**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KERUGOYA**

**CRIMINAL APPEAL NO. 203 OF 2012**

**TITUS MUNUVE ALIAS WASAA……APPELLANT**

**-VERSUS-**

**REPUBLIC ……..RESPONDENT**

***(Appeal from the original conviction and sentence in Criminal Case Number 385 of 2011 in the Principal Magistrate's court at Wang'uru – HON. B.M. Ochoi (PM)***

***JUDGEMENT***

The appellant **Titus Munene alias Wasaa** was charged before the Senior Resident Magistrate's Court, Wang'uru in two counts with the offences of store breaking Contrary to **Section 306 (a) and stealing** contrary to **Section 279(b)** of the **Penal Code.**

In the first count, it was alleged that on the 4th day of June 2011 at Ngurubani town in Kirinyaga County, jointly with others not before the court, the appellant broke into the store of ***Stephen Thiru Thuo*** and stole five bags of Miller rice valued at kshs 41,250 the property of the complainant ***Stephen Thiru Thuo.***

In the second count, it was alleged that on the same date and place, the appellant jointly with others not before the court broke into the store of ***Nancy Njeru Gakono*** and stole from therein two bags of miller rice valued at kshs 17,000 the property of ***Nancy Njeri Gakono.***

An alternative charge to the first count charged the appellant with the offence of handling stolen goods contrary to **Section 322(2)** of the **Penal Code** in that on the 6th day of June 2011 at Thiba village in Kirinyaga County otherwise than in the course of stealing, he dishonestly received and retained five kilograms of miller pishori rice knowing or having reasons to believe them to be stolen goods.

After full trial, the appellant was convicted on the two principal counts and was sentenced in each count to five years imprisonment for the offence of store breaking and two years for stealing. The terms of imprisonment were to run concurrently.

He was aggrieved by the conviction and sentence hence this appeal. In his petition of appeal, the appellant mainly complained that the learned trial magistrate erred in law and in fact by convicting him on the basis of contradictory and insufficient evidence and in rejecting his defence; that the sentence of five years imprisonment was manifestly harsh and excessive .

When prosecuting his appeal, the appellant made oral submissions in which he summarized his view of the evidence presented before the trial court. He submitted that the evidence only proved that rice was recovered from him but did not prove that the said rice had been stolen. He urged the court to allow his

appeal.

Mr Sitati, on behalf of the state opposed the appeal and submitted that the evidence adduced by the prosecution was credible and sufficiently proved the guilt of the appellant as charged. He also submitted that the sentence of five years imprisonment was lawful and lenient in the circumstance of the case. He invited the court to dismiss the appeal for lack of merit.

The prosecution in support of its case in the trial court called a total of eight witnesses. In brief, the prosecution case was that on 3rd June 2011, PW1 and PW2 kept a total of 13 ½ bags of rice in a store known as Wathika Stores located in Ngurubani town which they shared with three other people. PW1 left 8 ½ bags while PW2 left five bags in the said store before leaving in the evening. The bags of rice were left in the custody of PW4 who was to lock the store with a padlock and leave with the keys so that early the following morning of 4th June 2011, he would open the store for PW1 who was to transport his rice to Nairobi for sale.

According to PW4, when he reported to the store on 4th June 2011 at around 4.30 a.m, he was surprised to find that the store had been broken into during the night by cutting the padlock and PW1's five bags and PW2's two bags of rice had been stolen. The padlock was also missing. He informed PW1 and PW2 about the development and they both visited the store and confirmed the information. PW1 immediately reported the matter at Wang'uru Police Station.

PW7 Corporal **Richard Odhiambo** commenced investigations into the theft. He visited the store and noted that the door was intact but the padlock was missing. On 6th June 2011 following information received from PW5 who was PW1's wife, he recovered a bag of rice in a store in the same town known as Njanjo's Store which PW5 identified to be part of the rice stolen from Wathika Store on the night of 3rd/4th June 2011.

According to PW4 and PW5, they identified the recovered rice to be part of the rice stolen from Wathika Store because it was a mixture of Mwea pishori and Tanzania pishori rice. The rice had been sold to PW6 by one Titus the appellant herein.

In her evidence, PW6 narrated how she had bought the recovered rice from the appellant and how she caused his arrest after receiving information that the rice she had bought from him was stolen property. Upon his arrest, the appellant led PW7 to his house where another five kilogrammes of pishori rice were recovered. He was thereafter charged with the offences for which he was tried and convicted.

In his defence, the appellant gave sworn evidence and did not call witnesses. He denied having committed the offences as charged and claimed that he was a rice trader; that the rice he had sold to PW6 was his property which he had milled from his stock of paddy rice and that he had bought the five kilos of rice recovered from his house on1st June 2011.

Having summarized the evidence tendered before the trial court, I wish to observe that this being a first appeal, this court is enjoined to re-evaluate and re-examine the evidence in order to draw its own independent conclusions bearing in mind that unlike the trial magistrate, I did not see or hear the witnesses.

I have considered the submissions made by the appellant and the state. I have also reconsidered the evidence on record. I find that no direct evidence was adduced in the trial court proving that the appellant was the person who broke into Wathika Store and stole the rice in question. This is because the offence was committed at night and none of the persons who testified in support of the prosecution case witnessed the incident.

The prosecution's case was solely based on circumstantial evidence to the effect that the appellant was the person who had sold to PW6 the bag of rice recovered from Njanjo's Store which PW1, PW3 and PW5 identified to be part of the seven bags of rice stolen from Wathika's Store on the night of 3rd and 4th

June 2011.

The record shows that the only way PW1, PW3 and PW5 allegedly identified the rice as part of PW1's property stolen from Wathika Store's was that it was a mixture of mwea pishori and Tanzania pishori rice which was similar to the rice stolen from the first complainant. They did not however point to any distinguishing or unique feature in the recovered bag of rice which would have proved beyond doubt that indeed it had been stolen from Wathika Store and it could not have originated from any other source.

It is important to note that no evidence was produced before the trial court to show that PW2 and PW5 were the only rice traders in that town who used to pack a mixture of mwea and Tanzania pishori rice.

The appellant in his defence told the trial court that he was a rice trader and that he had milled the rice sold to PW6 from his stock of paddy rice. PW6 in her evidence confirmed that she had previously bought rice from the appellant giving some credence to his claim that he was infact a rice trader.

The learned trial magistrate disregarded this part of the appellant's defence and erroneously held that the appellant had failed to explain how he had come into possession of the rice he had sold to PW6. The learned trial magistrate ought to have considered the appellant's defence in its entirety and compared it with the evidence adduced by the prosecution witnesses and had he done so, he might have reached a different conclusion. The learned trial magistrate failed to address his mind to this aspect of the appellant's defence and proceeded to convict him on the strength of the doctrine of recent possession.

It is noteworthy that the appellant had maintained throughout the trial that the bag of rice recovered from PW6 was his property. And as stated earlier, the rice so recovered was not positively identified to be part of the rice stolen from Wathika Store on the night in question. In the circumstances, I hold the view that the trial magistrate's application of the doctrine of recent possession in this case was inappropriate. It was misdirection on his part.

For the doctrine of recent possession to apply, it must be proved beyond doubt that the property recovered was infact stolen and that it had been recovered in the possession of the accused person soon after the theft had occurred and no satisfactory explanation was given by the accused person to account for the stolen property's possession.

In this case, I am satisfied that the evidence availed to the trial court did not prove beyond doubt that the bag of rice recovered from PW6 was infact one of the bags which had been stolen from Wathika Store and therefore, there was no basis for the application of the doctrine of recent possession.

In view of the foregoing, I find that the learned trial magistrate failed to properly evaluate the evidence before him and as a result made an erroneous finding that the charges preffered against the appellant had been proved beyond reasonable doubt. My view is that the appellant's defence when compared to the rest of the evidence created a reasonable doubt regarding whether or not he had committed the offences as alleged. The learned trial magistrate ought to have given him the benefit of that doubt.

Lastly, I wish to observe that there was an anomaly in the way the charge sheet was drafted in this case. A look at the charge sheet shows that the appellant was charged in the two main counts with two separate and distinct offences which should not have been charged together.

The offence of store breaking and committing a felony contrary to **Section 306 (a)** of the **Penal Code** is a complete offence on its own. It adequately covered the acts the appellant had allegedly committed since theft qualifies to be a felony. It was therefore unnecessary for the prosecution to combine it with the charge of theft in the same count. This was an irregularity on the face of the charge sheet which the learned trial magistrate should have detected and caused to be corrected in the course of the trial. It is however an irregularity which did not affect the prosecution case as it did not occasion any prejudice on the appellant.

For all the foregoing reasons, I am satisfied that the appellant's conviction in this case was unsafe. I find

merit in the appeal and I consequently allow it. I therefore quash the convictions and set aside the sentence. The appellant is to be set free forthwith unless otherwise lawfully held.

C.W. GITHUA

JUDGE

**DATED, SIGNED AND DELIVERED AT KERUGOYA THIS 12TH DAY OF FEBRUARY 2014** in the presence of

The appellant

Mt Sitati for the state

Mbogo Court Clerk