



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
CRIMINAL APPEAL NO. 216 OF 2013

HALIMA SAIDI APPELLANT

VERSUS

REPUBLIC RESPONDENT

(Being an appeal from the original conviction and sentence in Machakos Chief Magistrate's Court Criminal Case No. 103 of 2013 by Hon. A. A. ODAWO, Resident Magistrate on 20th September 2013)

JUDGMENT

1. **Halima Said**, the appellant was charged with the **offence of stealing** contrary to section 275 of the Penal Code.

The particulars were **that on the 15th day 2012 at Grogon area in Machakos District within the Eastern Province stole 3 metal dust bins boxes valued at Kshs.30,000 the property of Municipal Council of Machakos.**

2. In the alternative she was charged with the **offence of handling stolen property** contrary to section 322(1) of the Penal Code. The particulars were that **on the 15th day of April 2012 at Grogon area in Machakos District within the Eastern Province, otherwise than in the course of stealing dishonestly received or retained 3 metal dust bin boxes knowing or having reasons to believe them to be stolen or unlawfully obtained.**
3. She was tried, convicted on the alternative count and sentenced to serve four (4) years imprisonment.
4. Being aggrieved by the conviction and sentence thereof she appealed on grounds that the learned trial magistrate erred in law and facts in:-

- **Dismissing the defence in its entirety.**
- **Holding that the appellant had committed the alternative offence.**
- **Holding that the appellant was aware that the bins were stolen and she handled them.**
- **Finding that the appellant dishonestly received and/or handled stolen property.**
- **Finding that the case was proved beyond any reasonable doubt on the alternative count.**
- **In sentencing the appellant to four (4) years imprisonment.**

5. Facts of the case were that on the 15/4/2012 employees of the Municipal council got information that some three (3) metal bin boxes had been stolen. PW 1, PW 2, and PW 3 went in search of them. They found some dustbins that were partially burnt being loaded onto a motor-vehicle registration No. KAN 981 Y. The bins which appeared as scrap metal were being removed from a

- store which was alleged to belong to the appellant. She was arrested and charged.
6. When put on her defence the appellant stated that on the 1st November 2012 she was unwell. As she waited to mount a motorcycle as a passenger the rider was arrested. She used a 'tuk tuk' to get to her home. On arrival she was arrested. She was later charged for an offence she did not commit.
 7. At the hearing of the appeal, learned counsel for the appellant, Mr. Tamata argued that evidence adduced did not support the charge. He stated that the two (2) persons who identified the appellant were not called as witnesses and the metal bins were not produced in evidence.
 8. The learned state counsel Mrs. Abuga conceding to the appeal stated that the two (2) men who were found loading the dust bins on the motor vehicle registration number KAN 981 Y were not called as a witnesses. Having not been called there was no confirmation that they were working for the accused. The investigating officer did not testify, therefore there was no proof beyond doubt that she committed the offence.
 9. This being the first appellate court, it has the duty to subject evidence adduced at trial to fresh and exhaustive examination so as to reach its own independent conclusion as to the guilt of the appellant. (*See Okeno versus Republic (1972) E.A. 32*).
 10. This is a case where the prosecution called only three witnesses. Their evidence was that they found two (2) men loading some metal bins they believed belonged to the complainant on a motor-vehicle registration number KAN 981Y, Canter. Neither the owner of the motor-vehicle or the two (2) individuals were called as witnesses. No evidence was adduced as to ownership of the alleged store where the bins were being retrieved. The appellant was arrested because per the allegation she was standing nearby and she disappeared.
 11. There was no evidence to connect the appellant with the offence of stealing.
 12. In regard to the alternative charge of handling stolen property the prosecution had a duty of proving that the appellant knew or had reason to believe that the property were stolen; and she must have dishonestly received or retained the items (bins).
 13. The evidence adduced did not establish the fact that the appellant knew anything to do with the scrap metal (metal bins) that were being loaded in the motor – vehicle. It was therefore erroneous on the part of the trial magistrate to return a finding of guilty.
 14. The appeal therefore succeeds in its entirety. The conviction is quashed and the sentence meted out is set aside.
 15. The appellant shall be released forthwith unless otherwise lawfully held.
 16. It is so ordered.

DATED, SIGNED and DELIVERED at MACHAKOS this 28TH day of MAY, 2015.

L.N. MUTENDE

JUDGE