



**1. MORIS ONDANYI MADIDA**

**2. VERONICAH MBINYA.....APPELLANT/ACCUSED**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from the decision of Mr Sd.D.M ITAYA RM delivered on 7/05/2010 in Kajiado Criminal Case No. 84 of 2009)*

**J U D G M E N T**

On 16<sup>th</sup> December 2009 the accused in the subordinate court MORRIS ONDANYI MADIDA and VERONICA MBINYA, who were charged with stealing contrary to Section 275 of the Penal Code (Cap 63), and alternatively with handling stolen goods contrary to Section 322 (2) of the Penal Code, were acquitted by the learned magistrate under Section 210 of the Criminal Procedure Code (Cap 75 Laws of Kenya). The subordinate court found that the prosecution had failed to establish a *prima facie* case to warrant putting them on their defences.

The charges were in relation to five (5) fridges valued at Kshs.396,000/= said to have been the property of Kenya Breweries Ltd. After trial, initially the court ordered that the fridges be released to the accused persons.

However, on 7<sup>th</sup> May 2010, the subordinate court made a ruling on the release of the fridges after taking evidence on the apparent ownership of the fridges. In the said ruling the magistrate DM I Itaya RM stated:-

**“The receipts clearly show that the fridge which were sold to Best Sellers Shop by Fridex Investment Ltd had a Frigorex name or logo on them. It therefore follows that the five fridges belong to Frigorex. Veronica Mbinya and Maurice Madida bought the fridges without proper inquiry. Infact Veronica indicated to court that her business entails selling second hand goods and electronics. The investigating officer did a very shoddy job since he did not endeavour to trace the ownership of the fridges. It was incumbent upon him to visit Fridex Investment Ltd and inquire how they acquired the fridges. I therefore order that the five fridges produced in court be released to Lavina Owuor on behalf of Frigorex East Africa. Veronica Mbinya and Maurice Madida bought fridges which had been stolen and can only be refunded the purchase price.”**

From the above ruling, MORIS ONDANYI MADIDA and VERONICA MBINYA filed this appeal on 10<sup>th</sup> May 2010. In their petition of appeal, they contended that the magistrate erred in his decision on various grounds.

Written submissions were filed by the Appellants’ Counsel Mulwa, Isika & Mutia Advocates. Mrs

Gakobo for the State also filed submissions.

I have considered the appeal and submissions filed. I have perused the evidence tendered by the prosecution in the criminal case before the subordinate court. I have also perused the evidence tendered on apparent ownership of the fridges.

Restitution of property in criminal proceedings is governed by Section 177 of the Criminal Procedure Code (cap 75) which provides:-

**177. Where, upon the apprehension of a person charged with an offence, any property is taken from him, the court before which he is charged may order-**

- a) that the property or a part thereof be restored to the person who appears to the court to be entitled thereto, and, if he be the person charged, that it be restored either to him or to such other person as he may direct; or**
- b) that the property or a part thereof be applied to the payment of any fine or any costs or compensation directed to be paid by the person charged.**

It is apparent from the above provisions of the law that the criminal court can only restore property to a person who appears to be the owner. Since the court is not the investigating officer, it has to rely on evidence tendered in court.

In our present case the only evidence tendered at the trial by witnesses regarding apparent ownership of the fridges was with regard to a fridge found at Isinya outside Orange Café. (PW1) ERIC KAMAU gave its serial number as 274937. It was said to belong to Frigorex and leased to East African Breweries. Even with regard to this fridge, the original records from Frigorex were not produced in court. A prospective witness by the name Lavina Owuor who could give details regarding ownership was not called to testify. In cross-examination PW1 clearly stated that the said fridge had not been branded with EABL colours, as should have happened.

I must observe that I have not seen any record that the subject five (5) fridges were produced in court as exhibits. The only exhibit was P Exhibit 1 produced by (PW2), PC SALIM JUMA. It was described as certificate for photographs.

When the issue of release of the fridges arose after the acquittal, the learned magistrate stated:-

**“The prosecution did not adduce sufficient evidence to show that the five fridges taken away from the accused persons and now in the custody of the police at Isinya Police Station belong to the complainant, Kenya Breweries Limited. It is now over three weeks since the court’s decision was delivered and no petition of appeal has been lodged before High Court to challenge the said decision. In the circumstances I find no reason why the fridges should not be returned to the accused persons from whom they were taken.”**

The High Court later revised the above decision of the subordinate court, and ordered that evidence of ownership of the fridges be taken by another magistrate. Therefore, on 23/3/2010 evidence on apparent ownership of the fridges was taken before DM Itaya RM, who delivered the ruling on release of the fridges now being challenged.

In my view, though the High Court might have ordered that the subordinate court takes evidence to establish apparent ownership of the fridges, the court in a criminal case should ideally only determine ownership or release of property in its custody or control. The record does not show that the subject fridges were in the custody of the subordinate court, or that they were produced as exhibits.

Besides, the evidence of Lavina Wanjiru Owuor (PW1) in the proceedings to establish ownership is not conclusive of ownership of the fridges by Frigorex East Africa. She only generally stated that the fridges were only manufactured by Frigorex. However, she clearly stated in cross examination that she

did “**not have documents to show Frigorex owns the fridges.**”

On the other hand, Moris Ondanyi and Veronica Mbinya had documents to show where the fridges were bought. In my view, with the evidence on ownership placed before the subordinate court, the balance of apparent ownership tilts in favour of the accused who were acquitted. The function of the criminal court is merely to restore property “**to the person who appears to the court to be entitled thereto**”. The underlining is mine. If any of the parties wants to pursue the issue of ownership beyond apparent ownership that should be the subject of civil proceedings. It is not a function of the criminal court. With the evidence placed before the subordinate court both in the main trial and in the proceedings to determine apparent ownership of the fridges, the persons who appear entitled thereto are the Appellants herein who were the accused in the subordinate court.

Consequently, I allow the appeal, set aside the order for release of the fridges to Lavina Owuor made by the learned magistrate and order that the fridges be returned to the appellants/accused persons from whom they were taken away. It is so ordered.

Dated and delivered at Machakos this **29<sup>th</sup>** day of **February** 2012.

**George Dulu**

**Judge**

**In presence of:-**

Mr Mutia for the Appellants

Mr Mukofu for State

Nyalo – court clerk