REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 111 OF 2011

STEPHEN MWANGI KIMANI ……... 1ST APPELLANT

JULIUS MWANGI GATHEGI …… 2ND APPELLANT

VERSUS

REPUBLIC ……..…….. PROSECUTOR

(Appeal from the Judgment of the Chief Magistrate's Court at Nakuru, Hon. W. K. Korir – Senior Principal Magistrate delivered on the 15th April, 2011 in CMCR No. 7145 of 2009)

JUDGMENT

The two appellants herein namely **STEPHEN MWANGI KIMANI** (hereinafter referred to as the **'1st appellant'**) and **JULIUS MWANGI GATHEGI** (hereinafter referred to as the **'2nd appellant'**) both filed an appeal challenging their conviction and sentence by the learned Senior Principal Magistrate sitting at Nakuru Law Courts.

The appellants were brought before the lower court on 22/12/2009 facing a charge of **STEALING CONTRARY TO SECTION 275 OF THE PENAL CODE**. The particulars of the charge were that

> ***"On the 11th day of December 2009 at Provincial Hospital Nakuru District of the Rift Valley Province jointly with others not before court stole 470 soluble insulin and 580 mixtard insulin all valued at Ksh 1.5 million the property of Provincial General Hospital Nakuru.***

The 2nd appellant in addition faced an alternative charge of **HANDLING STOLEN PROPERTY CONTRARY TO SECTION 322(2) OF THE PENAL CODE** of which the particulars were that

> ***"On the 8th day of January 2010 at Nakuru Township in Nakuru District of the Rift Valley Province, otherwise than in the course of stealing dishonestly retained 30 vials of Mixtard Insulin worth Ksh 45,000/= the property of Provincial General Hospital Nakuru knowing or having reason to believe them to be stolen property or unlawfully obtained"***

Both appellants pleaded **'Not Guilty'** to the charges. Their trial commenced on 8/3/2010 at which trial the prosecution led by **INSPECTOR OCHIENG** called a total of nine (9) witnesses in support of their case. The brief facts of the prosecution case were as follows.

The 1st appellant **'Dr Stephen Kimani'** was at the material time an intern pharmacist working at the PGH – Nakuru. **PW1 DR. JACKLINE NDINDA MWENDWA** was the pharmacist in charge at the same Heath Facility. She explained to the court that the hospital was supplied with drugs by the Kenya Medical Supplies Agencies (KEMSA) and amongst the drugs which the hospital ordinary received from KEMSA was insulin used in the management of diabetes. They would be supplied both with mixtard insulin and soluble insulin. **PW1** explained that layout of the drugs store and the cold room. She explained that in the pharmacy there is the main drug store and inside the drugs store was the cold room where sensitive drugs like Insulin were kept. There was a key to open the door to the drugs store whilst the cold room was locked with a padlock. All keys were normally kept in the office of **PW1**. On that particular day 11/12/2009 the door to the office of **PW1** had jammed and could not be opened so the keys could not be placed in her office. Instead the keys were kept behind a small fridge in the drugs store.

On 11/12/2009 which was a Friday **PW1** reported on duty as usual. At 9.00 am she gave the 1st appellant the keys to the store and the cold room. At 3.00pm **PW1** left the hospital leaving a **'Dr Simon Wangia'** in charge. He was to return the keys of the cold room to her later.

PW2 DR. SANYA BEGUM ABDULMOLLA told the court that during the material time she worked as a pharmacist at PGH – Nakuru. On 11/12/2009 she reported on duty at 8.00 am. She was on duty together with the 1st appellant and others. **PW2** stated that she requested the 1st appellant to remove 20 vials of mixtard from the cold room to be kept in the small fridge for use in the hospital over the weekend. The 1st appellant did as directed and **PW2** checked and confirmed that the 20 vials were kept in the small fridge. Later that day at about 4.00pm she saw the 1st appellant trying to open the door to the office of their in charge **PW1**. Upon enquiring the 1st appellant told **PW2** that the door had jammed so he was unable to return the drugs store keys into the office of **PW1** where it was normally kept. They then decided to keep the keys behind a small fridge which was in the main drugs store. After that they left for the day. **PW2** testified that after the 1st appellant left she also locked up and left for the day at about 4.30pm taking with her keys to the main entrance.

The next day 12/12/2009, **PW2** reported to work at 8.30am. She worked as usual until 11.00am when a certain drug was required from the cold room. When **PW2** went to get the key (from where it had been placed the previous day) she was surprised to find the padlock to the cold room door missing. Upon checking further she realized that several vials of insulin were missing from the shelves in the cold-room. The matter was reported to the police.

Later on 8/1/2010 an unidentified patient informed **PW1** that he had purchased insulin bearing the GOK logo from a chemist in Nakuru Town. This was reported to police who laid an ambush at Nabongo Chemist along Kenyatta Avenue. The supplier of the insulin was called and lured to the chemist. When he arrived the police pounced and arrested the 2nd appellant with 30 vials of insulin in a black polythene paper. The 30 vials allegedly bore the same '**Batch No. XS61856'** as the insulin stolen from PGH – Nakuru and the GOK logo had also allegedly been erased from those 30 vials. On the basis of police investigations the two appellants, (together with a third accused person who was ultimately acquitted by the trial court), were arraigned in court and charged with the offence cited above.

At the close of the prosecution case both appellants were ruled to have a case to answer and were placed on their defence. Each opted to make a sworn statement denying any involvement in the theft of drugs from the hospital. On 15/4/2011 the learned trial magistrate delivered his judgment in which he convicted both appellants and sentenced them to serve two (2) years imprisonment each. Being aggrieved by both their conviction and sentence the two appellants appealed.

This is a first appeal. The duties of a court of first appeal were succinctly put in the case of **MWANGI Vs REPUBLIC [2004] 2 KLR 28** where the Court of Appeal held as follows

> ***"1. An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to afresh and exhaustive examination and to have the appellant court's own decision on the evidence***

2. The first appellate court must itself weigh the conflicting evidence and draw its own conclusions.

3. It is not the function of the first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court holds the advantage of hearing and seeing the witness"

From the facts of this case in order to successfully prove this charge of stealing the prosecution must tender concrete and tangible evidence to show that

(i) Firstly a theft of insulin from the drug store at PGH – Nakuru did in fact occur.

(ii) Secondly that it was the appellants who perpetrated this theft by physically and unlawfully removing the insulin from the drugs store at the PGH – Nakuru – this is what is termed the 'acuts reus' of the offence

(iii) Thirdly that the appellants did so with the intention of permanently depriving the PGH – Nakuru of the use of these drugs – this is termed the 'mens rea' of the offence

It is a well established principle in law that in any criminal case the burden lies squarely upon the prosecution to prove each and every aspect of its case beyond reasonable doubt. At no time does this burden ever shift to require the accused person to prove his innocence. With this in mind I will now proceed to analyze the evidence on record with a view to determining if each of the aforementioned ingredients of this charge has been proved beyond reasonable doubt.

i Were drugs stolen from the Hospital as alleged?

PW1 DR. JACKLINE MWENDWA who was the pharmacist in charge at PGH – Nakuru at the material time told the court that 470 vials of soluble insulin and 580 of mixtard insulin were stolen from the cold room store. In order to prove that such a theft did occur it behoved the prosecution to show firstly that such quantity and type of insulin were indeed in the store prior to 11/12/2009. **PW1** explained that the hospital which is a Government facility ordinarily purchased its drugs supply from KEMSA. As such there ought to have been documentation in the form if delivery notes, stock cards or bin cards to prove the existence of this stock of insulin in the cold-room prior to the alleged theft. **PW1** did produce the stock card. **P. Exb 1** which she relied upon as proof that on 11/12/2009 there existed 470 vials of soluble insulin and 580 vials of mixtard insulin in the cold room store. However under cross examination by **MR. OGOLLA** for the appellants **PW1** admits that she never handed over this stock card to the police. She only showed it to the police on the day that she came to court to testify. Therefore this crucial document was left in the hands of P**W1** which creates a disconnect in the chain of custody. The court cannot rule out the possibility that the document may have been doctored. Under cross-examination at page 15 line 10 **PW1** says

"On 11/12/2009 I did not do a stock taking of the soluble insulin. I saw the soluble insulin in the store. I did not count the vials….. I did not give the card to the police. We gave it to the police today …….. From the card one can tell what has been delivered to the pharmacy. One cannot be able to say what was remaining at the pharmacy by looking at the card" (my own emphasis)

Further on **PW1** goes on to state at page 16 line 17

"On 11/12/2009 Dr. Kimani (the 1st appellant) took over from Hezekiah (referring to Dr. Hezekiah Abuga) I did not witness the handing over. I do not know what was handed over. We do not have records for handing over……."

Therefore **PW1** is unable to state with certainty that at the time when the pharmacy was handed over to the 1st appellant it contained the quantity of insulin alleged to have been stolen.

PW5 DR. HEZEKIAH ABUGA told the court that on 10/12/2009 he was the Ag in charge of the stores at PGH – Nakuru. He carried on his normal duties and removed some mixtard insulin from the cold room to the small fridge for use over the weekend. The next day 11/12/2009 **PW5** requested **PW1** his supervisor to allow him be off-duty and travelled to Nairobi. **PW5** handed over the stock to the 1st appellant. However **PW5** is not able to tell the court with certainty the quantity of insulin which he handed over to the 1st appellant. No handing over notes were prepared. **PW5** told the court that the last stock check he did was early in the month of December, 2009. He states at page 29 line 12

> ***"On 10/12/2009 I saw the mixtard and soluble insulin at the cold room. The Bin card for soluble insulin was reading 478 on 10/12/2009. For the mixtard the Bin card was reading 580 vials".***

PW5 goes on to state at page 29 line 19

> ***"Dr Kimani (the 1st appellant) was assigned the duty to be the in charge of the store when I left. There was no official handing over ….. The (Bin) card does not show a stock count…."***

Therefore it is clear that **PW5** had no idea what quantity of insulin he handed over to the 1st appellant. No daily stock check was done and there was no record to show the daily use (consumption) of the insulin. More disturbingly **PW5** concludes in his cross-examination when he states at page 30 line 16

> ***"I counted 470 vials on 3rd or 4th December, 2009. I made a confusion about the physical count and what I left on 10/12/2009"***

PW5 now admits that it was on 3rd or 4th December, when he counted 470 vials in the cold room. This was a large busy hospital serving numerous patients. Out of those patients, I have no doubt that some required insulin and no doubt the insulin was being dispensed to patients on a daily basis. If 470 vials were counted on 3rd or 4th December, it is highly unlikely that the same quantity would still be in the store almost one week later on 10/12/2009 when **PW5** handed over the store to the 1st appellant. Although **PW1** mentioned in her evidence that monthly consumption forms were prepared at the hospital to indicate the quantity of drugs dispensed to patients no such monthly consumption forms were ever exhibited in court to show how much insulin was dispensed between 4/12/2009 and 10/12/2009 when the 1st appellant took over. The testimony of **PW5** raised more questions than answers. For example he tells the court that on 4/12/2009 there were 470 vials of soluble insulin in the store. Yet he later states that he checked and counted 478 vials. Where did the additional 8 vials come from? There is no delivery note to explain this increase.

All in all it is quite apparent that the stock keeping methods adopted at PGH – Nakuru were totally deficient. Nobody could tell the quantity of insulin which was in the cold room at any given time. More importantly it has not been proved that the quantities of insulin alleged to have been stolen on 11/12/2009 were actually in existence in the cold-room on the material date. In order for an item(s) to be stolen it must in the first place be shown to exist. The prosecution have failed to prove that on 11/12/2009 there existed in the cold room store at PGH Nakuru 470 vials of soluble insulin and 580 vials of mixtard insulin. It has also not been proved that the above quantities of insulin were handled over to the 1st appellant on that date. As such the first ingredients of this charge of theft had not been proved beyond reasonable doubt.

Be that as it may I will proceed to examine the evidence to draw a determination as to whether the *actus reus* of the offence of stealing has been proved against the appellants.

(ii) Is there evidence to prove that the appellant stole any insulin from the Hospital

There is no witness who saw either the 1st or 2nd appellant remove any quantity of insulin from the cold room. With respect to the 2nd appellant he did not work at PGH – Nakuru and indeed he had no connection with the hospital. The basis of the charge against him is alleged recovery and I will deal with this later.

With respect to the 1st appellant it is not in doubt that he worked at PGH – Nakuru as an intern pharmacist and there is no doubt that he had access to the cold room store. However as stated earlier no witness ever saw the 1st appellant at any time remove any insulin from the store and exit the hospital premises with it. Indeed the witnesses all concede that the amount of insulin alleged to have been stolen was large and would have constituted of a bulky and heavy package. Anyone attempting to leave the hospital premises with such a package would have easily been spotted and stopped.

The prosecution is relying on circumstantial evidence to prove their case against the 1st appellant. In the case of **MWANGI Vs REPUBLIC [1983] KLR 522** the Court of Appeal set out the conditions under which circumstantial evidence would suffice as proof of the guilt of an accused person. In that case it was held that

> ***"In a case depending exclusively on circumstantial evidence the court must, before deciding upon a conviction find that the inculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other hypothesis than that of guilt. It is also necessary before drawing the inference of the accused's guilt from the circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference"***

In other words in order to rely upon circumstantial evidence as proof of guilt the facts must point exclusively at the accused person as the perpetrator of the offence.

In this case the court was told that the insulin was allegedly stolen from the cold room store. This cold room is located in the main drugs store. The keys to this main store were ordinarily kept in the office of the pharmacist in charge **PW1**. The court is not told how many people had access to this office where the keys were kept. There was no break in to the main store or the cold room. Therefore the person who stole the insulin had access thereto by way of the keys. **PW1** told the court that on 11/12/2009 she left work and left the keys to '**DR. SIMON WANGIA'** who was to return the keys to her office. **'DR. SIMON WANGIA'** testified as **PW3**. He made no mention of having been handed the store keys by **PW1**. He only stated that on 11/12/2009 at 4.00pm he left Nakuru and travelled to Nairobi **PW3** did however confirm that he had in his possession a spare key to the pharmacy main door.

DR. SANYA ABDULMOLIA was also an intern working at PGH – Nakuru she stated that on 11/12/2009 between 4.00pm and 4.30pm she saw the 1st appellant trying to open the door to the in charge's office in order to return the keys to the store. The door to that office had jammed and could not open. **PW2** states that (page 19 line 7)

> ***"I saw Dr. Kimani (the 1st appellant) trying to open in-charge's office. I went and asked him what the problem was. He said the office could not open and he could not place the key for the cold room inside. We then decided that we place it behind the small fridge that is in the bulk store. He placed it and showed me where he kept it…"*** (my emphasis).

It is clear from this testimony and by her use of the term **'we'** that **PW2** together with 1st appellant made the decision to place the key in an alternate place. It is also clear that the location of this key was not known to the 1st appellant alone. **PW2** equally had knowledge of where the key was and could have accessed the store at any time. **PW2** goes further to state at page 19 line 17

> ***"Dr Kimani then left the consultation room and I locked the store I ensured that every where was closed and I proceeded to lock the pharmacy. I closed the bulk store and pharmacy consultation room. I did not check the cold store and the small store. I assumed them to be***

locked. I went with the keys for the main entrance. I saw Dr. Kamani leave the consultation room ….. I did not see anyone carry anything …….”

From her own testimony it was **PW2** who locked up the pharmacy after everyone had left. She went with the keys to the main door. How then could 1st appellant have gained access where **PW2** had one key and **PW3** had travelled to Nairobi with the spare key? It is important to note that **PW2** says she saw the 1st appellant leave and he did not leave carrying anything. Certainly she did not him leave carrying a bulky package of insulin. Even under cross-examination **PW2** reiterates that

“I did not see Dr. Kimani leave with a box. I was the last one to leave. I did not take the drugs. The next day I was the first one” (to arrive)

Again of importance is the fact that **PW2** admits that as she was locking up she did not bother to confirm that the cold room store was locked she merely assumed that it had been locked. This is an admission which seriously impacts the evidence. If the store was not locked (and there is no evidence that it was) then any person working inside that pharmacy would have had access and could have taken the insulin. **PW2** admitted that she was the last one to leave the pharmacy and the first to arrive the next day. There is no evidence that the 1st appellant sneaked back to the pharmacy after **PW2** left. Even if he had returned how would he have accessed the cold room store? **PW2** left with one key to the pharmacy and **PW3** had travelled to Nairobi with the spare key.

Undoubtedly the facts show that the 1st appellant had an opportunity to access the cold room store. However this access and opportunity was not exclusive to the 1st appellant. The key was kept in an open place – behind a fridge in the main store. **PW2** knew where the key was and had access to it. Similarly any other employees in that pharmacy had equal access. In order to impute guilt on the part of the 1st appellant it must be shown that he and he alone had access to the keys of the cold room store where the insulin was kept. This exclusive access is not proved **PW1** in her evidence at page 14 line 16 admits that

“The key (to the cold room store) was left in the store behind a small fridge. That is where Dr. Kimani left it. There was need to open the drug store before accessing the key. I keep the key to the drug store and the other key was kept by Dr. Sanya who worked over the week-end. The two keys to the drug stores were with me and Dr. Sanya. The door to the store was not broken. The main door was not broken. The rear door was not broken. My office was not broken”

With so many people having access to the cold room store and given that the 1st appellant did not even have possession of the keys to the main drug store it is difficult to comprehend why the learned trial magistrate convicted him.

In her judgment at page 90 the trial magistrate accepts that **PW1**, **PW2**, **PW3** and possibly even the cleaner all had access to the pharmacy. Anyone of them had access to the keys to the cold room. Any one of them had the opportunity to steal the insulin. Having so conceded the trial magistrate goes on to make an utterly bewildering hypothesis. He states at page 91 line 18

“A close look at this evidence Accused 1 (1st appellant) was setting up PW2. There is no evidence that the lock of the door to PW1’s office had indeed refused to open. Accused 1 had already taken the medicine from the cold room and he was looking for somebody to share the blame with …”

There is absolutely no evidence at all to support these fanciful suppositions. There is no evidence that the 1st appellant was trying to set up **PW2**. If **PW2** said she never saw 1st appellant leave with anything, how can the court conclude that it was he who took the drugs? Where is the evidence to support the trial magistrate’s conclusion that the 1st appellant had already removed the insulin from the cold room? The trial magistrate also finds that the allegation that the door had jammed was a lie cooked up by 1st appellant. However from the evidence **PW1** stated that it was Dr. Wangia who informed her that her door

had refused to open. Dr. Sanya **PW2** confirms that she met 1st appellant struggling to open the door. She confirms that the door had jammed. On the strength of such evidence the conclusion by the trial court is simply bewildering as it is not based on the evidence on record. These conclusions of the trial court fly in the face of the evidence on record. There is nothing to support such findings and they can only be termed as assumed scenarios created by the trial court to support the conviction of 1st appellant.

The duty of the court is make findings based on the facts before it. It is erroneous for a trial court to dream up findings on the basis of its own fanciful theories regarding what may have happened. Findings must be derived from the facts and evidence – period. The trial magistrate goes on to conclude at page 92 line 8 that

"He (1st appellant) is the person who was best placed to explain how the insulin disappeared". With respect this finding is an error in law. It amounts to shifting the burden of proof to the 1st appellant. The 1st appellant has no obligation to explain anything. He is under no duty to fill up the gaps left in the prosecution case. The burden in law is always upon the prosecution to prove its case. That burden never shifts. The trial court erred in attempting to shift the burden of proof to the 1st appellant.

In view of the fact that neither the main store nor the cold room had not been broken into, the person who stole the insulin must have used a key to access the drugs. The evidence shows that the 1st appellant did not have exclusive custody of those keys. The keys to the cold room were kept in the open behind a fridge. The keys to the main store were in the possession of **PW1, PW2** and **PW3**. The court was not told why these three were excluded as suspects yet 1st appellant who did not even have the keys to the main store was charged. The circumstantial evidence relied upon does not pass muster. There is no evidence to point exclusively at the 1st appellant as the one who stole the drugs in question. His conviction is based on pure suspicion as well as the fanciful musing of the trial magistrate. The *actus reus* of the offence of stealing has not been proved against the 1st appellant. I find his conviction to be unsound and I hereby quash the same.

With respect to the 2nd appellant he was convicted on the basis of this alleged recovery of some of the stolen vials of insulin in his possession. **PW1** told the court that on 8/1/2010 she was informed by an unidentified patients that somebody was supplying stolen insulin to Nabongo chemist along Kenyatta Avenue in Nakuru. This patient had in his possession a vial of insulin bearing the same batch number X561856 as the batch earlier stolen from the hospital and the vial also had the GOK (Government of Kenya) mark on it.

PW1 alerted the police. The police swung into action. They went to Nabongo chemist and told the owner to inform her supplier that she needed a supply insulin. The police laid an ambush and arrested the 2nd appellant as he delivered the insulin. It was said that 2nd appellant was arrested carrying 30 vials of insulin in a black polythene paper. Thus it is alleged that the 2nd appellant was arrested whilst in possession of the stolen property. This recovery of the alleged stolen vials of insulin was made on 8/1/2010 about one month after the insulin was said to have been stolen from the hospital. The prosecution therefore sought to place reliance upon the doctrine of **'recent possession'** in order to impute guilt on the part of the 2nd appellant in the theft of the insulin from the hospital.

In the case of **ERICK OTIENO ARUM Vs REPUBLIC 2006 eKLR**, the Court of Appeal sitting in Kisii held as follows:-

> ***"Before a court can rely on the doctrine of recent possession as a basis of conviction in a criminal case, the possession must be positively proved. In other words, there must be positive proof first, that the property was found with the suspect, secondly that, that property is positively the property of the complainant, thirdly the property was stolen from the complainant, and lastly that the property was recently stolen from the complainant"***

Therefore in order to establish guilt through the doctrine of **'recent possession'** the prosecution must

prove

> ***(a) That the insulin allegedly recovered was the same insulin stolen from the complainant. (ie PGH Nakuru)***
>
> ***(b) That the 30 vials of insulin were found in the possession of the 2nd appellant***
>
> ***(c) That said property was recently stolen***

With respect to the last ingredient the theft of insulin from PGH- Nakuru allegedly occurred on 11/12/2009. The recovery of the 30 vials allegedly in the possession of the 2nd appellant was made on 8/1/2010. This is a period of roughly one month. Insulin is a pharmaceutical. It is a medical drug used only on prescription. It is therefore not a fast moving commodity and would take some weeks to dispose of. Thus possession of insulin one month after it has been stolen can in my view be termed to **'recent possession'.**

It has been alleged that the 30 vials of insulin recovered on the 2nd appellant formed part of the consignment of insulin stolen from PGH – Nakuru. On 11th December, 2009. **PW1** told the court that the insulin stolen from the hospital were all of '**Batch No. 'XS6185'** and that the insulin stolen from the hospital being government supplies all bore the **'GOK'** mark. The exhibits allegedly recovered from the 2nd appellant were produced in court. **P. exb 5**. The vials of insulin all bore the same batch No. being **'XS61856'** and all the vials bore some erasures, which **PW1** asserted was the erasure of GOK mark from the vials.

PW6 PC EMMANUEL KIILU MUTINDA was the officer who arrested the 2nd appellant. **PW6** told the court that he and other officers laid an ambush at Nabongo Chemist along Kenyatta Avenue in Nakuru. A man emerged from behind the chemist carrying a black polythene paper. The police stopped the man and searched the bag he had. Inside they recovered 30 vials of mixtard insulin bearing Batch No. XS61856.

In order to prove that these 30 vials were part of the drugs stolen from PGH – Nakuru there must be shown some quality or mark specifically identifying them as such. Although the prosecution sought to rely on the batch number **PW1** did concede under cross-examination that the batch number is a mark put on a specific batch of drugs by the manufacturer **not** by the hospital. Indeed **PW1** did admit that

> ***"The batch number is put on the drug by the manufacturer. KEMSA does not put the batch number on the drugs. KEMSA supplies the whole of Kenya with drugs. They use the same batch number. I cannot say they came from Nakuru General Hospital but it is clear the drugs belonged to the Government"***

Proof that the drugs belonged to the Government of Kenya does not amount to proof that these drugs came from Nakuru PGH. It is quite probable that insulin bearing a similar batch number was delivered by **'KEMSA'** to various government hospitals and dispensaries throughout the country. This batch No. therefore cannot be relied upon as proof that the 30 vials originated from Nakuru PGH.

The prosecution further alleges that the **'GOK'** mark had been erased from the 30 vials recovered from the 2nd appellant and this was taken to amount to proof that those 30 vials were part of the consignment stolen from Nakuru – PGH. It is important to note that no witness testified to having seen a **'GOK'** mark on any of the 30 vials. All the witnesses can testify to having seen on the vials was an erasure. No witness is able to state with certainty what word or words were erased from those 30 vials. **PW8 PC JOSEPH WEKESA** who was the investigating officer admits that

> ***"I did not know the writing that was in the erased area'***

PW9 ANTIPAS NYANJWA is a forensic document examiner attached to CID Headquarters in Nairobi.

He told the court that he received the recovered 30 vials of insulin form police with a request that he examine them. **PW9** told the court that he did examine the labels and medicine packets and stated that **"in my opinion I could find evidence of physical eraser on those areas shown with arrows in pencil…."** **PW9** prepared and signed his report dated 16/9/2010 which report was duly produced as an exhibit in this matter **P. exh 9**. However although **PW9** was able to confirm the presence of erasures on the labels of the 30 vials he **could not** state what word or words had been so erased. Under cross-examination at page 65 line 11 **PW9** states

> ***"I was asked to find out if there were erasures and that is what I did. I did not establish what was erased. I had no request to restore what was erased".***

Thus although there is clear evidence that certain words were erased, there is no proof that the words so erased were **'GOK'**. In other words there is no concrete proof that the 30 vials were part of the Government stock which had been stolen from PGH – Nakuru.

Aside from the question of identification of the recovered exhibits there is also the question of whether the 2nd appellant was found in **'actual possession'** of the same. **PW1** told the court that she only made a report of the sale of government stock to the police. She was not present when the drugs were recovered. **PW6** the arresting officer told the court that he arrested the 2nd appellant **outside** the Nabongo Chemist. **PW6** stated under cross-examination at page 39 line 8

> ***"We arrested him (the 2nd appellant) along Kenyatta Avenue. He was alone. We did not arrest him inside Nabongo Chemist. We did not arrest anybody inside Nabongo Chemist……."***

PW8 the investigating officer contradicts this evidence when he states that the 2nd appellant was arrested **inside** Nabongo Chemist when he went to deliver the drugs there. **PW8** stated at Page 56 line 7

> ***"I would be surprised if PC Kiilu (PW6) told the court Accused 3 was arrested along Kenyatta Avenue…"***

There remains uncertainty as to where exactly the 2nd appellant was arrested – was he arrested on the street outside or was he arrested inside the chemist. Although **PW6** said he was with other police officers when he effected the arrest none of these other officers were called as witnesses to confirm exactly where they arrested the 2nd appellant. This question therefore remains unsettled.

The court is further mystified by the obvious reluctance of the police to call any witness from Nabongo Chemist to buttress their case. This is despite the investigating officer. **(PW8)** having told the court that the owner of the chemist co-operated with police and called the 2nd appellant to bring her the insulin. The said lady owner of the chemist was not called to testify to confirm that indeed it was the 2nd appellant who was her supplier whom she called to bring her drugs. There was an obvious attempt by police in this case to shield the owners of the chemist possibly to ensure that they did not face any prosecution for dealing in illegally acquired drugs. In his defence the 2nd appellant states that he had only visited Nabongo Chemist on 8/1/2010 to purchase drugs when he was arrested. No inventory was made of any items recovered on the 2nd appellant. A chemist on a busy street is a public place and is open to any member of public. The allegation by 2nd appellant that he had merely gone there to purchase drug for himself cannot be entirely discounted. This is more so since police failed to call the owner of the chemist to confirm if it was the 2nd appellant whom she had she who had called to bring her the drugs. Failure to call this crucial witness broke the chain of evidence and weakened the prosecution case.

In view of the fact that it has not been proved beyond reasonable doubt that the 30 vials were part of the government stock stolen from PGH – Nakuru and in view of the obvious contradictions regarding the arrest of the 2nd appellant I grant him the benefit of doubt and I find that he was entitled to an acquittal. The doctrine of recent possession is not in the circumstances applicable.

The 2nd appellant also faced a charge of Handling Suspected Stolen Property. Given my earlier finding that the recovered insulin has not been proved beyond reasonable doubt to be part of the insulin stolen from PGH – Nakuru. This charge therefore cannot stand. The 2nd appellant cannot be convicted on the alternative charge of Handling Suspected Stolen Property.

In any criminal case the burden lies squarely upon the prosecution to prove its case beyond reasonable doubt. The prosecution in this case have failed to satisfactory discharge this burden of proof. On the basis of the foregoing I find that this case was not proved beyond reasonable doubt. I therefore allow this appeal. The conviction of both the 1st and 2nd appellant is hereby quashed. The two (2) year sentence imposed by the trial court is also set aside. Each appellant is to be set at liberty forthwith unless otherwise lawfully held.

Dated in Nakuru this 29th day of July, 2016

Maureen Odero

Judge