



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CRIMINAL APPEAL NO.193 OF 2010**

**KIMANI MATARI MACHARIA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**(An Appeal from original conviction and sentence in Nakuru C.M.CR.C.NO.1134 of 2008 by Hon D.K. Mikoyan, Senior Resident Magistrate, dated 9<sup>th</sup> June, 2010)**

**JUDGMENT**

This is an appeal from the judgment of the court below (**D.K. Mikoyan, SRM**) delivered in **Nakuru C.M. Criminal Case No.1134** of 2008, in which the learned magistrate found the appellant, **Kimani Matari Macharia**, guilty of the alternative charge of handling stolen goods contrary to **section 322(2)** of the **Penal Code**. Upon being convicted the appellant was sentenced to serve one year imprisonment with effect from 9<sup>th</sup> June, 2010.

The appellant was aggrieved and has preferred this appeal against the decision of the learned magistrate citing seven grounds which I have condensed as follows:

- i) that the learned magistrate shifted the burden of proof to the appellant
- ii) that the conviction was against the weight of the evidence
- iii) that there were contradictions in the prosecution case
- iv) that the appellant's defence was ignored
- v) that the sentence was harsh and excessive.

The learned counsel for the appellant urged the court to allow the appeal for the above reasons.

The respondent's counsel conceded the appeal more or less on the same grounds.

Being the first appellate court, this court must reevaluate the evidence afresh in order to arrive at its own independent conclusion bearing in mind that it has not seen or heard the witnesses. It must be noted that the appellant faced the main charge of stealing 37 angle line metals, the property of Gicheha Farm

Ltd. between 1<sup>st</sup> October, 2007 and 4<sup>th</sup> February, 2008.

Prosecution case was to the effect that during the period in question, thieves stole angle lines used to fence the complainant farm. According to the employees of the farm, **PW1, Damaris Mumbi** the caretaker, **PW2 Mohammed Galgalo** and **PW3 Ekwi Natali** the security officers, after discovering the theft they traced the stolen angle line metals to a workshop in Njoro, where they found the appellant, and subsequently reported to the police. The appellant was arrested and charged.

The appellant denied the charges and maintained that the angle line metals were purchased from a dealer in Kericho by his employer, **DW2, David**

**Nganga Githinji**. DW2 David Nganga Githinji on his part confirmed that the workshop where the metals were found belonged to him and that the appellant was only his employee; that he deals in scrap metal. He also testified that he bought the metals in question from his supplier, **John Cheruiyot**. He produced three invoices to demonstrate that he dealt in scrap metal and that the metals in question were supplied to him together with other scrap metal.

The learned trial magistrate weighed the above evidence and found that it did not disclose the offence charged in the main count. He however found that it proved the alternative charge and as stated earlier convicted the appellant.

The only broad question that fell for determination before that court and which similarly is the case in this appeal is whether the appellant knowingly or having reason to believe that the metals were stolen dishonestly received or retained them or assisted in their retention, removal, disposal or realization by or for the benefit of another person or whether he arranged to do so. But first it was imperative for the prosecution to prove that the angle line metals were stolen.

I have looked at the evidence of the three main witnesses from the complainant farm which attempts to show that the metals belonged to the farm. The only description given of the stolen metals to link the exhibits to the complainant's metals are, for example, that they were painted maroon, grey, green; that they had holes on them spaced 2 feet apart and that they were old.

The above description for an item of common usage is not sufficient. Indeed the witnesses admitted that there was nothing else unique about the exhibits. **PW1, Damaris Mwathi** stated in cross-examination that;

**“Many people use angle lines to fence . . . . . It is common to have holes on the angle line at different distances.”**

PW2. Mohamed Galgalo for his part said;

**“I do not know if there are other angle lines from other farms with the same hole spacing.”**

Finally PW3, Evans Ekwi Natali was emphatic that;

**“Angle lines by appearance do not disclose that the same belong to Gicheha Farm.”**

Clearly, therefore there was no proof that the angle line metals recovered from a workshop in Njoro and produced as exhibits belonged to Gicheha Farm Ltd.

Secondly there is no evidence that the appellant dishonestly received them or that he knew or had reason to believe them to have been stolen; or that he dishonestly received, retained or assisted in their retention.

He was an employee of **DW2, David Nganga Githinji** who admitted he purchased the metals together with other scrap metals.

For the reasons stated I come to the conclusion that the learned magistrate failed to sufficiently analyse the evidence presented before him and thereby fell into grave error in convicting the appellant on insufficient evidence.

For the above reasons, the appeal succeeds; the conviction is quashed and sentence of 1 year imprisonment set aside.

The appellant is acquitted and shall be set free forthwith unless lawfully detained.

**Dated and Delivered this 27<sup>th</sup> day of October, 2011.**

**W. OUKO  
JUDGE**