REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MURANG'A

CRIMINAL APPEAL NO 12 OF 2015

(Appeal against Conviction and Sentence in Kangema PM Criminal Case No 243 of 2013 – E. M. Kagoni, Ag SRM)

EVANS MWANGI WANJIRU……..……..APPELLANT

VERSUS

REPUBLIC……..…....……..RESPONDENT

J U D G M E N T

1. The Appellant was charged in the main count of ***breaking and stealing*** contrary to **sections 307 and 275** of the ***Penal Code***. It was alleged in the particulars of the charge that on 10/08/2013 in Rwathia Location of Kangema District within Murang'a County, jointly with another person not before the court, he broke and entered a school house (classrooms) and stole from therein various listed items, all valued at KShs 13,000/00, the property of ***Rwathia Mixed Secondary School***. He was charged in the alternative with ***handling stolen property*** contrary to **section 322(2)** of the Penal Code.The allegation in this count was that in the same Rwathia Location on the same date, he was found in possession of the same items as in the main count.

2. The Appellant pleaded not guilty and was tried. He was acquitted of both the main charge and also the alternative charge. But he was convicted under **section 179(2)** of the ***Criminal Procedure Code*** of ***stealing*** contrary to **section 275** of the Penal Code and sentenced to serve 18 months imprisonment. He has appealed against both conviction and sentence.

3. On 23/06/2015 the Appellant was admitted to bail pending disposal of his appeal, but he was unable to meet the bail terms. The appeal was heard on 09/11/2015 and judgement reserved for 04/12/2015. However, I proceeded on my annual leave on 30/11/2015, to resume on 01/02/2016, hence the re-scheduling of delivery of this judgement.

4. I have perused the record of the trial court and also considered the submissions of the learned counsels appearing. The main issue for determination is **whether the conviction under section 179(2) of the Criminal Procedure Code was proper and lawful**. Learned Prosecution Counsel for the Respondent does not support the conviction.

5. ***"…intent to commit a felony therein…"*** is an ingredient of the offence under section 307 of the Penal Code, and ought ordinarily to be alleged in the particulars of the offence. It was not so alleged in

the main charge against the Appellant. But it was alleged that he had stolen from the school he was alleged to have stolen the various items listed in the charge. Theft under section 275 of the Penal Code is a felony. The failure to allege ***intent to commit a felony therein*** could thus not occasion a failure of justice as ***intent to commit a felony therein,*** in the particular circumstances of this case, was presumed in the allegation of theft. The charge in the main count was thus not fatally defective as submitted by learned counsel for the Appellant. The defect was curable under section 382 of the Criminal Procedure Code.

6. But learned counsel was right in his submission that the alternative charge was fatally defective for failure to allege ***knowledge*** or ***reason to believe the goods were stolen***. **Section 322(1)** of the Penal Code, which defines handling stolen goods, provides -

> ***"A person handles stolen goods if (otherwise than in the course of 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."***

It was not alleged in the particulars of the offence that the Appellant **knew**, or had **reason to believe the goods to be stolen**. The alternative charge was clearly fatally defective and the trial court should have rejected it.

7. I have already found that the charge in the main count was not fatally defective. But as it turned out, the goods allegedly stolen from the school did not belong to the school but to various other persons who were never called to testify.

8. There was thus no proper proof that the various items alleged to have been stolen existed in the first place. There was no evidential basis for the conviction for theft under section 275 of the Penal Code entered against the Appellant.

9. One other thing, on the trial court's reliance upon section 179(2) of the Criminal Procedure Code. This was not necessary. The Appellant faced two distinct offences in the main count – **breaking into the school with intent to commit a felony therein** (contrary to section 307 of the Penal Code) and **stealing from therein** (contrary to section 275 of the same Code). The charge had two limbs. This does not necessarily mean that the two limbs must stand or fall together. The offence of breaking with intent to commit a felony could well be proved but the offence of stealing from therein not proved, or *vice versa*. A trial court would be properly entitled to convict for the offence proved without necessity of recourse to section 179(2) of the Criminal Procedure Code.

10. For reasons given elsewhere above, the Appellant's appeal is hereby allowed in its entirety. The conviction is quashed and the sentence imposed set aside. The Appellant shall be set at liberty forthwith unless otherwise lawfully held. It is so ordered.

DATED AND SIGNED AT MURANG'A THIS 11TH DAY OF FEBRUARY 2015

H P G WAWERU

JUDGE

DELIVERED AT MURANG'A THIS 12TH DAY OF FEBRUARY 2016