



**IN THE HIGH COURT OF KENYA**

**AT BUNGOMA**

**(CORAM: CHERERE-J)**

**CRIMINAL APPEAL NUMBER 16 OF 2019**

**BETWEEN**

**MICHAEL WEKESA SULULU.....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

*(Appeal against conviction and sentence in Criminal Case Number 315 of 2018*

*in the Senior Resident Magistrate's Court at Sirisia delivered*

*by Hon. L.N.Kinale (SRM) on 22<sup>nd</sup> January, 2019)*

**JUDGMENT**

**Background**

1. **MICHAEL WEKESA SULULU**, the appellant herein was charged with stealing by agent contrary to section 275 of the Penal Code but was acquitted and convicted and sentenced to 3 years on an alternative charge of handling stolen goods contrary to Section 322 (1) (2) of the Penal Code. The particulars of the charge are that: -

**“On diverse dates between 10<sup>th</sup> June, 2017 and 17<sup>th</sup> March, 2018 at Nalondo trading centre within Cheptais Sub-County within Bungoma County jointly with others not before the court otherwise than in the course of stealing dishonestly received or retained 2 solar systems and two solar panels all valued at Kshs. 35,890/- the properties of D. LIGHT SOLAR COMPANY LIMITED.**

**The prosecution's case**

2. The prosecution called 8 witnesses in support of the case. **PW1 WILSON MAINGI** and **PW6 GEORGE MUSAMALI** an Engineer and Security Consultant with D. Light Company Limited respectively testified that two solar systems and 2 panels the property of D.Light company had been recovered from various people and that they were inspected and found to had been tampered with. **PW2 WILFRED NJIBWAKE WAMALWA** testified that one of the solar systems was sold from his shop by one Levi. **PW3 ROSEMARY NASIMIYU** and **PW4 SHADRACK WABULE** from whom a solar system was recovered from each stated that they bought them from the Appellant. **PW5 DAVID WAFULA** similarly stated that the solar panel recovered from him was sold to him by the Appellant. **PW7 CPL EDWARD MOLI** the arresting officer testified that the report made by D.Light Company Limited was one of dealing with their products illegally. It was his evidence that they recovered 2 solar systems and two solar panels and arrested the Appellant who was alleged to have sold them. **PW8 PC JOHN KAVIS** received the Appellant and the 2 solar systems and two solar panels recovered by PW7 and after investigations charged the Appellant.

3. When put on his defence, the appellant gave sworn testimony in which he denied the offences.

4. *In a judgment 22<sup>nd</sup> January, 2019*, Appellant was convicted and sentenced to 3 years on the alternative charge of handling stolen property.

**The Appeal**

5. The conviction and sentence provoked this appeal. In his grounds of appeal filed on 04<sup>th</sup> February, 2019, Appellant raised 8 grounds of appeal which I have considered together with the written submission filed on 24<sup>th</sup> July, 2019.

6. When the appeal came up for hearing on 506<sup>th</sup> August, 2019, the Appellant relied wholly on the grounds of appeal and submissions filed on 24<sup>th</sup> July, 2019.

7. Mr. Akello, learned State Counsel opposed and submitted that the Appellant had been identified as the person that sold the solar systems and panels in issue and that the conviction and sentence are lawful.

### **Analysis and Determination**

8. The duty of the 1st appellate court was explained by the Court of Appeal in the case of **Kariuki Karanja Vs Republic [1986] KLR 190** that: -

*"On first appeal from a conviction by a judge or magistrate, the appellant is entitled to have the appellate court's own consideration and view of the evidence as a whole and its own decision thereon. The court has a duty to rehear the case and reconsider the material before the judge or magistrate with such materials as it may have decided to admit."*

9. I have considered the appeal in the light of the evidence on record, the grounds of appeal and submissions by the Appellant and on behalf of the State.

10. In the case of **Malingi vs Republic (1989) KLR 225** cited by the Appellant Bosire J (as he then was) rendered himself as follows: **"By the application of the doctrine 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 the 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 nature of the item and 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 a 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 or was a guilty receiver."**

11. I have considered the evidence on record and it is apparent that the report made to the police was not one of theft but of tampering with solar systems. This was confirmed by **PW1 WILSON MAINGI** and **PW6 GEORGE MUSAMALI** who are employees of the complainant company and also by **PW7 CPL EDWARD MOLI** the arresting officer who testified that the report made on behalf of the company was one of the tampering with solar panels and not stealing.

12. There being no evidence that the solar systems and panels were stolen, it did not, with respect to the trial court matter that the said goods were sold by the Appellant or not. And if he sold the goods which he denies, they cannot be considered to be stolen goods since there was no evidence that they were stolen.

13. From the above analysis, I have come to the conclusion that the trial court erred in convicting the Appellant on an offence that was not proved beyond any reasonable doubt or at all. Accordingly, I find that this appeal has merit.

14. Accordingly, the conviction is quashed and the sentence set aside. Unless otherwise lawfully held, it is ordered that the Appellant be set at liberty.

**DATED AND DELIVERED IN BUNGOMA THIS 09<sup>th</sup> DAY August 2019**

**T. W. CHERERE**

**JUDGE**

**Read in open court in the presence of-**

**Court Assistant - Brendah**

**Appellant - Present**

**For the State - Mr. Akello**