



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

[Coram: Fred A. Ochieng J.]

HCRA NO. 72 OF 2012

SILAS KAMALIZA TOFIKO ::::::::::::::::::::::::::::::::::: APPELLANT

=VERSUS=

REPUBLIC ::::::::::::::::::::::::::::::::::: RESPONDENT

JUDGMENT

The appellant, **SILAS KAMALIZA TOFIKO** was convicted for the offense of handling stolen goods contrary to Section 322 (2) of the Penal Code. He was then jailed for five (5) years.

In his appeal, he submitted that he was wrongly convicted as he had no idea that the goods he was ferrying had been stolen.

The appellant was employed as a driver of a lorry. He said that the lorry had been hired to transport some goods. Therefore, his only role in the matters which gave rise to his conviction was to drive the lorry, in the ordinary course of his employment.

In the circumstances, the appellant argued that he lacked a guilty mind, which was a necessary ingredient for an offense of handling stolen goods.

His defense was said to have been reasonable. Therefor, **Mr. Ngigi**, the learned advocate for the Appellant, submitted the Appellant should not have been convicted.

Finally, the Appellant submitted that the jail term of 5 years was excessive.

In answer to the appeal, **Mr. Omwenga**, learned senior state counsel, submitted that the Appellant cannot have been an innocent person, considering that he had, inside the lorry, a Somali sword, a pistol and a metal bar.

The Respondent also submitted that the Appellant cannot have been in the course of his regular duties, as the owner of the lorry testified that he did not assign the Appellant the task that he engaged in.

The circumstances in which the goods were loaded into the lorry, were also said to have been a clear indication that the goods were not obtained lawfully.

The Respondent also pointed out that when the Appellant was ordered, by the police to stop the vehicle,

he defied the orders. The Appellant was later forced to stop after the police had shot one of his accomplice. In those circumstances, the Respondent submitted that the conduct of the Appellant was reflective of a guilty mind.

Finally, the sentence was also said to have been very reasonable. Therefore, the Respondent urged me to dismiss the appeal.

The facts giving rise to this case are straight forward.

PW2, **EDWIN ISIYA** owned a shop at Nangili. Next to the shop, there was a store. And inside the shop and the store, PW2 had many items which he used to sell to customers.

Meanwhile, PW2 lived in a dwelling located behind the shop.

On the material night, PW2 locked up the shop and the store, at the close of business, at about 7 pm. He then retired to his dwelling place, behind the shop.

PW1 **PHILIP EWOI LOBUNG**, worked as a security guard, at PW2's shop. He was on duty on the evening when the incident took place.

At about 10:00 pm, a person emerged from the back of the shop, and confronted PW1, with something that looked like a gun.

PW1 did not identify the person, although the security lights were on. The reason for the failure to identify person was that he had covered his face, using some clothing.

The man ordered PW1 to lie down, but PW1 ran off into the darkness, about 50 metres away from the shop.

Meanwhile, PW2's attention was attracted by some commotion. He woke up and went to the front part of the shop, where PW2 used to sit.

PW2 did not find PW1, (the security guard) outside. He returned to his dwellings.

After about 30 minutes, PW2 heard some movements. He phoned his neighbor, **RONALD SITUMA** (PW 6).

PW.6 met PW.2 outside his shop and informed him that he (PW6) had seen a lorry behind his plot. PW6 had seen people loading things onto the lorry.

PW.2 phoned the police patrol base at Nangili, and sought their help. The police responded quickly, and went to the scene.

However, by the time they got there, the lorry had been driven off.

The police officers boarded the complainant's vehicle, and they then set off in pursuit of the lorry.

It was not long before the police saw the lorry. They then fired into the air, in an attempt to get the lorry to stop. However, the lorry did not stop.

The vehicle in which the complainant and the police were in, was a pick-up. The officers were at the back of the said pick-up.

When the lorry refused to stop, the pick up tried to overtake the lorry. But the lorry blocked the pick-up.

In the light of that development, the police decided to shoot at the lorry. As a result, one of the four(4)

occupants of the lorry was shot and injured.

It is thereafter that the lorry stopped.

In the driver's seat, was the Appellant. He was arrested, together with the other 3 persons.

Inside the lorry, the police recovered the items belonging to the complainant. The said items were valued at Ksh.177,000/=.

The police also recovered a toy pistol, a metal bar and a screw driver from the cabin of the lorry.

PW3, **ERIC KURIA**, is the owner of the lorry. He confirmed that the Appellant was his driver.

On the material day, PW3 instructed the Appellant to go to Matunda, to ferry some sand.

On the following morning, PW3 learnt that his lorry had been detained at Matunda police station, on the grounds that it had been used to ferry stolen goods.

During cross-examination by the Appellant, PW.3 said that the lorry never used to be hired to ferry shop goods. PW3 also said that the Appellant never told him that he had been hired to go and ferry goods on the material night.

PW4, CPL **CHARO KONDA**, was one of the police officers who came to the aid of the Complainant. It is he who shot at the lorry when it defied the orders requiring it to stop.

PW7. **KELVIN KHADACHI**, is the person who drove the pick-up which the police and the Complainant used to pursue the lorry.

PW.9 **STEPHEN GICHU GATIMU**, testified that on 1st November 2011, he had asked PW2 to deliver sand to his place in Langas. The sand was to be delivered by the Appellant using the lorry belonging to PW3.

Being the first appellate court, I have re-evaluated all the evidence on record. There is no doubt that the Complainant's goods were stolen from his shop.

Secondly, there is clear evidence that the stolen goods were recovered from the lorry which was being driven by the Appellant.

The recovery was made within a very short period of time, immediately after the goods had been stolen.

Pursuant to section 322 (1) of the Penal Code:-

“A person handles stolen goods if (otherwise than in the course of stealing) knowing or having reason to believe them to be stolen goods, he dishonestly receives or retains the goods, or dishonestly undertakes or assists in their retention, removal, disposal or realization by or for the benefit of another person, or if he arranges to do so”

In the case of **JULIUS KAMANDE – Versus – REPUBLIC, CRIMINAL APPEAL No.244 of 2005; Lesiit J**, dealt with a case in which the Appellants were found sleeping inside a house in which some goods which had been stolen, were recovered. The house did not belong to the Appellant.

The learned Judge expressed herself thus:-

“From the evidence adduced on the recovery of the suitcase and other items identified by PW.2 as those stolen from her, it is difficult to find that the appellants were aware of the presence of the items in the house, or even to infer that they knew they were stolen or unlawfully obtained. Without evidence

on which an inference could be made, that the appellants were aware that the stolen items were in the house, the doctrine of recent possession cannot be invoked as it cannot operate in a vacuum”

For that reason, the convictions for handling stolen goods were quashed.

And in the case of **ELIJA M. MWASHUMBE – Versus – REPUBLIC CRIMINAL APPEAL NO.231 OF 2003 (at Mombasa), Maraga J.** (as he then was), dealt with a case in which the Appellant had admitted having been found in possession of sheep which had been stolen.

The sheep had been taken to the Appellant's home, by a boy who said that the said sheep were for sale. The Appellant used to be a livestock trader. He bought the sheep, and later re-sold the same.

But when one purchaser failed to pay the balance of the agreed price, the Appellant reclaimed the sheep. That conduct persuaded the appellate court that the Appellant cannot have had a guilty mind, as he would otherwise have been content to clandestinely dispose of the sheep.

In this case, the trial court was convinced that the Appellant had a guilty mind because he had seen the goods being removed from the complainant's shop through an

opening from which a window had been uprooted. Secondly, the lorry was being loaded at about 1:30 am.

Thereafter, the Appellant, apparently defied orders from the police, to stop the lorry. The lorry only stopped when one of the occupants thereof had been shot by the police.

Was that evidence sufficient proof of the Appellant's mens rea?

In considering the answer to that question, it is important to bear in mind the fact that the Appellant maintained that he had simply been hired to ferry the goods.

In **MWAVULA & MUTHOKA – Versus – REPUBLIC(1980) KLR 127**, at page 129, the Court of Appeal said:-

“The position as we see it is that Joseph, having admitted being in possession of the property proved to have been recently stolen, should not be convicted for handling, if his explanation for such possession was one which is reasonable and which might possibly be true: he did not have to convince the court that it was in fact true- (KIPSAINA – Versus – THE REPUBLIC (1975) E.A 253).

This is much the same as saying that a person accused of handling is entitled to an acquittal if, on consideration of the evidence as a whole, a reasonable doubt is raised whether, at the time he received the property, he did so with a guilty mind, knowing or having reason to believe it to have been stolen. No onus is placed on the accused person in this respect; but if he had offered an explanation, it will only avail him if it is both reasonable and credible”

Thus in this case, the issue for consideration is not what happened when the police were pursuing the lorry. By that time, the goods were already in the possession of the 4 persons who were inside the lorry.

The question about whether or not the Appellant had a guilty mind must be answered within the context of the time when the goods were being loaded onto the lorry.

But I do also wish to add that just because a vehicle you are driving is fired at, late in the night, may not necessarily tell you that those firing at you had good intentions. Therefore, the fact that the driver of the lorry did not stop, does not, of itself, imply that he wanted to escape from the police. He may or may not have known that those firing were police officers.

There is no evidence that proves that the Appellant refused to stop, in an attempt to either escape or to

defy lawful orders.

So, did the prosecution prove that when the goods were being loaded onto the lorry, the Appellant knew or had reason to believe that the goods were stolen?

Of course, a reasonable person could ask himself why the person hiring his lorry would want to move his goods late at night.

But that alone is not reason enough for the person to conclude that the goods were stolen.

I note that even the police officers at the scene appear to have had reason to arrest the person whom the Appellant said, had hired him to go and ferry those goods. That person is PW9.

He was in police custody for 4 days, before he was finally set free. In the circumstances, I find that it is possible that the Appellant's defense was true. Therefore, it would be unsafe to sustain the conviction.

Accordingly, the appeal is allowed, the conviction quashed and the sentence set aside. The appellant shall be set at liberty forthwith unless he is otherwise lawfully held.

DATED, SIGNED AND DELIVERED AT ELDORET, THIS 20TH DAY OF NOVEMBER, 2013.

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FRED A. OCHIENG

JUDGE.