REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NO 74 OF 2013

Ezekiel Wanjohi Wachira…….....…....…….……Appellant

Versus

Republic……..…….…….……Respondent

Consolidated with

Criminal Appeal No. 73 of 2013

John Ndiangui Mugambi.....…....….....…….……Appellant

Versus

Republic……..……...…….…….……Respondent

(Appeals against Judgement, sentence and conviction in Criminal case number 1039 of 2012, Republic vs Ezekiel Wanjohi Wachira and John Ndiangui Mugambi at Nyeri, delivered V. O. Nyakundi, R.M. delivered on 29.5.2013).

JUDGEMENT

Three accused persons, namely **Paul Wanjohi Mugambi, Ezekiel Wanjohi Wachira** and **John Ndiangui Mugambi** were arraigned before the chief Magistrates court at Nyeri on the 10.11.2012 where they were charged with the offence of stealing contrary to Section **275** of the Penal Code.[1] The appellants herein faced a second count of handling stolen property contrary to Section **322 (1) (2)** of the Penal Code.[2] The first accused who is not a party to this appeal was convicted of the offence of stealing the goods in question and was sentenced to two years imprisonment while the appellants herein were convicted of the offence of handling stolen property and were sentenced to five years imprisonment each.

This being a first appeal, this court is required to weigh conflicting evidence and draw its own conclusions.[3] It is the function of a first appellate court to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions. In doing so, this court must make allowance for the fact that the trial court had the advantage of hearing and seeing the witnesses**.[4]**

PW1 George Mutahi Kiranga, testified that on 6.11.12 he discovered some of his seedlings had been stolen. He reported the theft to an AP Camp and on 9. 12. 12 an A. P. officer informed him that some seedlings had been found and he proceeded to the AP camp where he identified them and also found the first appellant who also said he had left one seedling at his home. He added that the first appellant led

them to the home of the second appellant who had given him the seedlings. At the second appellants home, they recovered one seedling and the second appellant told them the seedlings belonged to the first accused in the lower court. This led to the arrest of the first accused.

At the trial **PW2 NO. 82004802 APC Snr Sgt John Ndirangu** confirmed having received a report from **PW1** that his seedlings had been stolen**.** Since the first appellant used to supply flower seedlings to him, he asked him to sell seedlings to him which he agreed. On 9.12.2012 the first appellant came to him with the exhibits produced in court, he promptly alerted **PW1** who came and verified they were his. The first appellant led them to the second appellants' home where they recovered one seedling. Both appellants herein said they received the seedlings from the first accussed in the lower court.

PW3 No. 887662PC Geoffrey Shitoshi the investigating officers evidence was that the first accused had stolen the items and given to the appellants herein to sell.

At the close of the prosecution case the trial magistrate was satisfied that a *prima facie* case had been established and put all accused persons on their defence. The provisions of section 211 of the Criminal Procedure Code[5] were complied with and both appellants herein gave sworn evidence.

In his defence, the first appellant maintained that he had been asked by an AP Police (PW2) to sell to him some seedlings. He delivered the first one, but he said he wanted a different type. He said he did not have but he promised he will try and get it. He went to his cousin the second appellant who gave him the seedling and he delivered as agreed. The second appellant told them that the seedlings were supplied by his brother, the first accused in the lower court. The witness narrated how the first accused upon being arrested narrated how he used to steal the seedlings.

The second appellants defence was that on the material day, some people came to his home, that the first appellant said he was the one who gave him some seedlings, and he was required to own up. His mother informed them that the seedlings had been brought by the first accused in the lower court.

After evaluating the prosecution and the defence case, the trial magistrate found the first accused in the lower court guilty and sentenced him to two years imprisonment for the offence of stealing while the appellants herein were sentenced to five years imprisonment for the offence of handling stolen goods.

Aggrieved by the said finding, the appellants appealed to this court against the conviction and sentence imposed by the said court even though the grounds raised seem to be asking the court to consider the sentence only. But since the appeal is not drawn by an advocate, this court will examine both conviction and sentence for the interests of justice.

Both appellants tendered written submissions which I have considered. I have carefully considered the submissions by the learned state counsel, the relevant law and authorities.

In my view, only one issue falls for determination in these two appeals, namely:-

Whether the prosecution proved the case of handling stolen property to the required standard.

One of the most important elements of the charge of handling stolen goods is that the accused must know or have reason to believe that the gods were stolen.[6] To my mind the rule that the prosecution may obtain a criminal conviction only when the evidence proves the defendant’s guilt beyond reasonable doubt is basic to our law. In ***Sawe vs Republic[7]*** the court held that *“suspicion however strong cannot provide the basis of inferring guilt which must be proved beyond reasonable doubt.”*

The key question that this court seeks to answer is whether or not the appellants offered any explanation that could exonerate them from the offence or whether there exists any other co-existing circumstances which could weaken or destroy the inference of guilt which is a necessary test before convicting on the offence of handling stolen property.

For the offence of handling stolen property to be proved to the required legal standard, the prosecution must adduce concrete evidence proving beyond any reasonable doubt that the person accused of the offence otherwise than in the course of stealing knowingly or having reason to believe that the goods in question had been stolen dishonestly received or retained the goods or dishonestly facilitated their retention, removal, disposal or for the benefit of another person. The key ingredients of the offence must be proved before the prosecution can secure a safe conviction. These ingredients are:-

i. *That the property the subject matter of the charge had been stolen;*
ii. *That the accused person otherwise than in the course of stealing dishonestly handled the goods in question by retaining them or facilitating their disposal either for his benefit or for the benefit of another person knowing or having reason to believe that the goods had been stolen or were unlawfully obtained.*

It is not in doubt that the appellants explained that the seedlings were brought to them by the first accused in the lower court who was convicted of the offence of theft. No evidence was adduced to show that they knew or had reasonable cause to believe that the seedlings had been stole. The first accused was in the business of selling seedlings. It has not been shown that they knew where he obtained the seedlings from or handled the items dishonestly. In fact PW2 an administration police officer was a customer to the first appellant who used to sell seedlings and when he asked for the seedlings, the first appellant supplied but PW2 asked for a particular type since he was already investigating the theft and the first appellant did not have it at the material time and he promised to look for it and managed to get it from the second appellant and he took it to PW2 whom he knew as an administration police officer. It's highly unlikely the first appellant could agree to sell a stolen item to a police officer for obvious reasons hence the element of dishonestly handling does not come out at all or at least to the required standard. The first appellant led the said officer to the second appellant who also confirmed that the seedlings were brought to their home by the first accused. This chain of events pointed to the first accused in the lower court who was in my view correctly convicted. In my considered opinion, the appellants in this case ought to have been treated as prosecution witness against the first accused in the lower court as opposed to being charged when they had explained how they came into possession of the items.

In my view, the prosecution did not prove its case beyond reasonable doubt as required under the law. The legal burden of proof in criminal cases never leaves the prosecution's backyard. (See **Viscount Sankey L.C.** in the celebrated case of **Woolmington vs. DPP**[8]).

If at the conclusion of the trial the prosecution has failed to establish the burden of prove to the appropriate standard, the prosecution will lose.[9] In *Uganda vs. Sebyala & Others*,[10] the learned Judge citing relevant precedents had this to say:-

"The accused does not have to establish that his alibi is reasonably true. All he has to do is to create doubt as to the strength of the case for the prosecution. When the prosecution case is thin an alibi which is not particularly strong may very well raise doubts"

I find that the appellants having offered such a reasonable explanation, they explained how they came into possession, hence none of the ingredients of the offence were proved. The learned magistrate did not accord the appellants defence sufficient weight and due consideration, hence erred in law.

Accordingly, in view of my findings as outlined in this judgement, I find that the conviction and sentence imposed upon the appellants by the learned Magistrate was not supported by the evidence adduced and the law and cannot be allowed to stand. I therefore quash the conviction and set aside the said sentences imposed upon both appellants and order that the appellants herein namely **Ezekiel Wanjohi Wachira** and **John Ndiangui Mugambi** be forthwith set at liberty unless otherwise lawfully held.

Dated at Nairobi this **19th** day of **February** 2016

John M. Mativo

Judge

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[1] Cap 63, Laws of Kenya

[2] Ibid

[3]Shantilal M. Ruwala V. R (1957) E.A. 570

[4]see Peters V.Sunday Post (1958) E.A. 424

[5] Cap 75, Laws of Kenya

[6] See Tembere vs Republic {1990} KLR 393

[7] {2003} KLR 354

[8] {1935} A.C 462 at page 481

[9] See Halsburys' Laws of England, 4th Edition, Volume 17, paragraphs 13 & 14

[10]{1969} EA 204