



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 413 OF 2008

ABEDNEGO AMBANI SIMBOUNI.....APPELLANT

VERSUS

REPUBLICRESPONDENT

(From original conviction and sentence in criminal case Number 3671 of 2005 in the Chief Magistrate's Court at Kibera – Mrs. Kasera (RM) on 11th August 2008)

RULING

1. The appellant herein **Abednego Ambani Simbouni**, filed a petition of appeal dated 25th December 2008, in which he advanced thirteen (13) grounds of appeal. The appeal stems from the appellant's conviction on two counts in **CM Cr. Case No. 3671 of 2005** at Kibera law courts.
2. In **CM Cr. Case No. 3671 of 2005** adverted to above, the appellant was convicted in the alternative to count No. I, for knowingly handling an assortment of Hyundai motor vehicle accessories and components, having reason to believe them to be stolen contrary to **Section 322(1)** of the **Penal Code**. He was also convicted on count II for the offence of dealing in motor vehicle components and accessories without a licence contrary to **Section 3(1)** of **Cap 520** laws of Kenya.
3. Learned counsel, Mr. Simiyu urged on behalf of the appellant that the two counts, the basis of which the appellant was convicted, were incurably defective for being duplex. The learned counsel urged that the charges were duplex for not being specific on what particular act of handling, the appellant was charged with.
4. **Section 322(1)** of the **Penal Code** under which he was convicted in the alternative to count I provides that:

“A person handles stolen goods if (otherwise than in the course of stealing) 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.”

There are therefore specific acts which are of themselves constitutive of the offence of handling stolen goods under **Section 322(1)** of the **Penal Code** once it is established that the appellant knew or had reason to believe them to be stolen goods. Anyone of those acts performed on their own, constitutes an offence under **Section 322(1) Penal Code**.

5. **Section 2(1)** of **Cap 520** laws of Kenya, under which the appellant was convicted on count II provides that:

“In this Act, unless the context otherwise requires— “deal”, in relation to any motor vehicle components or accessories includes buy or otherwise acquire, and sell or otherwise dispose of, motor vehicle components or accessories in the way of trade or business, whether by way of barter, pledge or otherwise, and whether as principal or agent, but does not include a transaction relating to motor vehicle components or accessories which, by reason of the circumstances thereof, the parties thereto, or the nature or quantity therein, is an isolated transaction inconsistent with any form of dealing in motor vehicle components or accessories by way of trade or business.”

This section too provides several acts which constitute an offence under **Section 2(1)** of **Cap 520** laws of Kenya. Anyone of those acts performed on its own constitutes an offence under **Section 2(1)** of **Cap 520** laws of Kenya, if the other components of the offence are proven.

6. I have perused the court of Appeal decision in **Shamji Vaja Shah v Rep Cr. App No. 27 of 1953 [1958] EA**, to which I was referred. In the stated case the court of Appeal stated that it is an essential feature of Criminal law, that an accused person should be able to tell from the indictment the precise nature of the charge or charges against him, so as to be in a position to put forward his defence, and to direct his evidence to meet them. I have also perused the other authorities to which learned counsel Mr. Simiyu referred me, and which are in the same vein. These were:

1. **Rahim Booth and 2 others v Republic Cr. App No. 266, 267 and 268 of 1951**
2. **Mwaniki v Republic CA 68 of 2001**
3. **Uganda v Hamisi Cr. App No. 58 of 1969, pg 292**

7. It is trite law that a duplex charge not only embarrasses the appellant because it is not clear what specific act he is said to have committed, it also prejudices him as he cannot know how to marshal his defence to meet the charges. It is tantamount to throwing out a wide net hoping that the accused person will be caught in any one of the meshes.

8. On the remaining grounds the learned counsel urged that exhibits No. 14-17, upon which the court relied to convict the appellant were not in the custody of the investigating officer at the time of the trial. That they were in fact ferried to court on the hearing date by **PW2**, in motor vehicle registration No. KAN 400X. This is captured by the record of the court at the time of trial.

9. These exhibits were not even in the inventory that the police took when they visited the scene of the crime. Where the material evidence was that there was a distinguishing mark “**LAP**” on the goods, it was out rightly prejudicial to the appellant for the goods to have been left in the custody of **PW2** after a report was made to the police, as anyone could have imposed those marks on the exhibits even subsequent to the appellant’s arrest. It is noteworthy that the idea of the symbol “**LAP**” as a distinguishing mark was first put forward by **PW4**.
10. I respectfully agree with learned counsel Mr. Simiyu that the integrity of the exhibits was breached. Further where **PW2** and **PW4** gave conflicting evidence, with **PW2** admitting that he brought the goods to court in his car on the date of the hearing, while **PW4** who rode in the same car denied this fact, it is clear that one of them lied to the court. In the circumstances it was not up to the court to choose which witness to believe since both testified for the prosecution. The doubt created in the prosecution case in view of the contradiction on this material fact should have operated in favour of the appellant.
11. Having perused the lower court record, the grounds of appeal and the submissions of learned counsel Mr. Simiyu, I am of the humble view that it was wise for the learned state counsel Miss Maina to concede the appeal. The charges were indeed duplex, and so loosely drafted as to make it impossible for the appellant to tell the precise nature of the charge he was called upon to meet or

for which he was convicted. The integrity of the exhibits had also been breached and the evidence was contradictory and inconsistent.

12. For the foregoing reasons, I find that the appeal on both counts is meritorious. I quash the conviction entered against the appellant and set aside the sentence imposed upon him on each count. I order that the appellant be and is hereby set at liberty forthwith unless otherwise lawfully held.

SIGNED DATED and DELIVERED in open court this **15th day** of **August** 2012.

L. A. ACHODE

JUDGE