REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL NO. 109 OF 2009

CHARLES MATERE…….....APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

JUDGMENT

1. CHARLES MATERE, the Appellant herein was arraigned before the lower Court at Butali on the 08/11/2005 alongside one WANAMI LIHANDA MUKANGAI where they were jointly charged with the offence of classroom breaking and committing a felony therein. The Appellant faced an alternative charge of handling stolen goods whereas the said co-accused faced a second charge of failing to prevent a felony.

2. They both denied the charges and a trial was conducted.

3. The prosecution arraigned eight witnesses and at the close of its case the trial court placed the then accused persons on their defences. They both opted for and gave unsworn testimonies. By a judgment delivered on 17/07/2009 the appellant was found guilty of the offence of classroom breaking and committing a felony therein whereas his co-accused was found guilty of failing to prevent a felony. The appellant was then sentenced to two years imprisonment while the other accused person was sentenced to a fine of Kshs. 10,000/= in default to serve six months imprisonment.

4. Whereas the appellant's co-accused opted not to lodge any appeal against the conviction and sentence, that was not the case with the appellant herein. He lodged his appeal on 13/08/2009 alongside an application for bail pending appeal. He was consequently released on bail pending appeal on 03/12/2009.

5. Although the appellant had filed his appeal through a firm of advocates he later on opted to prosecute the appeal himself whereas Learned Counsel Mr. Oroni appeared for the state. In his oral submissions to the court the appellant argued that the offences of classroom breaking and committing a felony therein had not been proved and prayed for his unconditional release on the success of his appeal. Mr. Oroni however opposed the appeal.

6. As this is the Appellant's first appeal, the role of this appellate Court of first instance is well settled. It was held in the case of **Okemo vs. R (1977) EALR 32** and further in the Court of Appeal case of **Mark Oiruri Mose vs R (2013)eKLR** that this Court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyse it and come to its own independent conclusion on the matter.
7. In line with the foregone, this Court in determining this appeal will revisit the evidence in a bid to

ascertain if the appellant was legally convicted and sentenced.

8. The appellant faced the main charge of classroom breaking and committing a felony therein. The alleged felony however was not stated in the charge but was contained in the particulars of the charge to be stealing. The charge read as follows:

> ***'CLASSROOM BREAKING AND COMMITTING A FELONY CONTRARY TO SECTION 306(a) OF THE PENAL CODE.'***

9. It was however incumbent upon the drafters of the charge to disclose with precision the alleged felony in the charge as well as the section of the law alleged contravened. That would have demonstrated if the offence allegedly committed upon the break-in was a felony or not in the first instance. The charge as presented gave the impression that it was one offence known as ***'classroom breaking and committing a felony under section 306(a) of the penal code'*** whereas in the actual sense there were two distinct offences in which one could be convicted on any or both. The charge was therefore defective and as so argued by the appellant in his first ground of appeal.

10. The charge as drafted did not meet the criteria of precision as so settled in case law even by taking into account the particulars. In salvaging a charge which was argued to be defective the Court in **Isaac Omambia vs. Republic (1995) eKLR** had the following to say:-

> "***In this regard, it is pertinent to draw attention to the following provisions of section 134 of the Civil Procedure Code which makes particulars of a charge or information an integral part of the charge. Every charge or information shall contain, and shall be sufficient if it contains a statement of the specific offence or offences with which the accused person is charged together with such particulars as may be necessary for giving reasonable information as the nature of the offence."***

11. In our case the particulars could not cure that defectivity although they indicated that the appellant stole since the law provides for stealing in several ways and in various sections. The appellant could not therefore be left guessing in the darkness as to which section of the law the alleged theft referred to. The charge was irredeemably defective.

12. The upshot was that the said defective charge could not have been a legal basis for the conviction.

13. However even when we look at the evidence on record still the offence of classroom breaking and committing a felony was not proved in law. There was no evidence of any break-in into the alleged classroom or the place where the alleged generator was stored. Evidence revealed that the place was instead opened and not broken into or at all. The first limb of the charge was hence outrightly misplaced.

14. On the other limb of committing a felony which was presumably stealing, I am afraid the record still remains silent on how the appellant stole the alleged generator. None of the witnesses testified to have seen the appellant during the time in which the theft was allegedly committed and likewise none of them stated that the appellant stole the generator. The record remains with several people who had access into the place where the generator was who did not include the appellant. There was also the uncontroverted evidence of the students having used the generator that night without the permission of the school and later on left with it in the pretext that they were taking it back to the school Principal's house together with the radio and since they were drunk and rowdy the only watchman could not and did nothing. It remains so possible that the students may have left with the generator instead since they are the ones who did not return it into the store. That is not wild-thinking by any standard whatsoever. All in all there was hence no evidence of theft on the part of the appellant.

15. The trial court hence erred in finding that the main count was proved.

16. On the conviction of the main count, the appellant could not and was so not found guilty of the alternative charge of handling stolen goods. The prosecution did not lodge any cross-appeal in respect the alternative charge but instead supported the trial court's finding. Even without the filing of a cross-appeal in the circumstances of this case, the prosecution did not urge this court to find the appellant guilty in respect to the alternative charge. Instead, and as said, it supported the conviction aforesaid.

17. In the foregoing circumstances therefore, I will go on into a deeper analysis of this aspect for the possible prejudice likely to be visited upon the appellant. However I wish to state that the fact that the appellant sought for money and led to the recovery of the generator that should not be deemed to be evidence that he was in possession of stolen property. I say so because of the evidence on record.

18. **PW5** who was the School's office messenger stated that on the appellant learning of the loss of the generator at the school and being a neighbour who runs a kiosk thereabout offered to trace the whereabouts of the generator if he would be given some money to enable him repair his bicycle for the mission. That was on 23/10/2005. **PW4** who was a Teacher at the school came across the appellant on 25/10/2005 who told him that he had gathered some information on the whereabouts of the generator but needed some more money to assist him accomplish the assignment. That formed the basis of the said sum of money. The purpose of the money was very clear and was aimed at recovering the generator. It will therefore be wrong to infer that the money was given for any other purpose other than the foregone.

19. Indeed the appellant accomplished the assignment and led PW5 and PW7 into the recovery of the generator. It was in a sugarcane farm where the same was likely to have been hidden. There was no evidence that the farm belonged to the appellant neither was evidence tendered that it was the appellant who had taken the generator there.

20. As the appellant was busy persuing the recovery of the generator the school on the other hand viewed him as either the thief or a smart handler who wanted to make money out of the issue. Instead they reported the events to the police and a trap was laid against the appellant only for the police not to show up as agreed.

21. It is also on record that when the appellant was confronted while carrying the generator he dropped it and ran away. It was at night and the appellant was bound to take care of his safety.

22. The school was the special owner of the generator having leased the same from one of its teachers. The recovery hence restored the said generator back to the owner. Even if for argument sake we find that the appellant had stolen the generator the fact that the same was restored back to the owner brought the aspect of theft to an end. That is clearly stated in **Section 322(3)(b)** of the Penal Code, Chapter 63 of the Laws of Kenya. Upon the said restitution of the generator the appellant, even if was the thief, could not have been charged with the offence of handling stolen property. The alternative charge was hence misplaced and could not stand in this instant case.

23. The unfolding discourse therefore reveals that none of the offences preferred against the appellant could legally succeed.

24. Consequently, the appeal succeeds and the conviction is hereby quashed. The sentence is hence set aside and the appellant reclaims his liberty forthwith.

25. It is so ordered.

DATED and SIGNED at MIGORI this 6th day of .November, 2015.

A.C. MRIMA

JUDGE

DATED, COUNTERSIGNED and DELIVERED at KAKAMEGA this 23rd day of November, 2015.

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JUDGE