REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT LODWAR

HIGH COURT CRIMINAL APPEAL NO. 19 OF 2014

STATE …… APPELLANT

VERSUS

JOSPHINE ACHIENG OKOKO …… RESPONDENT

(An appeal from the ruling delived on 27th August, 2014 by Hon Mrs R M WACHIRA Acting Principal Magistrate)

JUDGMENT

This is an appeal by the state against a ruling by R.M.W Wachira Acting Principal Magistrate acquitting the respondent under section 210 of the criminal procedure code delivered on 27/8/2014. The Respondent Josphine Achieng Okoko was charged in the trial court with two counts of being in possession of suspected stolen property contrary to section 323 of the penal code.

The particulars of the offence were that on the 20th day of July, 2013 at Kakuma Township in Turkana West District in Turkana County was found in possession of motor vehicle Reg. No. KBR 531C Chesis No. NCP 55-0028230 Engine No.INZB 582025 make Toyota/probox suspected to have been stolen or unlawfully obtained.

The particulars for count 2 were that on the 20th day of July, 2013 at Kakuma Township in Turkana West District in Turkana County was found in possession of motor vehicle Reg No. KBR 721D Chesis No KR 42-5037835 Engine No. 7K – 0739363 make Toyota Townace suspected of having been stolen or unlawfully obtained.

The prosecution called three witnesses, PW1 Chief inspector Albert Tawaya who testified that acting on information they visited the home of the Respondent where they found 2 vehicles – KBR 531C Probox and KBR 721D. They asked her for document of ownership but she did not produce any. They suspected the vehicles to be stolen or unlawfully obtained and towed then to the police station. This witness wrote to KRA to ascertain ownership and the reply was that Motor vehicle KBR 721D was in the name of Simon Kimani Kengere as the owner and KBR 531C the owner was Kahingu Muvabu. They also found that the Engine numbr and those in the log book were different. They interrogated the appellant and she had no explanation as to how she came by the two vehicles. This is almost similar evidence given by PW2 Segt. Maubini Ndiwa and PW3 P.C David Maiyo.

The prosecution having closed the case the learned trial magistrate delivered her ruling finding that the prosecution had not established a prima facie case against the appellant for the following reasons: first Samwel Kimari and Kihing'o Muvabu the reasons ampering as owners did not testify; and therefore no one had complained then the vehicle had been stolen; secondly then no official from KRA produced the

reports on ownership of motor vehicle and the authenticity of the details in the report.

The state appealed against the acquittal on five grounds that the learned trial magistrate erred in law and that finding that the respondent did not have a case to answer when there was evidence on record to warrant her being put on her defence; that the trial magistrate erred in finding that documents produced did not prove the charge; that the trial magistrate erred in law and fact in ordering the release of the motor vehicle exhibits to the appellant when there was no evidence she was the owner; that the trial magistrate did not appreciate that the prosecution evidence was not challenged and finally that the ruling was against the weight of the evidence on record.

1. **Mr. Gikunda for the appellant submitted that there was evidence from the Kenya Revenue Authority which established that the motor vehicle did not belong to the respondent. The Respondent did not challenge this evidence nor innovate either in cross-examination or otherwise that he was the owner of the motor vehicles. The evidence adduced therefore showed that the motor vehicles were suspected to have been stolen, the charge the Respondent faced and which was therefore established. Learned counsel further submits that the trial magistrate erred in ordering the release of the motor vehicle exhibits to the Respondent when she had o document of ownership. The respondent informed the court that she had nothing to say in respect of the appeal.**

The right of the DPP to appeal against an acquittal is provided for in section 348A of the criminal procedure code which provides

> ***"348A (1) when an accused has been acquitted on a trial held by a subordinate court or high court or when an order refusing to admit a complaint or formal charge or an order dismissing a charge has been made by a subordinate court or High court, the Director of Prosecutions may appeal to the high court or the court of appeal as the case may be form the acquittal or order on a matter of fact and law***
>
> ***(2) if the appeal under sub-section (1) is successful the High Court or court of appeal as the case may be may substitute the acquittal with a conviction and may sentence the accused person appropriately"***

It is noteworthy to note that the present provision of section 348 A which was an amendment to previous section 348A which provided for appeal on question at hand only. In the present provision, the DPP can appeal on question of both fact and law. This amendment was effected by the security laws (Amendment act 2014).

What is a question of law was dealt with by the court of appeal in Paul Kobia M'Mbaya – VS – Republic criminal appeal No.267 of 2003 (2007) EKL as follows

> **' we recognize that what constitute a question of law for purposes of an appeal to the superior court would ultimately depend on the nature of determination by the subordinate court and will vary infinitely from case to case. In some cases the point of law can be gleaned from the decision without much ado. For justice the subordinate court would make findings which are ex-facie erroneous in law and embark on erroneous statutory interpretation. These cases where the error of aw is patent or apparent on the face of the record present no difficulty. There are other less obvious cases where the error of law arise from the manner the subordinate court has treated the evidence adduced at the trial.**

The authorities on this issue demonstrate that it is a question of law whether the learned trial magistrate properly directing herself on the facts and the law would come to such a decision. The issue for determination therefore is whether a reasonable tribunal properly directing itself on the evidence and the law would come to the conclusion reached by the trial magistrate.

As I have recounted the evidence above, the prosecution established that the motor vehicles were

recovered from the possession for the Respondent. A search from KRA showed the said motor vehicles were registered in the names of other people other than Respondent. The respondent did not have documents of ownership of the same. This was an offence of being in possession of suspected stolen property. The evidence adduced by the prosecution is satisfaction in my view to establish a prima facie case against the respondent.

Considering the evidence adduced I find that the decision by the trial magistrate to acquit the respondent under section 210 was not supported by evidence and the law. I therefore set aside the order of acquittal entered against the respondent. I direct that the matter be placed before the principal magistrate for a retrial by another magistrate other than W. Wachira Ag. Principal Magistrate. The order for release of the exhibits to the Respondent is hereby set aside, and if the said exhibits have been released, the same will be repossessed for the purpose of the retrial.

Dated at Lodwar this 16th day of March, 2016.

S RIECHI

JUDGE

17/3/2016

Before – S N RIECHI J

Gikunda for appellant – present

Respondent – present

Lotiir – C/clerk

Court – the judgment read over and delivered in open court in presence of Gikunda for the appellant and Respondent in person this 17th day of March, 2016.

S RIECHI

JUDGE