REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NO. 35 OF 2014

ROBERT KARURU NJUGUNA………..……..APPPELANT

VERSUS

REPUBLIC…………………………..............RESPONDENT

(Appeal against original conviction and sentence in Nyeri Chief Magistrates' Court Criminal Case No. 938 of 2013 (Hon. C. Mburu, Resident Magistrate) on 14th May, 2014)

JUDGMENT

The appellant was alleged to have committed several offences and so he was charged with three separate counts relating to those offences. The first count was that of being in possession of an imitated firearm contrary to **section 89(3)** of the **Penal Code, cap 63**; the second was that of burglary contrary to **section 304 (2)** and stealing contrary to **section 279(b)** of the **Penal Code**. The alternative charge to this count was that of handling stolen goods contrary to **section 322(2)** of the **Penal Code**. In the third and final count, the appellant was charged with the offence of conveying suspected stolen property contrary to **section 323** of the Penal Code.

The particulars of the first count were that on the 22nd day of December 2013 at Waka area of Ruringu in Nyeri County within the Republic of Kenya, without reasonable excuse, the appellant had in his possession an imitated firearm in circumstances which raised reasonable presumption that the said firearm was intended to be used in a manner prejudicial to the public order. As for the second count the particulars were that on the night of the 22nd day of December, 2013, at Waka area of Ruringu in Nyeri County within the Republic of Kenya, the appellant, jointly with others not before court, broke and entered a dwelling house of Mary Wangari Thendu with intent to steal and did steal from therein, Aucma 14 inch TV,Royal Tech DVD player, Techno mobile phone, 6 Kg gas Cylinder, Techno Charge lamp, two bedcovers and a white mosquito net the property of Mary Wangari Thendu all valued at Kshs 23,000/=. The particulars of the alternative count were that on the same date and place otherwise in the course of stealing, the appellant dishonestly received or retained the items stated in the main count which he knew or had reason to believe that they were stolen goods.

Just like in the preceding two counts, the particulars of the third count were similar in respect of the date and place of commission of the offence; it was alleged that on the material date and place, having been detained by inspector Madolio and police constable Mosoti, in exercise of the powers conferred by section 26 of the Criminal Procedure Code, the appellant had in his possession one Aucm, 14 inch TV model No 144Q, one pair of safari boots shoes, and an Alcatel touch screen mobile phone 918 all valued at Kshs 21,000 reasonably suspected to have been stolen.

The appellant was convicted on the 1st count, the alternative charge to the 2nd count and the 3rd account;

he was sentenced to serve 7 years' imprisonment on the 1st count and 2 years' imprisonment on each of the rest of the counts with the sentences running consecutively. He appealed against the magistrate's court's decision on the following grounds: -

1. The learned magistrate erred in law and in fact in convicting the appellant for the offence of possession of an imitated firearm without the evidence of a ballistics expert;

2. The learned trial magistrate misdirected herself in convicting the appellant on the count of handling stolen property yet the evidence of identification of the exhibits and that of its owner was doubtful;

3. The learned magistrate misdirected herself by relying on the evidence of the two police officers who did not tender any evidence of the record or inventory of the stolen goods that the appellant is alleged to have been found in possession of;

4. The learned magistrate erred in law in convicting the appellant on the third count against the available evidence; and,

5. The learned magistrate erred in law and fact in rejecting the appellant's defence and also in subjecting the appellant to an irregular trial contrary to section 88 (1) and section 85 (2) of the Criminal Procedure Code.

These grounds of appeal have to be interrogated against the evidence on record; it is therefore necessary and mandatory for this court to examine and analyse the evidence at the trial afresh to not only ascertain whether it supports the learned magistrate's findings but also for this court to come to its own conclusions. This court is however mindful that, much as it may arrive at different conclusions from those of the trial court, the latter court had the advantage of seeing and hearing the witnesses first hand.

The complainant **Nancy Wangare Thendani (PW1)** testified that she was away when on 22nd December, 2013 she received a call from her landlord to the effect that her house had been broken into the previous night. She came back to find several household items stolen; these included a 14-inch television set (make Aucma), a DVD (Royal Tech), a gas cooker (mecko), 2 bed covers, a mosquito net, 2 cell phones (techno) and a techno lamp charger.

On 23rd December, 2013 the complainant made a report to the police of the loss of these items; she was later informed that the items had been recovered by police while on patrol. She identified the items at the police station though she did not have receipts for them. Amongst other items she saw but which did not belong to her were what she referred to as a "man-made" pistol and another television set which, incidentally was of the same make as hers.

Inspector George Madalio (PW2) who was then attached to Nyeri police station testified that on 22nd December, 2013, he was on patrol with police constable Moseti and six students who were on internship. While at Skuta, he saw four young men carrying a luggage. He asked them to stop so that he could search the luggage. Rather than stop, the young men ran away. He, however, managed to arrest the appellant with the items that were allegedly stolen including two television sets tied together in a piece of cloth. He is also alleged to have been in possession of a homemade pistol in a brown polythene bag. Apart from these items, he also had mosquito net and a pair of shoes in a brown bag.

Police Constable Moseti (PW3) who was in the company of inspector **Madialo (PW3)** testified they were on patrol at 2.30 am when they arrested the appellant. The appellant is said to have been in the company of three other young men. He was carrying items in a piece of cloth. He dropped them and ran away but the police caught up with him. Inside the cloth were wrapped assorted items including two television sets, a DVD, a gas cooker and a brown bag packed with a pair of shoes, a mosquito net and a toy pistol. In the course of that day the complainant reported that her items had been stolen; she identified some of the items recovered from the appellant as those that had been stole from her house. The officer,

however, identified the complainant as Martin Mwangi and not Mary Wangari Thendu.

With the evidence of these three prosecution witnesses, the appellant was put on his defence; the record does no show whether he gave sworn evidence or an unsworn statement. Be that as it may, he stated that on 23rd December, 2013, at around 3 PM he was on his way from church headed to Ruringu Skuta when he encountered a group of people running towards the opposite direction. He also started running away but he fell down in the process. After about half an hour a police officer arrested him. He was bundled into a police vehicle packed with assorted items; he was later charged for having stolen these items. He denied having been in their possession.

This evidence has to be viewed through the prism of the law relating to offences for which the appellant was convicted. The first of the three counts is an offence defined under **section 89(3)** of the **Penal Code**; that section provides as follows:

> ***89.(3) In any prosecution for an offence under this section, it shall be presumed, until the contrary is proved, that a weapon having the appearance of a firearm is a firearm.***

According to **section 89(4)** a "firearm" has the meaning assigned to it by the **Firearms Act, cap 114**; **section 2** of that Act defines a firearm in the following terms:

> ***"firearm" means a lethal barrelled weapon of any description from which any shot, bullet or other missile can be discharged or which can be adapted for the discharge of any shot, bullet or other missile and includes—***
>
> ***(a) a weapon of any description designed or intended to discharge—***
>
> ***(i) any noxious liquid, noxious gas or other noxious substance; or***
>
> ***(ii) an electrical charge which when it strikes any person or animal is of sufficient strength to stun and temporarily disable the person or animal struck (such weapon being commonly known as a "stun gun" or "electronic paralyser");***
>
> ***(b) any airgun, air rifle, air pistol, revolver, crossbow, laser gun or any other similar weapon;***
>
> ***(c) the barrel, bolt, chamber, silencer, muffler, flash-guard or any other accessory designed or adapted to diminish the noise or flash caused by firing a weapon and also other essential component part of any weapon; and***
>
> ***(d) any weapon or other device or apparatus which may be specified by the Minister by order published in the Gazette to be a firearm for the purposes of this Act.***

This definition demonstrates that a firearm is a weapon of particular description and with certain characteristics; it follows that a firearm's description and its unique characteristics are matters of evidence; in other words, evidence must be led to establish that the weapon in issue not only fits the description of the sort of weapon referred to in section 89 of the Act but also that it manifests particular characteristics prescribed in that provision of the law. It is only upon such evidence that the trial court can form its opinion that the instrument alleged to be a firearm, is indeed a firearm as known in law. Accordingly, where a weapon is alleged, as it was alleged in the case against the appellant, that the weapon he was found in possession of was an imitation of a firearm, there must be evidence illustrating in what respect or respects the imitation or the counterfeit was similar to the real or genuine firearm. This is necessary because **section 89(3)** of the Act is categorical that for purposes of prosecution of an offence under section 89, an imitation of a firearm is indeed a firearm. What this means, in my humble view, is that the trial court must be satisfied as to what a firearm is before coming to the conclusion that a particular tool or item presented before it is itself an imitation of a firearm. The only means through which the court can be persuaded to arrive at such a conclusion is through evidence or opinion of an expert in matters of firearms. Such an expert's opinion would be admissible under **section 48** of the

Evidence Act, cap 80.

In the trial against the appellant, the court did not receive any evidence or an expert opinion to support the contention that the item the appellant is alleged to have been found in possession of was an imitation of a firearm or had, in the words of **section 89(3),** "the appearance of a firearm" and was therefore, for purposes of prosecution under that section, a firearm. Bare statements by the two police officers who arrested the appellant that he was found in possession of "a homemade" or a "toy" pistol were not sufficient for the simple reason that the officers did not provide any basis why they thought that the particular item was "a homemade" or a "toy" pistol. As a matter of law, they were ill-equipped to provide an opinion on whether that item was an imitation of a firearm because they were not firearms or ballistics experts.

By convicting the appellant on the first count, the learned magistrate misapprehended the evidence and misdirected herself on the law. The court could not possibly proceed on the assumption the so-called "homemade" or "toy" pistol, was an imitation of a firearm. For the reasons I have given, what is or what is not a firearm is not a fact a trial court can possibly take judicial notice of under **section 60** of the **Evidence Act**; there must be proof of this fact. In the absence of such a proof, I am inclined to conclude that the conviction of the appellant on the first count was obviously against the weight of evidence and was therefore unsafe.

The second count of which the appellant was convicted was that of handling stolen goods which, as noted, was alternative to the primary count of stealing and burglary**.** That offence is defined in **section 322(1)** of the **Penal Code** which states as follows:

> ***322. Handling stolen goods***
>
> ***(1) A person handles stolen goods if (otherwise than in the course of the stealing) knowing or having reason to believe them to be stolen goods he dishonestly receives or retains the goods, or dishonestly undertakes, or assists in, their retention, removal, disposal or realization by or for the benefit of another person, or if he arranges to do so.***

The punishment for this offence is prescribed in **section 322(2)** of the Penal Code; incidentally, the charge only referred to this section and not **subsection (1)** thereof but nothing much turned or ought to have turned on this omission; more so, I found nothing in the appellant's grounds of appeal or his submissions suggesting that he took issue with this omission and I doubt the omission was prejudicial to his trial in any event.

The Court of Appeal for East Africa in **Ratilal & Another versus Republic (1971) E.A at 577** gave a glimpse of what the offence of handling stolen goods entails; it stated thus**:**

> ***First the handling must be of stolen goods and done otherwise than in the course of stealing. We agree that this is a necessary element which must be proved by the prosecution. The prosecution must prove that the goods are stolen and must further satisfy the court that the handling of the goods was "otherwise in the course of stealing". This altered element can, however, be proved by circumstances from which the court can infer and decide whether the offence was theft or handling of stolen goods. The prosecution should therefore always, except where the evidence positively establishes either that the act was theft or was one of handling stolen goods, lay alternative counts to cover both offences. This was done in this case.***

Thus, at the very least the prosecution must firstly, proof theft. According to **Halsbury's Criminal Law, Evidence and Procedure (Volume 11(1) (2006 reissue), Paragraph 303**, such proof may be by direct evidence of theft or the circumstances in which the defendant himself handled the goods may of themselves prove that the goods were stolen; it has further been held in **See R v Sbarra (1918) 13 Cr App Rep 118, CCA; R v Fuschillo [1940] 2 All ER 489** that there is no rule that there must be other evidence of the theft. Secondly, the prosecution must prove that the handler or the person in whose possession the goods were found was not in the process of stealing.

Inspector George Madalio (PW2) and **police constable Moseti (PW3)** were consistent in their evidence that the appellant and three other persons were found in possession of stolen items which were recovered and exhibited in evidence. The two officers concluded that these items constituted stolen goods apparently because of the circumstances surrounding the appellant's possession of the properties but more importantly because the appellant neither laid any claim on them nor offered any or any reasonable explanation of how he came into possession of these goods. It is worth noting that he did not cross-examine any of the two officers and therefore their testimony was uncontroverted. In the face of such evidence, I am bound to agree with the learned magistrate that the appellant was a handler and was properly convicted of the offence of handling stolen property contrary to **section 322(1)** as read with **section 322(2)** of the **Penal Code**.

The final count of which the appellant was convicted was that of conveying suspected stolen property contrary to section 323 of the Penal Code. That section reads as follows:

> ***323. Any person who has been detained as a result of the exercise of the powers conferred by section 26 of the Criminal Procedure Code (Cap. 75) and is charged with having in his possession or conveying in any manner anything which may be reasonably suspected of having been stolen or unlawfully obtained, and who does not give an account to the satisfaction of the court of how he came by the same, is guilty of a misdemeanour***.

Having been convicted of the offence of handling stolen property contrary to **section 322(1),** I would think that a conviction under section 323 of the Penal Code is untenable. I say so because, a conviction for handling stolen goods under **section 322(1)** of the Penal Code is premised on a foregone conclusion that the goods in question are stolen. It has been emphasised in **Ratilal & Another versus Republic (supra)** and in **Halsbury's Laws of England(supra)** that there must have been theft for a conviction on the offence of handling stolen property to be sustainable.

On the contrary, the offence defined in **section 323** of the **Penal Code** is premised on suspicion of theft. I suppose that if the trial court is persuaded as to come to the conclusion that that the goods in issue are stolen property it would be a contradiction of sorts for the same court to convict the appellant on a separate count which is founded on the fact that the goods were not stolen but were rather suspected to be stolen. At the very least, this offence should be an alternative count to that of handling stolen property where the latter is preferred as the principal count.

I am of the humble view that being in the nature of an alternative count in the sense that offences under **section 322(1) and 323** of the **Penal Code** are founded upon the same act of the appellant, a conviction on both counts would amount to punishing the appellant twice. If either of the counts is, as I have held, in the nature of an alternative, then the court ought to refrain from entering a verdict on what would constitute an alternative count. For this reason, I find the conviction of the appellant on the count of conveying suspected stolen property untenable.

The final question for determination is the question of sentence. The learned magistrate ordered that the sentences meted out against the appellant on the three counts of which he was convicted should run consecutively rather than concurrently. It has been held that where a person is charged with two or more counts involving the same transaction, the practice is to direct that the sentences should run concurrently; it is only in cases where separate and distinct offences are committed in different criminal transactions that the trial court may direct that the sentences meted out should run consecutively rather than concurrently. The Court of Appeal alluded to this position in **Nairobi Criminal Appeal No. 66 of 2015 Peter Mbugua Kabui versus Republic** where it held:

> ***As a general principle, the practice is that if an accused person commits a series of offences at the same time in a single act/transaction a concurrent sentence should be given. However, if separate and distinct offences are committed in different criminal transactions, even though the counts may be in one charge sheet and one trial, it is not illegal to mete out a consecutive term of imprisonment.***

The court cited with approval the decision in **Sawedi Mukasa s/o Abdulla Aligawaisa (1946) 13 EACA 97** where the Court of Appeal for eastern Africa stated that the practice is where a person commits more than one offence at the same time and in the same transaction, save in very exceptional circumstances, to impose concurrent sentences.

The offences constituting the counts with which the appellant was charged were committed in the same transaction and therefore the trial court should have directed that the sentences meted out against the appellant for each of these counts to run concurrently rather than consecutively.

In conclusion, I would allow the appellant's appeal to the extent that his conviction on the 1st and 3rd counts is quashed and the respective sentences set aside. His conviction on the 2nd count is upheld; however, since he was sentenced to serve two years in prison on this particular count and he has been in prison since the 9th June, 2014, it is obvious that he has completed his sentence. I therefore order that the appellant be set at liberty forthwith unless he is lawfully held.

Signed, dated and delivered in open court this 24th March, 2017

Ngaah Jairus

JUDGE