REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CRIMINAL APPEAL 11 OF 2014

DANIEL MUTISO NGUI……..……...……APPELLANT

VERSUS

REPUBLIC……..…… RESPONDENT

(An appeal arising out of the conviction and sentence of M.K. Mwangi Ag. SRM delivered on 10th February 2014 in Criminal Case No. 98 of 2009 in the Chief Magistrate's Court at Machakos)

JUDGMENT

The Appellant has appealed against his conviction and sentence of 6 years' imprisonment for the alternative charge of handling stolen goods contrary to section 322(2) of the Penal Code. The particulars of the charge were that on the 6th January 2009 at Kwawange village, in Mwala District within Eastern Province, jointly, otherwise than in the course of stealing, dishonestly received or retained one radio make Pansonic cassette, one television set make Sony, one pair of safari boots, one pair of black leather shoes two torches and a bible, knowingly or having reasons to believe them to be stolen goods or unlawfully obtained.

The Appellant was jointly charged with two other accused persons and they were arraigned in the trial court on 12th January 2009, and charged with a main charge of robbery with violence contrary to section 296(2) of the Penal Code, and the alternative charge of handling stolen goods contrary to section 322(2) of the Penal Code. All the accused persons pleaded not guilty to all the charges, and the court after trial acquitted the Appellant's co-accused persons, and convicted the Appellant on the alternative charge of handling stolen goods.

The Appellant being aggrieved has appealed the conviction and sentence meted by the trial magistrate. His grounds of appeal are stated in his Petition of Appeal dated and filed in Court on 19th February 2014. These grounds are that this case taken a period of 6 years to determined and the Appellant was remorseful and rehabilitated, a family man and sole bread winner, and he persuade the Court to consider reducing the sentence.

The Appellant also availed to the Court supplementary grounds of appeal during the hearing which were as follows:

1. That, in spite of a *de novo* trial, the Appellant was convicted and sentenced on the basis of exhibit evidence adduced in a variant court before a different magistrate hence there was a miscarriage of justice.
2. That, the evidence of the earlier trial was rendered legally inadmissible by the *de novo*

proceedings.

3. That, the charge sheet was incurably defective due to the variation in the substantive evidence adduced by the prosecution witnesses and the details/particulars specified on the committal document.
4. That, there were contradictions and inconsistencies in prosecution witness(es) evidence.
5. That, crucial witnesses were not called to corroborate/confirm/deny evidence of purported recovery of alleged stolen items.
6. That, there was no police recovery/inventory form to confirm purported recovery of items.
7. That, the conviction and sentence in spite of the aforegoing amounted to a gross miscarriage of justice.

The Appellant provided the Court with written submissions wherein he argued that following the declaration by the trial Magistrate Hon. M. K. Mwangi to declare a *de novo* trial on 14/3/2012, it followed that any and all evidence earlier submitted was rendered immaterial and inconsequential and hence should not have been employed in arbitrating of the matter before the lower court "*res ipsa loquitur*".

However, that the prosecution witnesses kept making references to the earlier trial when justifying the absence of exhibits alleged to have been recovered by police on 5/1/2009. Further, that the trial magistrate permitted evidence in another court, before another magistrate and whose import was voided by the *de novo* declaration, to form a basis upon which he convicted and sentenced the Appellant. The Appellant alleged that this is in contravention of the spirit, import and purport of a *de novo* trial and amounts to stage management of the trial. The Appellant cited the decision in **Bukenya vs. Uganda (1968) EA** in this respect

The Appellant also submitted that the charge sheet detailed the scene of robbery as Kangungu village while PW I stated in her evidence that she was robbed in her home at Kamunyu village, and PW 5 alleged to have visited the scene of crime at Kyavango village. Therefore that the evidence adduced pertaining to particulars of the crime scene are both contrary and inconsistent, and the charge sheet has been rendered incurably defective under section 214 of the Criminal Procedure Code. The Appellant relied on the decision in **Yongo vs. Rep (1983) KLR** for this submission.

Lastly, the Appellant submitted that PW 2 alleged that he received only 3 items from him namely a TV set, a radio and a pair of shoes, and no other witnesses were called to corroborate the evidence of PW 2, which was crucial in that it formed the main body of circumstantial evidence used in convicting Appellant. Furthermore, that the police recovery at PW 2's home was not inventoried and/or recorded by officers who made the recovery.

Ms. Saoli, the learned counsel for the State on her part submitted that the Appellant's conviction was proper since the prosecution proved its case beyond reasonable doubt, and in particular through the evidence of PW 2 who testified that the Appellant asked him to keep for him certain items while in the company of two other person who were unidentified. PW 4 also testified that he got information that the Appellant was keeping stolen goods and went to his house, and he led them to the house where the stolen goods were stored. Further, that PW 1 was able to identify the goods stolen from her home and PW 5 investigated the offence.

The learned counsel however conceded that the trial took 6 years to complete while the Appellant was in custody, and that the trial court ought to have considered the time spent by the Appellant in custody and reduced his sentence as he will now have to spend 12 years in prison which is an injustice. The counsel submitted that the court upholds the conviction which was proper, but reviews the sentence which it has discretion to do.

As this is a first appeal, I am required to re-evaluate the evidence tendered in the trial Court, and come to an independent conclusion as to whether or not to uphold the conviction and sentence. This task must have regard to the fact that I never saw or heard the witnesses testify (see **Okeno v Republic [1973] EA 32**).

The trial first commenced on 30th January 2009 before the learned trial magistrate, Hon. Munguti SRM who heard 5 witnesses before the hearing of the trial was taken over by Hon. M.K. Mwangi Ag. SRM on 14th March 2012, who ordered that the trial starts *de novo*. The prosecution then called 5 witnesses. PW1 testified that on 2nd January 2009 at about 3 am while asleep at home, their house was broke into and they were robbed by persons she could not identify, who stole their television, radio, 2 pairs of shoes, a bible, 2 tins of maize and 2 maasai swords. Further, that on 6th January 2009 the police called them and told them they had recovered a few items, which items were the ones earlier produced in court.

This evidence was corroborated by that of PW3 who was PW1's husband, who also gave the same account of what transpired, and who stated that the exhibits were released to them and he sold them.

PW2 on his part testified that on 2nd January 2009 at 3 a.m while asleep, he was awoken by knocks on his door and the Appellant asked him to open the door. Further, that he knew the Appellant who was his cousin. He testified that the Appellant asked him to keep for him a television set, radio and shoes, and said that he had been chased from his rental house by his landlord. PW2 stated that the goods were brought to his house on 5th January 2009 and he kept the goods, but was advised by his father to go and report it to the police, which he did, and the police came and took the goods.

PW4 was an administration police officer stationed at Mwala's District Commissioner's office and she testified that on 5th January 2011 at 10 p.m. while on patrol, they received information that the Appellant had stolen property and went to his house and conducted a search. Further, that the Appellant led them to a house where they recovered goods including a maasai sword, kamba bible, a television set, 2 metal bars, 2 pangas, 2 torches and 2 pairs of shoes. PW4 testified that she then arrested the Appellant, and that PW1 came the following day and identified the goods.

PW5 who was a police officer stationed at Massii Police station testified that he visited the scene of the robbery and saw a broken door, and the Appellant and his co-accused were then arrested , the property was recovered by the police and produced as exhibits. He also testified that the investigating officer could not be found as he had retired from the police force.

After the close of the prosecution case, the Appellant was put on his defence and made a sworn statement. He did not call any witnesses. He stated that he was a water vendor, and that on 5th January 2009 at about 9 p.m. he was taking his donkeys home and he met the police who arrested him for an unknown reason and that they asked or a bribe of Kshs 500/= which he did not have. Further, that they took him to Masii police station on 6th January 2009 and that he was taken to Court on 12th January 2010.

From the foregoing submissions and evidence, I find that the issues raised in this appeal are firstly, whether the Appellant was convicted under a defective charge; secondly, whether there was need to produce the exhibits after the trial started *de novo*; and lastly, whether the Appellant's conviction for the offence of handling stolen property was based on consistent, sufficient and satisfactory evidence.

On the first issue, the Appellant argued that the charge was defective under section 214(1) of the Criminal Procedure Code as there is conflicting evidence as to the place the robbery occurred. The said section 214 provides as follows:

> **"(1) Where, at any stage of a trial before the close of the case for the prosecution, it appears to the court that the charge is defective, either in substance or in form, the court may make such order for the alteration of the charge, either by way of amendment of the charge or by the substitution or addition of a new charge, as the court thinks necessary to meet the circumstances of the case:**
>
> **Provided that—**
>
> **(i) where a charge is so altered, the court shall thereupon call upon the accused person to plead to the altered charge;**

(ii) where a charge is altered under this subsection the accused may demand that the witnesses or any of them be recalled and give their evidence afresh or be further cross-examined by the accused or his advocate, and, in the last-mentioned event, the prosecution shall have the right to re-examine the witness on matters arising out of further cross-examination."

All that section 214(1) of the Criminal Procedure Code does is to give the courts power to amend or alter charges, and prescribes certain procedures to be followed when this is done. I have perused the proceedings of the trial court and note that at no time did the trial Court during the *de novo* trial find any variance between the charge and the evidence, or make any orders as to the amendment or alteration of the charge. There was therefore no violation of section 214(1) of the Criminal Procedure Code as alleged by the Appellant as the said section was inapplicable.

In addition section 214(2) of the Criminal Procedure Code provides as follows:

"(2) Variance between the charge and the evidence adduced in support of it with respect to the time at which the alleged offence was committed is not material and the charge need not be amended for the variance if it is proved that the proceedings were in fact instituted within the time (if any) limited by law for the institution thereof."

Likewise, it is not necessary to amend the charge on account of a contestation by the Appellant as to the place where the offence was committed and it was upto the prosecution to prove that the offence was committed in the place stated in the charge sheet. In any event, an error as to the place of the commission of an offence stated in a charge sheet is not fatal and is one that is curable under section 382 of the Criminal Procedure Act as it does not prejudice the Appellant so long as the prosecution proved that the said offence was committed.

On the second issue as to whether it was necessary to produce the exhibits during the *de novo* trial, this Court notes that the term *de novo* means that the case was to begin afresh from the beginning. **Black's Law Dictionary, Eight Edition** defines a *de novo* trial as follows*:*

"A new trial on the entire case – that is, on both questions of fact and issues of law – conducted as if there had been no trial in the first instance."

The Evidence Act in section 34 also provides as follows as regards the admissibility of evidence given in previous proceedings:

"(1) Evidence given by a witness in a judicial proceeding is admissible in a subsequent judicial proceeding or at a later stage in the same proceeding, for the purpose of proving the facts which it states, in the following circumstances—

(a) where the witness is dead, or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or where his presence cannot be obtained without an amount of delay or expense which in the circumstances of the case the court considers unreasonable,

and where, in the case of a subsequent proceeding—

(b) the proceeding is between the same parties or their representatives in interest; and

(c) the adverse party in the first proceeding had the right and opportunity to cross-examine; and

(d) the questions in issue were substantially the same in the first as in the second proceeding.

(2) For the purposes of this section—

(a) the expression "judicial proceeding" shall be deemed to include any proceeding in which evidence is taken by a person authorized by law to take that evidence on oath; and

(b) a criminal trial or inquiry shall be deemed to be a proceeding between the prosecutor and the accused"

Lastly, section 200(4) of the Criminal Procedure Code also provides as follows as regards conviction on evidence partly recorded by one magistrate and partly by another:

"Where an accused person is convicted upon evidence that was not wholly recorded by the convicting magistrate, the High Court may, if it is of the opinion that the accused person was materially prejudiced thereby, set aside the conviction and may order a new trial."

The import of the foregoing provisions is that even if a *de novo* trial is legally a new trial, evidence that was produced in previous criminal proceedings between the parties and where the accused were given an opportunity to cross examine on the same is admissible.

The Appellant was given the opportunity to cross examine on the exhibits produced in the earlier proceedings and is thereby not prejudiced by the reference to and reliance by the learned trial magistrate on the said exhibits, even though the trial magistrate did not expressly refer to the enabling provisions of the law. In any event the remedy for the Appellant under section 200(4) of the Criminal Procedure Code if he suffers any prejudice in this regard is not the quashing of his conviction, but a retrial.

On the third issue as to whether there was consistent and sufficient evidence to convict the Appellant, in **Tembere vs. Republic [1990) KLR 353**, Githinji J. (as he then was) held as follows as regards the elements of the offence of handling stolen property:

"One of the important elements of the charge of handling stolen property is that the accused must know or have reason to believe that the goods were stolen another vital element is that the accused must dishonestly receive or retain the goods."

In addition, in **Malingi vs. Republic (1989) KLR 225** the Court emphasised the need to prove not just possession of an item but that the item was stolen it stated thus: -

"The trial court has a duty to decide whether from the facts and the circumstances of the particular case under consideration the accused person either stole the item or was guilty or innocent receiver. By the application of the doctrine the burden shifts from the prosecution to the accused to explain his possession of the item complained about. He can only be asked to explain his possession after the prosecution has proved certain basis facts. Firstly that the item he had in his possession had been stolen; it had been stolen a short time of its loss to the time the accused was found with it was, from the nature of the item and the circumstances of the case, recent; that there are no co-existing circumstances which pointed to any other person having been in possession of the item. The doctrine being a presumption of fact is a rebuttable presumption. That is why the accused is called upon to offer an explanation in rebuttal, which if he fails to do an inference is drawn, that he either stole it or was a guilty receiver."

In the present appeal PW1 and PW3 gave evidence that the goods were stolen from their house on 9th January 2009, and that they identified the goods after they were recovered. This Court has also found that the evidence in the earlier proceedings in the trial court where the goods that were recovered were produced as exhibits is admissible under section 34 of the Evidence Act.

Evidence was also brought that the goods were found in the possession of PW2 who testified that he was given the goods by the Appellant. PW2 therefore explained his possession of the goods. The Appellant on the other hand was not able to explain how the goods came to his possession before he gave them to PW2, and he also led the police to the house where the goods were which corroborated PW2's assertions that it is the Appellant who gave him the stolen goods. I therefore find that the conviction entered against the

Appellant was based on sufficient evidence and was therefore safe.

Lastly, as regards the legality of the sentence meted on the Appellant, the principles upon which an appellate Court will act in exercising its discretion to review or alter a sentence imposed by the trial court were settled in the case of **Ogolla s/o Owuor vs R (1954) EACA 270,** wherein the Court of Appeal stated as follows:

> ***"The Court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors". To this, we would add a third criterion namely, "that the sentence is manifestly excessive in view of the circumstances of the case (R - v- Shershowsky (1912) CCA 28TLR 263)."***

In the instant appeal, under section 322(2) of the Penal Code a person who handles stolen goods is guilty of a felony and is liable to imprisonment with hard labour for a term not exceeding fourteen years. Therefore the sentence imposed by the trial court of 6 years imprisonment was legal.

However, I agree that the trial court did overlook a material factor in sentencing the Appellant, which was that the Appellant had been in custody for a period of 5 years at the time of sentencing, which period ought to have been taken into account and was not. Section 333(2) of the Criminal Procedure Code provides as follows in this regard:

> **" Subject to the provisions of section 38 of the Penal Code (Cap. 63) every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code.**
>
> **Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody."**

Therefore the Appellants appeal succeeds only to the extent that this Court reduces the sentence of imprisonment to the time served. His conviction for the charge of handling stolen property contrary to section 322 (2) of the Penal Code is otherwise upheld and confirmed. The Appellant shall therefore be set free forthwith unless otherwise lawfully held.

It is so ordered.

DATED AND SIGNED AT MACHAKOS THIS 29TH DAY OF JULY 2015.

P. NYAMWEYA

JUDGE

DELIVERED AT MACHAKOS THIS 30TH DAY OF JULY 2015

JUDGE