



**REPUBLIC OF KENYA.**

**IN THE HIGH COURT OF KENYA**

**AT KITALE.**

**CRIMINAL APPEAL NO. 105 OF 2010.**

**TONNY KARANJA MWANGI :::::::::::::::::::: APPELLANT.**

**VERSUS**

**REPUBLIC :::::::::::::::::::: RESPONDENT.**

*(Being an appeal against the conviction and sentence of D.M. Ochenja – PM, delivered on 17<sup>th</sup> September, 2010 in Kitale CM CR.C No. 1892/2009)*

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

1. The appellant **Tonny Karanja Mwangi** was charged with the offence of store breaking and committing a felony contrary to the provisions of section 306 (a) of the Penal Code. The particulars of the charge stated that on the diverse dates between the 13<sup>th</sup> and 16<sup>th</sup> day of May, 2009 at Milimani Estate in Trans Nzoia West District within Rift Valley Province, jointly with others not before court broke into the store of Mr. Daniel Ng'ang'a Mwangi with intent to steal and did steal therein 2 complete chassis for a 51 seater bus, 4 Diffs, 6 axel tubes, 51 bus seats, hubs and drums, 8 bus batteries, 98 tyres of 295/80 size, ploughing discs, 20 UD shocks, 2 NKR Engines, 2 gear boxes, 60 Jericans, 200 empty bags, 28 m/s plates, 2 land cruiser seats, 71 empty tanks, 72 bags of C.A.N. fertilizer , furniture and about 10 tones of metal, all valued at Ksh. 5.8 million the property of **Mr. Daniel Ng'ang'a Mwangi**.

2. The appellant was also charged with an alternative charge of handling stolen goods. The appellant pleaded not guilty to the charges and after a full hearing, he was convicted and sentenced to two (2) years imprisonment. Being aggrieved with the conviction and sentence, he appealed and in the petition of appeal he has raised the following grounds of appeal:-

(i) THAT the Learned Trial Magistrate erred in law when he based his findings on inadequate evidence.

(ii) THAT, the Learned Trial Magistrate erred in law and fact when he failed to take into account material contradictions in the evidence of the prosecution witnesses.

(iii) THAT, the Learned Trial Magistrate erred in law and fact when he found that the prosecution case had been proved beyond reasonable doubt while in fact it had not.

(iv) THAT, the learned trial Magistrate erred in law when he shifted the burden of proof to the accused person.

(v) THAT, the Learned Trial Magistrate erred in law when he failed to appreciate that all the elements of the offence charged had not been proved.

3. In further arguments to support the above grounds of appeal, **Mr. Njoroge**, Learned counsel for the appellant submitted that the evidence adduced by the prosecution witnesses did not support the charge against the appellant. For example there was no evidence adduced to show that the appellant had any knowledge that the goods he was buying were stolen. It is evident that the goods which were stolen from the complainant were stolen by other parties and Catherine Anyango, who testified as PW2 testified that she was contracted to look for a buyer for the goods and she contacted two persons namely PETER MUIRURI and PRISCILLAR WAIRIMU who came with a lorry and loaded the goods from the complainant's store. This witness only mentioned the appellant when she said she was receiving part of the payment. She also confirmed that she had no idea that the goods were stolen which clearly shows that if she is the one who sourced for the buyers, and she had no knowledge that the goods were stolen, it was not possible for the appellant to know the goods were stolen,

4. It was further submitted that the learned trial magistrate erred by finding that the appellant knew the goods were dishonestly obtained merely because they were bought chiefly. In this regard, the counsel referred to the case of **THAHABU IBRAHIM VS. REPUBLIC [1983] KLR PG. 609** where **O'Kubasu – J** (as he then was) held that

“1. In a charge of handling stolen property, it is not enough merely to show that the accused person knew something about the origin of the stole good. The charge has to be proved beyond reasonable doubt as required by law.

“The prosecution, in order to prove a charge of handling stolen property, must establish that the following elements existed;

(a) that the handling was otherwise than in the course of stealing;

(b) that the appellants had received the goods knowing or having reason to believe that they were stolen; or

(c) That the appellant's dishonesty undertook or assisted in the retention, removal or disposal or realization of the goods by or for the benefit of another person.”

5. The Learned Snr Principal State Counsel, **Mr. Onderi**, conceded to this appeal on the grounds that the evidence shows that the appellant was a registered scrap metal dealer. He received these goods from the yard of Mr. Muiruri who was his brother in law. The reason why the trial court convicted the appellant was because in the opinion of the trial magistrate, the price which the appellant had paid for the goods was low. Thus the appellant should have known the goods were stolen. This was a wrong test which was applied by the trial court. Secondly, the state also submitted that the charge sheet as drawn was defective because it failed to state the ingredients of the offence as provided for under section 322 (1) of the Penal Code. Thus he urged the court to allow the appeal, quash the conviction and set aside the sentence of two years which is in any event an illegal sentence as the law provides for a minimum sentence of seven (7) years.

6. This being a first appeal, this court is mandated by law to reconsider and re-evaluate the evidence before the trial court and arrive at its own independent determination on whether or not to uphold the judgment of the trial court. In so doing, this court should always be conscious that it never heard or saw the witnesses testify and should give due allowance for that. I now wish to set out briefly the evidence before the trial court.

7. **Daniel Mwangi, PW1** and also the complainant testified that on 21<sup>st</sup> May, 2009 he sent his manager to his store at Milimani area within Kitale that is when he found all his scrap metal and other items listed in the charge sheet were missing. Some of the scrap metals were inscribed with the name “**Matunda**”. He advised his manager to report to the police and his manager duly identified the items that were recovered in Eldoret. Those items were duly photographed and the photos were produced in court as exhibits During cross examination he told the court that the properties that were stolen were valued at 5.8 million

8. **Catherine Anyango, PW2** told the court that she was approached by Emmah Were Maria who was the first accused person and told that she was aware of somebody who was selling scrap metal if she could find a buyer. They went to Milimani area where she was shown a store with scrap metal and other items. She then looked for **Peter Muiruri** who sent a vehicle. They collected the scrap metal which was valued at Ksh. 96,000/=. However the said **Peter Muiruri** said he did not have enough money and Ksh. 40,000/= was given to the 1<sup>st</sup> accused together with Moses. PW2 decided to accompany Peter Muiruri to Eldoret and that is when she was introduced to the appellant as the owner of the goods. She was paid the balance of the money and some was sent to her by M-Pesa. The following day she learnt that the goods were stolen from Matunda stores.

9. The other evidence was by **Simon Simiyu Wamalwa, PW3**, the Manager of the complainant who was sent to the stores of the complainant and discovered the goods were missing. He reported the matter to the police. **Daniel Kamau Kuria, PW4**, is also a manager of the complainant who accompanied the police as they carried out the investigations. The evidence by the police is that they traced the appellant in Eldoret and he took them to where his scrap metal yard and that is where they recovered the items that were stolen from the complainant. The police also arrest the 1<sup>st</sup> accused person who was in custody of the complainant’s items.

10. After evaluating the above evidence the trial magistrate found that the prosecution had proved its case to the required standard. He particularly found the case against the appellant was proved because he ought to have enquired from his wife Priscilla Wairimu the origins of the goods. Secondly, the price at which the goods were sold should have raised some suspicion in the mind of the appellant and he was therefore convicted with the offence of handling stolen goods contrary to section 322 of the Penal Code.

11. Having set out the brief summary of the evidence before the trial court, I am in agreement with the state counsel that this evidence is not safe to sustain a conviction. The appellant was a registered scrap metal dealer. He bought the goods from other parties who had purchased the goods from the 1<sup>st</sup> accused person. Going by the evidence on record, there is nothing to support a charge of store breaking. The evidence clearly shows that the gate was opened and vehicle loaded while supervised by the accused person, an employee of the complainant who was having the custody of the goods. The goods were sold to parties who were not charged with this offence. To make a finding that the appellant should have known the goods were stolen is far fetched. In my view it was a mere suspicion that the appellant should have known the goods were stolen.

12. The value of the goods was not adduced in evidence to show the cost of the scrap metal. Moreover, the appellant was a registered metal dealer and I find nothing to prove that he knew that the goods were stolen. As it was held in the case of **Bhatt vs. Republic ([1957] EA at page 334** where the Court of Appeal explained what is a prima facie case as follows:-

*“Remembering that the legal onus is always on the prosecution to prove its case beyond reasonable doubt, we cannot agree that a prima facie case is full consideration might possibly be though sufficient to sustain a conviction. This is perilously near suggestion that the court would not be prepared to convict if no defence is made, but rather hopes the defence will fill the gaps in the prosecution case.*

*Nor can we agree that the question whether there is a case to answer depends only on whether there is ‘some evidence, irrespective of its credibility or weight, sufficient to put accused on his defence. A mere scintilla of evidence can never be enough: nor can any amount of worthless discredited evidence. It is*

*true, as Wilson – J. said that the court is not required at that stage to decide finally whether the evidence is worthy of credit, or whether if believed it is weightily enough to prove the case conclusively: that that determination can only properly be made when the case for the defence has been heard. It may not be easy to define what is meant by a ‘prima facie case’ but at least it must mean one on which a reasonable tribunal, properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence.”*

**13.** I think I need not say any more save that the appeal is allowed, the conviction and sentence is hereby set aside and unless otherwise lawfully held the appellant is to be set at liberty forthwith.

**Judgment read and signed on 11<sup>th</sup> February, 2011.**

**M. K. KOOME.  
JUDGE.**