



REPUBLIC OF KENYA

High Court at Mombasa

Criminal Appeal 126 of 2011

JAMES WAMBUGU KARIUKI.....APPELLANT

=VERSUS=

REPUBLIC.....RESPONDENT

(From Original Conviction and Sentence in Criminal Case No. 337 of 2009 of the Principal Magistrate's Court at Mariakani: D.M. Machage – S.R.M.)

JUDGMENT

The Appellant **JAMES WAMBUGU KARIUKI** has filed this appeal challenging his conviction and sentence by the learned Senior Resident Magistrate sitting at Mariakani Law courts. The Appellant was first arraigned in court on 21st December 2009 facing a charge of **STEALING CONTRARY TO SECTION 275 OF THE PENAL CODE**. The particulars of the charge were given as follows:

“On the 19th day of December 2009 at Kadzonzo Village, Mariakani Location in Kaloleni District within Coast Province, jointly with others not before the court stole one power transformer, 200 litres of transformer oil, one KPLC jacket, two pole climbing gear all valued at Kshs.705,000/- the property of Kenya Power and Lighting company”

In addition the Appellant faced an alternative charge of **HANDLING STOLEN PROPERTY CONTRARY TO SECTION 322(1) OF THE PENAL CODE**. The Appellant was also charged on Count No. 2 of **WILFULY INJURY TO WORKS OF A LICENCE HOLDER CONTRARY TO SECTION 97(1) OF THE ELECTRIC POWER ACT CAP 314, LAWS OF KENYA**. The Appellant entered a plea of ‘not guilty’ to all these charges and his trial commenced on 18th February 2010.

The prosecution led by **CHIEF INSPECTOR MOHAMED** called a total of seven (7) witnesses in support of their case. The brief facts of the prosecution case were that on 19th December 2009 at 3.00 A.M. **PW2 JOHN FREDERICK MWANALE** a security guard at Kadzonzo Secondary School heard the sound of metal being cut followed by a loud bang. He went and peeped over the wall. He noticed that the power transformer had been felled down and saw four (4) men busy siphoning fuel from the transformer. **PW2** immediately alerted his fellow guards **EMMANUEL CHAKA KARUNZA PW3** and **KARISA JOSEPH KATANA PW4**. They decided to phone an administration police officer **JOSEPH KINYUA PW5** who rushed to the scene. Upon arrival **PW5** found a motor vehicle Registration No. KBJ 971D parked a few metres away from the school. He found the Appellant seated inside the driver's seat. Upon being questioned the Appellant told the officers that he had been hired to transport Kenya Power & Lighting Company personnel to the scene. Inside the vehicle were ten (10) 20 litre jericans

containing the transformer fuel. The Appellant **PW5** led police to where the Kenya Power & Lighting company men were working. Upon seeing the police the men who were working on the transformer all fled. At the scene police recovered spanners, hiking hooks, rods, rope, safety belt and a Kenya Power & Lighting Company jacket. They collected all these and took the Appellant together with the exhibits to Changamwe Police Station. The Appellant later led police to try and trace one '**Dennis**' at Kenya Power & Lighting Company whom Appellant claimed had hired him that night but this Dennis could not be traced. Upon completion of police investigations the Appellant was taken to court and charged.

At the close of the prosecution case the Appellant was ruled to have a case to answer and was placed on his defence. He opted to make a sworn statement in which he denied any involvement in the theft. On 15th October 2010 the learned trial magistrate delivered his judgement. The court acquitted the Appellant on the main count of stealing contrary to Section 275 of the Penal Code and also acquitted him on the second count of Willful Injury to works of licence Holder contrary to Section 97(1) of Cap 314, Laws of Kenya. The trial magistrate did however convict the Appellant on the alternative charge of Handling Stolen Property contrary to Section 322 (1) of the Penal Code and thereafter the Appellant was sentenced to serve seven (7) years imprisonment with hard labour. Being aggrieved by both his conviction and sentence the Appellant filed this present appeal.

The Appellant who was unrepresented during the hearing of his appeal relied upon his written submissions which with the leave of the court had been duly filed. **MR. GIOCHE** learned State Counsel made oral submissions opposing the appeal. In view of the fact that the Appellant was acquitted in the trial court on both the 1st and 2nd counts, this court now only has to consider whether his conviction on the alternative charge of Handling was sound.

The offence of Handling is defined in Section 322(1) of the Penal Code as follows:

“322(1) A person handles stolen goods if (otherwise than in the course of the 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.”

It is clear from this definition that in order to prove a charge of Handling it must be shown:

- (1) That the accused was found in possession of stolen property and
- (2) He knew or had reason to believe that the property in his possession was stolen.

On the first limb there can be no controversy. **PW2**, **PW3** and **PW4** all of whom were watchmen on night duty told the court that they saw a group of four men bring down the electric transformer mounted next to Kadzonzo Secondary School and begin to remove the transformer fuel. **PW1 PETER MWASYA MULEE** the chief security officer with Kenya Police & Lighting Company at Changamwe in his evidence confirms that he went to the scene and found that the transformer had indeed been brought down and the fuel therein siphoned out. **PW1** also identifies the 10 jerricans containing the transformer fluid in court **Pexb9** as the property of Kenya Police & Lighting Company. **PW5** APC Kinyua also confirms that upon responding to the distress call from the watchmen he went to the scene and found the Appellant seated in a vehicle parked nearby. Inside that vehicle he recovered ten jerricans of transformer fluid. On his part the Appellant did not deny having been found in possession of the ten jerricans of transformer fluid. I therefore find that this first limb of the offence of Handling has been satisfactorily proved.

With regard to the second limb the question is whether the Appellant knew or had reason to believe that the transformer oil in his vehicle was stolen property. In his defence the Appellant told the court that he had been hired by one '**Dennis**' who claimed to be an employee of Kenya Power & Lighting Company to take him and his colleagues to work on the transformer at night. This court takes judicial notice of the fact that it is not uncommon to find staff of Kenya Power & Lighting Company working on a transformer at any time of the day or night. **PW1** the security officer with Kenya Power & Lighting Company confirms that this is exactly what the Appellant told police upon his arrest – in other words his defence has been

consistent. **PW1** further confirmed that the Appellant offered and made efforts to lead both himself and police to Likoni to trace this ‘**Dennis**’ but they were unable to find him. The actions of the Appellant upon and after his arrest were not suspicious at all. At page 13 line 13 **PW1** stated:

“It is true as we were going to Likoni where we were trace the suspect I said I would follow up to find out the person from our payroll because there was a traffic jam”

If **PW1** a security officer with Kenya Power & Lighting Company suggested that he would track this ‘**Dennis**’ using the company payroll then the implication obviously is that the said ‘**Dennis**’ was indeed an employee of Kenya Power & Lighting Company giving further credence to the Appellant’s defence.

Similarly **PW5** who was the first police officer to arrive at the scene also confirms that the Appellant told them the same story. At page 12 line 12 **PW5** states thus:

“On approaching the school, we saw a motor vehicle registration number KBJ 971D with the driver inside who did not get out. It was some 50m from the scene. We asked him who he was. He told us that he had brought Kenya Power and Lighting Company staff to that area to repair a transformer. We were in uniform. He pointed to the place where the workers were”

From the testimony of **PW5** it remains clear that there was no inconsistencies in the Appellant’s defence. The Appellant made no attempt to escape upon seeing police who were in uniform. He remained seated in his vehicle and upon being questioned gave police a logical explanation for his presence at the scene. If the Appellant knew or had reason to believe that he had in his vehicle stolen property then I have no doubt that he would have made a run for it as the other men did. The behavior of the Appellant does not portray one with a guilty mind. Under cross-examination by the Appellant **PW5** goes onto to state at page 12 line 4:

“You were co-operative and took us to where the people with the transformer were. If you were guilty you would have taken off with the fuel. It is true you told us that you know the staff from Kenya Power and Lighting Company who had hired you and you could take us to the staff member. You were arrested in order to lead the police to the other culprits According to me you are innocent because if you knew the fuel was stolen, you would have driven off when we arrived. You did not take off ...”

It is clear that even **PW5** who arrested the Appellant at the scene believed his story and harboured doubts about his guilt. Similar doubts appeared to be harboured by **PW7 IP. NAHASHON MUTUA** who was the investigating officer. **PW7** stated at page 19 line 2 under cross-examination by the Appellant thus:

“I was told other people had escaped while you were arrested. I don’t know why you did not escape yet you were in the motor vehicle. I involved you in the investigations (my emphasis). You alleged you had been hired by Kenya Power and Lighting Company staff. I asked court to order for your remand at the police station to assist in investigations ...”

The investigating officer confirms that he only wanted to use the Appellant to assist in investigations. If the police were convinced of the guilt of the Appellant why would they seek his assistance in investigating the theft?

The eye witnesses to the theft did not identify the Appellant as one of the men who were siphoning fuel from the transformer. The Appellant was therefore **not** an active participant in the act of stealing and I have no doubt that this is what informed the decision of the trial magistrate to acquit him of the first count. From the explanation the Appellant gave to all who confronted and/or questioned the Appellant, his failure to try to escape and his co-operation with the police it is clear that the Appellant had no knowledge or belief that the fuel was being stolen. He genuinely believed that the men whom he ferried to that scene were Kenya Power & Lighting Company personnel out on duty to repair the transformer. There was nothing which the Appellant did to indicate a guilty mind. In my view the evidence adduced taken in conjunction with the Appellant’s defence would have been sufficient to raise grave doubts as to his

guilt. The benefit of such doubt [which doubts even the police harboured] ought to have been granted to the Appellant. In my opinion the Appellant's conviction on the alternative charge of Handling was not merited. As such I do hereby quash that conviction. Subsequently the seven (7) year sentence imposed upon the Appellant is also set aside. As such this appeal succeeds. The Appellant is to be set at liberty unless he is otherwise lawfully held.

Dated and Delivered in Mombasa this 16th day of October 2012.

M. ODERO
JUDGE

Read in open court in the presence of:

Mr. Tanui for State

Appellant in person