



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET
CRIMINAL APPEAL NO 26 OF 2012

SAMMY IKORI MACHARIA.....APPELLANT

=VERSUS=

REPUBLICRESPONDENT

(Appeal from the original conviction and sentence in Criminal Case Number 998 of 2010 in the Chief Magistrate's Court at Eldoret – Hon D. K Kimei (PM))

JUDGMENT

1. The appellant **Sammy Ikoroi Macharia** was charged in the lower court with the offence of stealing contrary to **Section 279(d)** of the **Penal Code** with an alternative count of handling stolen goods contrary to **Section 322(2)** of the **Penal Code**.

In the principal count, the prosecution alleged that on diverse dates between 1st day of February 2010 and 5th day of February 2010 at an unknown place within the Republic of Kenya, jointly with others not before the court, the appellant stole 98 pieces of rail bars of 603 feet, 26 pieces of railway telekom poles of 92 feet, 67 railways clips, 6 pieces break blocks and 2 pieces of rail sleepers all valued at Ksh 1,648,250 the property of Kenya Railways Corporation.

In the alternative count, the particulars thereof alleged that on the 5th day of February 2010 at Chepkorio village in Uasin Gishu District within Rift Valley Province, otherwise than in the course of stealing, the appellant dishonestly received or retained 98 pieces of rail bars of 603 feet, 26 pieces of railway telekom poles of 92 feet, 67 railway clips, 6 pieces break blocks and 2 pieces of rail sleepers all valued at Kshs 1,648,250 knowing or having reason to believe them to be stolen goods or unlawfully obtained.

2. After a full trial, the appellant was convicted on the alternative count and was sentenced to serve three years imprisonment. Being aggrieved by the conviction and sentence, through his advocates **Angu Kitigin & Company Advocates**, the appellant lodged this appeal raising the following grounds of appeal :-

- 1) ***The learned Senior Principal Magistrate erred in fact in convicting the Appellant on a defective charge sheet.***
- 2) ***The learned Senior Principal Magistrate erred in law and in fact by relying on accomplice evidence, which accomplice evidence required independent corroboration that was not done.***
- 3) ***The learned Senior Principal Magistrate erred in law and in fact in disregarding the Appellants defence when it was plausible.***

4) *The learned Senior Principal Magistrate erred in law and in fact in convicting the accused over goods that were never properly identified as belonging to Kenya Railways nor were the goods produced before court for independent verification of the same.*

5) *The learned Senior Principal Magistrate erred in law and in fact in sentencing the Appellant to a term of 3 years which sentence is punitive, excessive and in breach of the principles of sentencing.*

6) *The learned Senior Principal Magistrate erred in law and in fact in proceeding substantively in the absence of the Appellants Counsel thereby infringing on the constitutional right to legal representation.*

3. When the appeal came up for hearing before me on 22nd October 2014, learned counsel for the appellant **Mr. Angu** informed the court that parties had agreed to have the appeal disposed of by way of written submissions. The State through learned prosecuting counsel **Ms. Buseinei** did not dispute that position. The court record shows that the State through State Counsel one **V.I Kabaka** was the first to file its written submissions on 8th April 2013 while the appellant's advocates filed their written submissions on 10th April 2013. I have however noted from the court record that these submissions were filed without any direction by the court but their filing was regularized by this court on 22nd October 2014 when the appeal was scheduled for hearing.

4. In the written submissions filed on his behalf, the appellant challenged his conviction on the alternative count mainly on grounds that it was founded on insufficient evidence as the prosecution did not tender evidence to prove that the goods in question had in fact been stolen from the Kenya Railway's corporation as alleged in the charge sheet and that the goods were not produced before the court for identification by the prosecution witnesses. It was further submitted that the evidence before the trial court did not satisfy the essential ingredients of the offence of handling stolen property and that therefore, the trial magistrate erred in convicting the appellant. The court was urged to quash the conviction and set aside the sentence.

5. The appeal is not opposed by the state. The prosecuting counsel in his written submissions did not support the appellant's conviction. He agreed with the appellant that the trial magistrate had erred in convicting him on a charge of handling stolen goods while the key ingredients of the offence had not been proved by the prosecution beyond all reasonable doubt as required by the law pointing out that there was no evidence to prove that the appellant had been found in possession of the alleged stolen goods. He in addition observed that crucial witnesses had not been called to support the prosecution case.

6. Briefly, the prosecution case as can be discerned from the record of the trial court was as follows:-

On 7th February 2010, **P.C Nicholas Njenga** attached to the Criminal Investigations Department at Eldoret police station (PW 7) received a report that there was a lorry stuck in the mud at Chepkorio village, plateau area. He proceeded to the scene accompanied by other police officers and on arrival they found a lorry Registration number **KBA 517Z** loaded with rail bars and other assorted scrap metal. The lorry had no occupants. A similar report had been made on 6th February 2010 to PW1 **Charles Osuka Omukatu**, the Kenya Railways Eldoret Regional Co-ordinator.

According to PW1, on receiving the report, he rushed to the scene, saw the lorry and examined its cargo. He noted that the lorry was loaded with 98 rail bars, 67 chips, two slippers and assorted scrap metal suspected to have been stolen from the Kenya Railways corporation. The lorry was photographed together with its cargo by PW5 **Sgt Fredrick Sirengo Simiyu** the same evening while at the scene and thereafter after it was towed to Eldoret police station. The photographs were produced in evidence as exhibit 1 to exhibit 3.

Investigations then started in the course of which PW6 **CPL Bernard Wekesa** arrested the appellant

after he was identified as one of the persons who had hired PW3 and PW4 to transport the rail bars and assorted scrap metal to Nairobi at a fee. PW3 and PW4 had been employed by PW2, the owner of the lorry as the driver and conductor of the lorry respectively. In their evidence, PW3 and PW4 claimed that apart from the appellant, a lady by the name of Wanjiku had hired them to transport the scrap metal to Nairobi.

7. In his defence, the appellant denied having committed the offence as alleged. He claimed that he was a second hand clothes trader at Eldoret town and denied any knowledge of the property he was alleged to have dishonestly handled. He asserted that the only thing he did was to introduce the lorry driver to a lady.

8. This being the first appellate court, this court is enjoined to re-examine and re-evaluate the evidence adduced before the trial court in order to arrive at its own independent conclusion bearing in mind that unlike the trial court, it did not have the advantage of seeing or hearing the witnesses.

This duty of the first appellate court has been restated by the Court of Appeal in a number of authorities, for instance in *Okeno vs Republic (1972) EA 32*; *Simiyu & Another vs Republic (2005)1 KLR 1992 and Mwangi vs Republic (2004) 2 KLR 28* among others.

9. Having analysed and re-examined the evidence presented before the trial court and having considered the submissions made by the parties as well as the grounds of appeal, I find that it is not disputed that 98 rail bars, 67 chips and two sleepers together with an assortment of scrap metal were found loaded onto lorry Registration No. KBA 573Z on 6th February 2010 which were suspected to be property stolen from the Kenya Railways Corporation.

However, according to the evidence of PW7 the investigating officer, no report of theft of rail bars had been made to Eldoret police station. He did not also claim that such theft had been reported in any other police station. In his evidence, apart from making a generalized statement in cross-examination that there had been rampant theft of railway property, PW7 did not specify where and when such thefts had allegedly occurred and what type of railway property if any had been stolen. More importantly, PW1 did not identify the cargo found on PW2's lorry to be property actually stolen from the Kenya Railway's Corporation. In fact, PW1 confirmed in his evidence that he had inspected the railway line and had not found any interference with it meaning that none of its components had been stolen. From this evidence, it cannot be validly said that the prosecution had proved beyond doubt that the items found on the lorry in question had actually been stolen from the Kenya Railways Corporation.

10. For the offence of handling stolen property contrary to **Section 322(2)** of the **Penal Code** to be proved to the required legal standard, the prosecution must adduce concrete evidence proving beyond any reasonable doubt that the person accused of the offence otherwise than in the course of stealing knowingly or having reason to believe that the goods in question had been stolen dishonestly received or retained the goods or dishonestly facilitated their retention, removal, disposal or realization by or for the benefit of another person. The key ingredients of the offence must be proved before the prosecution can secure a safe conviction. These ingredients are;

- a) That the property subject matter of the charge had been stolen;
- b) That the accused person otherwise than in the course of stealing dishonestly handled the goods in question by retaining them or facilitating their disposal either for his benefit or for the benefit of another person knowing or having reason to believe that the goods had been stolen or were unlawfully obtained.

11. In this case, a reading of the judgment of the learned trial magistrate shows that the appellant was convicted and sentenced for the offence of handling stolen property mainly because he was identified by PW3 and PW4 to have been the person who had hired them to transport the rail bars to Nairobi at a fee.

As observed earlier, the prosecution did not prove as a fact that the rail bars had been stolen either from the Kenya Railways Corporation or from any other place. It is also significant to note that the prosecution did not lead evidence to establish that the appellant dishonestly retained or organized for the disposal of the said goods knowing or having reason to believe that they had been stolen or were unlawfully obtained. It was not suggested by the prosecution witnesses that the appellant owned or was associated with the ownership of the house behind which PW3 and PW4 claimed they found the rail bars or that any attempt had been made to conceal the same.

12. In view of the foregoing, even without examining the other grounds of appeal, I am satisfied that the evidence on record fell far short of establishing beyond doubt that the appellant had committed the offence for which he was convicted and sentenced by the trial court. I am in total agreement with the submissions by counsel for both parties that the essential elements of the offence of handling stolen goods had not been proved by the evidence adduced by the prosecution in this case. It is therefore my view that the learned trial magistrate erred in failing to properly evaluate the evidence adduced before him and thereby reached an erroneous finding that the alternative count had been proved against the appellant beyond any reasonable doubt.

Consequently, I am persuaded to find that the appellant was wrongly convicted. The learned prosecuting counsel was therefore right in conceding to the appeal.

The appellant's appeal is thus merited and it is hereby allowed. His conviction is accordingly quashed and sentence set aside. As the appellant had been released on bond pending determination of his appeal, his surety is hereby discharged. Security documents to be released to the surety. Orders accordingly.

C.W GITHUA

JUDGE

DATED SIGNED AND DELIVERED AT ELDORET THIS 30TH DAY OF OCTOBER, 2014

In the presence of:-

The Appellant

Mr. P.K Komen Holding brief for Mr. Angu counsel for the appellant.

Ms Busienei for the state

Mwende Court Clerk

