was, from the nature of the items and the circumstances of the case recent; that there are no co-existing circumstances which point to any other person as having been in possession of the item. The doctrine being a presumption of fact is a rebuttable presumption. That is why the accused is called upon to offer an explanation in rebuttal, which if he fails to do an inference is drawn that he either stole it was a guilty receiver……" See ***Maingi v R {1989} KLR 221.***

I have no doubt at all that there was sufficient evidence in support of the conviction of the appellant. The appellant came into possession of the shop goods by virtue of breaking into it and charting away the goods whose ownership is traceable to the

complainant. There was not a single right and interest acquired by the appellant subsequent to exercising the power of sale to third parties.

For this purpose, it is now well established reviewing the whole of the evidence, the list at hand in this appeal is the velacity of circumstantial evidence. The salutary approach is now well settled as demonstrated in the case of **Abanga alias Onyango v R CR Appeal No. 32 of 1990 UR** where the court held:

"Where the case rests entirely on circumstantial evidence such evidence must satisfy three tests:

(i). The circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established.

(ii). Those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused.

(iii). The circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else."

Looking at the evidence in support of the conviction of the appellant it points irresistibly to the appellant as the one who broke into the shop of the complainant and stole from therein a number of mobile phones and other accessories in exclusion of everybody else.

For the reasons stated there is no merit in this appeal. Accordingly, the appeal on both conviction and sentence fails. That is the order of the court.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 16TH DAY OF JANUARY 2020

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R. NYAKUNDI

JUDGE