

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.165 OF 2015

(An Appeal arising out of the conviction and sentence of Hon. F. Munyi (Ms.) - SRM delivered on 2nd October 2015 in Nairobi CM.CR. Case No.103 of 2010)

JAMES MUIRURI KIMANI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant, James Muiruri Kimani was charged with five (5) others (who were however acquitted by the trial court) with the offence of **stealing** contrary to **Section 275** of the **Penal Code**. The particulars of the offence were that on 16th January 2010 at Credible Sounds Shop along Moi Avenue in Nairobi, the Appellant, jointly with others not before court, stole five (5) Yamaha Keyboards valued at Kshs.87,500/- the property of Esther Wambura Muiruri. The Appellant was alternatively charged with the offence of **handling stolen goods** contrary to **Section 322(2)** of the **Penal Code**. The particulars of the offence were that on the same day at Audio Corner Shop along Luthuli Avenue in Nairobi, otherwise than in the course of stealing, the Appellant dishonestly retained three (3) Yamaha Keyboards knowing or having reason to believe them to be stolen goods. When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charge. After full trial, the Appellant was acquitted of the main count of **theft** but convicted of the alternative count of **handling stolen property**. The Appellant was sentenced to serve four (4) years imprisonment. The Appellant was aggrieved by his conviction and sentence and duly filed an appeal to this court.

In his petition of appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. He was aggrieved that he had been convicted on the basis of prosecution evidence that was inconsistent and contradictory. He faulted the trial magistrate for treating him differently from other accused by convicting him on the same facts yet acquitting his co-accused on the basis of the same facts. The Appellant was of the view that the prosecution had failed to establish the threshold of proof of beyond any reasonable doubt in the charge that was brought against him. The Appellant took issue with the fact that the trial court had shifted the burden of proof and thereby used the evidence that he had adduced in his defence to convict him of the alternative charge. The Appellant was of the view that the trial court had failed to appreciate and properly evaluate the evidence adduced in the trial court and thereby reached the erroneous verdict that he was guilty of the offence as charged. The Appellant was aggrieved that the custodial sentence that was imposed on him was harsh and excessive taking into account the nature of the offence that he had been convicted. For the above reasons, the Appellant urged the court to allow the appeal, quash his conviction and set aside the sentence that was imposed on him.

During the hearing of the appeal, this court heard oral submission made by Mr. Muriuki for the Appellant and Ms. Aluda for the State. Mr. Muriuki submitted that the prosecution had failed to establish its case on the charge of **handling stolen property** to the required standard of proof. He particularly emphasized the manner in which the Appellant was treated differently from his co-accused who were acquitted on the basis of the same evidence. Ms. Aluda for the State conceded to the appeal. She submitted that there were inconsistencies and contradiction in the evidence adduced by the prosecution witnesses which entitled the Appellant to the benefit of doubt. She urged the court to allow the appeal because in her view the

Appellant appeared to have been victimized because he did work with his co-accused prior to his arrest and arraignment in court.

Before giving reasons for its decision, it is imperative that the facts of this case be set out albeit briefly. PW1 Esther Wambura Muiruri was at the material time the owner of a business known as Credible Sounds. The business dealt with musical instruments and equipment and its accessories. The business operated in two shops, one in Moi Avenue and another in Luthuli Avenue. PW1 received information to the effect that some of her employees were stealing goods from her shops. She investigated the matter. On 16th January 2010, she got information that some of her employees, had planned to steal goods from her shop on that particular day. She instructed her personal driver, PW3 John Gitau Kariuki to trail one of her employees, who had loaded equipment in a van belonging to the business with a view to delivering it to their customers. According to PW1, on the material day, the employee James Thuku Mburu who had been employed as a driver, had colluded with other employees who had been employed as shop assistants and storekeepers (these employees, Joseph Gitau Mburu, Jennifer Wamuyu Wanderi, Charles Ngugi Ndungu and Stephen Gachina Ndungu were jointly charged with the Appellants in the trial court) to deflate the items in the delivery notes so as to enable them steal.

In particular, she testified that employees colluded to understate the items in the delivery notes. They indicated five (5) Yamaha Keyboards in the delivery note where in actual fact they had taken possession of ten (10) Yamaha Keyboards. On the material day, PW3 trailed the van upto the Coast Bus Station. He saw the driver unload two (2) Yamaha Keyboards. The driver then drove to a shop called Audio Corner along Luthuli Avenue. He delivered the remaining three (3) Yamaha Keyboards. PW3 was still on his trail. PW3 informed PW1 who informed the police. PW5 Corporal Gerald Kanyithia attached to CID Central Police Station was assigned to investigate the case. He went to Coast Bus Station and managed to retrieve the two (2) Yamaha Keyboards. He then proceeded to Luthuli Avenue where at Audio Corner Shop, he arrested the Appellant who was working in the shop. PW5 testified that he did not find the owner of the shop. He retrieved the three (3) Yamaha Keyboards. PW5 then escorted the driver and the Appellant to Credible Sounds shop along Moi Avenue where four (4) other employees in the shop were arrested. They were all charged with the theft of the keyboards.

When the Appellant was put to his defence, he testified that on the material day he went to work as usual at his place of work at Audio Corner Shop. He had been employed as a shop assistant. At lunch time, he went to the back of the shop and slept. He was woken up by the police. They ordered him to remove the three (3) keyboards that had been delivered to the shop. The three keyboards were loaded in the van belonging to Credible Sounds. He was shocked when he was arrested. He was escorted to Credible Sounds and later taken to Central Police Station. In essence, the Appellant denied having any knowledge of the theft of the keyboards.

As the first appellate court, this court is required to re-evaluate and re-examine the evidence adduced before the trial court with a view to ascertaining whether or not to uphold the conviction of the Appellant. As the first appellate court, this court is aware that it neither saw nor heard the witnesses as they testified and therefore cannot form any opinion regarding the demeanour of the said witnesses (see **Okeno –Vs- Republic [1972] E.A. 32**). In the present appeal, the issue for determination by this court is whether the prosecution adduced sufficient evidence to establish the guilt of the Appellant on the charge of **handling stolen goods** contrary to **Section 322(2) of the Penal Code**.

In the present appeal, it was clear to this court that the fate of the Appellant was tied to that of his co-accused in the trial court. According to the evidence adduced by the prosecution witnesses, it was apparent that a scheme was hatched by employees of Credible Sounds to steal from their employer. The scheme involved electronic items being removed from the Credible Sounds Shop along Moi Avenue under the guise that they were being delivered to customers while in actual fact the particular electronic items were being stolen and sold to other electronic shops along Luthuli Avenue. PW1, the complainant in this case, became aware of this scheme. She put in motion surveillance with a view to catching the culprits. On 16th January 2010, she sent PW3 to trail one of her drivers with a view to ascertaining where the electronic goods, particularly, the Yamaha Keyboards were being delivered to. The surveillance revealed that indeed PW1's employees were stealing from her. PW1 discovered the scheme hatched by

her employees involved understating the items in the delivery notes. On that particular day, her employees had understated the items to be delivered to their customers by five. These five keyboards were then sold to other electronic shops who, apparently, had an arrangement with the particular employees.

On that day, the five Yamaha Keyboards which had been stolen from PW1's shop were recovered with the assistance of the police. The employees who had colluded to put in place the scheme were all arrested and charged with theft. The exception was the Appellant. The Appellant was not an employee of PW1. He worked in an electronic shop along Luthuli Avenue by the name Audio Corner. He was employed as a shop assistant. On the particular day, three Yamaha Keyboards were delivered to the shop. It was clear from the evidence adduced by the prosecution witnesses that the Appellant was not involved in the acquisition of goods that would later be sold to the customers. PW5 clearly testified that the owner of the shop was not present at the time they recovered the three Yamaha Keyboards from the shop. No nexus was established between the three Yamaha Keyboards and the Appellant. The Appellant happened to be at the shop when the three keyboards were recovered by the police. He gave an explanation for his presence at the shop. He worked at the shop. It was clear to this court that the police failed in their duty to investigate the case. If there was anyone to be held liable for receiving the three Yamaha Keyboards at the shop, it should have been the person who had authority to order and purchase the same. The Appellant did not have such authority. He could not therefore be found guilty of handling stolen goods when in actual fact he had no legal authority to order the goods in the first place.

An issue of concern to this court is the manner in which the evidence that was adduced by the prosecution witnesses was treated differently by the trial court when it came to the major suspects and the Appellant in this case. It was clear from the evidence adduced by the prosecution witnesses that the plan to steal the electronic items from the complainant were hatched by the employees of the complainant. If the trial court evaluated the evidence and reached the verdict that the prosecution had failed to prove its case to the required standard of proof as against the employees of the complainant, the trial court could not, applying the same reasoning, find the Appellant who was not an employee of the complainant guilty of a cognate offence related to the main charge of theft. It was clear to this court that the Appellant was not accorded a fair trial. The trial court applied different standards to the Appellant as compared to that of his co-accused. This court is of the view that the same facts used to acquit the Appellant's co-accused cannot form basis to convict the Appellant. The trial court clearly fell in error.

In the premises therefore, this court will allow the appeal. The prosecution failed to establish the case brought against the Appellant on the charge of **handling stolen property** contrary to **Section 322(2)** of the **Penal Code** to the required standard of proof. Ms. Aluda for the State, correctly in this court's view, conceded to the appeal. The Appellant is acquitted of the charge brought against him. He is ordered set at liberty forthwith and released from prison unless otherwise lawfully held. It is so ordered.

DATED AT NAIROBI THIS 23RD OCTOBER 2015

L. KIMARU

JUDGE