

(Appeal from a judgment of the Chief Magistrate's Court at Kisumu)

(Ezra Awino – SPM) - dated 21st June, 2012

in

Criminal Case no. 368 of 2010

J U D G M E N T

INTRODUCTION

This is an appeal from the judgment of Senior Principal Magistrate Kisumu dated 21/6/2012 by which the appellant was convicted and sentenced to pay a total of Kshs 250,000 fine or in default serve a total of 18 months imprisonment. The appeal challenges both conviction and sentence. The state has conceded the appeal on ground that the appellant was convicted of both the main charge of stealing and the alternative charge of handling stolen property.

The issue for determination is whether the conviction on the two alternative charges should be set aside and the respective sentences quashed.

BACKGROUND

The appellant was charged with 5 counts of stealing contrary to section 275 of the Penal Code and corresponding 5 counts of sabotage contrary to section 343 (b) of the Penal Code. In the alternative, the appellant was charged with handling stolen property contrary to section 322 92) of the Penal Code. In total the appellant was charged with ten counts plus one alternative count.

After hearing the evidence from all the witnesses, the trial Court convicted the appellant with Counts 9,10 and 11.

The particulars of count 9 was that on night of 31st July and 1st August, 2010 at Ahero Buoye village Kisumu District, the appellant jointly with others not before Court stole one transformer serial number G222571 valued at Kshs 500,000/= the property of Kenya Power and Lighting.

The particulars of count 10 was that on the night of 31st July, 2010 and 1st August, 2010 at Ahero Buoye village Kisumu District, the appellant jointly with others not before the Court willfully and unlawfully destroyed one transformer serial number **G222571** Knowing such act would impede the electricity power supply to the community in Ahero Buoye area.

The alternative charge (Count II) stated that on 9/8/2010 at Kibuye Market Kisumu District, otherwise than in the cause of stealing, the appellant, dishonestly, retained or handled some transformers serial numbers **07060766, 06018692, 06018276, 07060706 and G222571** and 40 litres of transformer oil knowing or having reason to believe them to have been stolen.

GROUND OF THE APPEAL

The appeal raises 4 grounds

1. The learned trial Magistrate failed to appreciate that the evidence adduced did not support the charges preferred against the appellant.
2. The learned trial Magistrate erred in law and fact by failing to find that there was absolutely no

- evidence adduced in support of count 9 and 10 in the charge sheet.
3. The learned trial Magistrate erred in law and fact by failing to find that the charges were fatally defective for duplicity.
 4. The learned trial Magistrate erred in law and fact by proceeding to convict on 3 counts and failed to consider that it was factually and legally impossible for all 3 offences charged to be committed at the same time.

SUBMISSION BY THE STATE COUNSEL

The learned state counsel Mr. Magoma submitted that the conviction of the appellant of both the main charge and the alternative charge was wrong. He relied on the Court of Appeal decision in **CRA NO. 286 OF 2006 MURRITHI MWAI MUGO AND 2 OTHERS VRS REPUBLIC (2008) e KLR** in which the Court held that a conviction cannot be made for both the main and the alternative charge.

In addition to the foregoing, the Learned state counsel submitted that the charge of handling stolen property was defective because it was duplex. He relied on the decision of this Court in **HCCRA 109 of 2004 Benson Nyange and another Vrs Republic (2005) e KLR** in which the Court cited the Court of Appeal decision on **C.A.R.A 68 of 1999 SELIMIA OWUOR AND ANOTHER VRS REPUBLIC** to find that a charge under section 322 (I) of the Penal Code would be duplex if the particulars of the offence are in the alternative.

SUBMISSIONS BY THE APPELLANT

The learned counsel for the appellant, Mr. Opondo did not make any submission in view of the fact that the appeal had been conceded by the state.

ANALYSIS AND REVIEW

The Court agrees partially with the learned state counsel on the two grounds he raised as the basis for conceding to the appeal. It is obvious to this Court that the trial Court fell into error when he convicted the appellant of the main charge of stealing in Count 9 and the alternative charge of handling stolen property of the same alleged stolen goods. It is quite elementary that an alternative Count is charged as a matter of abundant caution and it is not open to the trial Court to consider it after it makes a finding that the main charge has been proved by evidence.

The foregoing view should also apply with respect to count 10 which involved sabotage. Having found that there was evidence to prove sabotage, which I don't agree, the Court should not have convicted for the offence of handling stolen goods. The reason being that the two alternative offences cannot be done at the same. That is the much I agree with the learned state counsel on the first ground for conceding the appeal.

I however disagree with the learned state counsel's submissions that the entire conviction was erroneous just because the appellant was convicted of the alternative count alongside count 9 and 10. In my view, the trial Court was entitled to convict on the alternative charge in respect of the items for which the main charges in count 1 to 8 were dismissed.

To that extent, the conviction was correct in respect of handling stolen property except for transformer serial number G222571 which was the subject matter in Court 9 and 10.

As regards the second ground of the duplex charge due to alternative particulars of the offence, I agree with the submissions of the learned state counsel. This Court is bound by the Court of Appeal decision in **SELINA OWUOR CASE** and I see no reason why I should not concur with the decision of this court in **BENSON NYANGE CASE** on the said point. The Court therefore finds that the alternative charge was defective on ground of it being duplex. The ingredients of the offence charged under section 322(1) of the Penal Code should not be in the alternative or lumped together. The prosecution should point out the particular ingredient from the evidence otherwise charging using the alternative ingredient of, retaining "or" handling five transformers and transformer oil knowing or having reason to believe them to have

been stolen, rendered the charge duplex and therefore defective.

The entire conviction for the charge of handling stolen property in count II therefore became a nullity and this appeal must succeed.

FINAL ORDER

In view of the foregoing reasoning, the Court hereby quashes the conviction and sentence contained in the impugned judgment.

Consequently, the appellant is set at liberty forthwith unless lawfully held.

Signed and Dated at Kisumu this 18th day October 2013

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O.N. Makau

Judge

Delivered at Kisumu this 24th day of October 2013

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Judge