



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT ELDORET

Coram: F. Azangalala J.

CRIMINAL APPEAL 110 OF 2009

BETWEEN

PETER NJAMA MWANGI alias KAMAU ::
APPELLANT

AND

REPUBLIC ::
RESPONDENT

*[Being an appeal from the Judgment of the Resident Magistrate –
I. Maisiba dated 2nd July, 2009 at Eldoret Chief Magistrate’s
Court in CRC. No.6266/2008]*

JUDGMENT

Peter Njama Mwangi, (hereinafter “**the appellant**”) has filed this appeal to contest his conviction and sentence by the Learned Resident Magistrate (**I. Maisiba**) sitting at Eldoret Chief Magistrate’s Court. The appellant was arraigned in court on 17th December, 2008 and charged with two counts. The 1st count stated that the appellant had in his possession suspected stolen property contrary to section 323 of the Penal Code. The count carried the following particulars: that the appellant on 2nd December, 2008 at Mwanzo Estate in Eldoret Township in Uasin Gishu District within the Rift Valley Province, having been detained by No. 46615 Cpl **Naftali Lagat** and No. 68650 P.C. **Charles Kyalo**, Police officers as a result of the exercise of the powers conferred by section 26 of the Criminal Procedure Code, had in his possession:-

- v **One Home Theatre make L.G. Model No. HT 5025 H – AO,**
- v **Five (5) Speakers,**
- v **A Gas Cooker,**
- v **A Gas Cylinder,**
- v **A Micro wave make / Sanyo S/No. 20/SUE 07070022 model F.M –G 25675 and**
- v **A Brower model 13000 RPM reasonably suspected to have been stolen or unlawfully obtained.**

In the 2nd count, the appellant was charged with being in possession of Government Stores Contrary to section 13(3) of the Government Stores Act. It was alleged in the particulars that the appellant on the same date and at the same place was found being in possession of Government Stores namely:-

**vTwo (2) Kenya Army Shirts,
vTwo (2) Kenya Army Trousers,
vTwo (2) Administration Police Jackets,
vFive (5) Military Berets and
vThree (3) prisons head badges.**

The appellant denied both charges and his trial commenced on 5th March, 2009 at which the prosecution led by **I.P. Boor** called three (3) witnesses in support of its case.

The brief facts were as follows:-

On 2nd December, 2009, **George Andalo**, P.W.1, in the company of one **Dorothy Macharia** and **Betty Simiyu** went to the appellant's house at Mwanzo to demand his rent. The appellant was P.W.1's tenant and according to him, he was in arrears of rent. The appellant was not present. P.W.1 entered the house and found an L.G. Home Theatre with 4 speakers, a DVD Player, a Cylinder, a Cooker and a Sanyo Micro wave. He also found a suit case containing a jacket, 3 police shirts, 5 berets, 6 jackets and a trouser. He then called Police. Cpl **Naftali Lagat**, (P.W.3) was instructed by his OCS Baharini Police Post to visit the scene. He did so and recovered 2 Kenya Army shirts, 2 Kenya Army trousers, 2 AP jackets, 3 Kenya Police blue shirts, 1 Kenya Army Jacket, 5 berets, 1 home theatre with 5 speakers, one gas cooker, a Sanyo Microwave, a gas Cylinder and a Brower machine. He suspected the items to have been stolen and commenced investigations. He learnt that the appellant was a suspected police imposter. He traced him at Moi Teaching and Referral Hospital. He then charged the appellant as already stated.

At the close of the prosecution case, the learned Resident Magistrate found the appellant with a case to answer and placed him on his defence. He gave a sworn statement in which he denied the charges, contending that he had left his house safely secured, yet police officers had gained access to the same in his absence and removed his property. The police officers assured him that they would release his property on production of receipts. The appellant however, specifically stated that he did not know where the police uniforms and berets had come from.

On 2nd July, 2009, the learned Resident Magistrate delivered his judgment in which he convicted the appellant on both counts and thereafter sentenced him to six (6) months imprisonment on the first count and one (1) year imprisonment on the second count. The sentences were to run consecutively.

Being aggrieved by his conviction and sentences, the appellant lodged this appeal before me on four (4) substantive grounds namely:-

- ØThat the learned trial Magistrate violated sections 7 (1) and 77 (1) as read with section 41 (1) of the Constitution and the Police Act;**
- Ø That the learned trial Magistrate convicted him on contradictory evidence;**
- ØThat his fair-trial rights under section 72 (3) (b) of the repealed Constitution were contravened; and**
- ØThat the sentences imposed upon him were manifestly excessive.**

At the hearing of the appeal, the appellant appeared in person and relied on written submissions which he had previously filed. Those submissions elaborated the above grounds of appeal. **Mr. Oluoch**, the learned Senior Deputy Prosecution Counsel, on his part, orally submitted that the appeal against conviction lacked merit and should be dismissed. On sentence, learned counsel was of the view that the same appeared excessive in the circumstances.

I have carefully perused the record, the grounds of appeal and the submissions made to me. Having done so, I have noted that the appellant's house was accessed by P.W.1 in his absence. It is significant that P.W.1 was the appellant's Land Lord and was demanding arrears of rent from him and also wanted his eviction from his house. I cannot in the premises exclude the possibility of P.W.1 using the report he made to the police at Baharini to repossess his house. It would also appear that P.W.1 may not have

accessed the appellant's house lawfully. His report could have been to camouflage his actions which, in my view, clearly contravened the law. The record does not disclose why P.W.1 and the police officers could not gain entry to the appellant's house in his presence. In those premises, the appellant's defence that he did not know where the Government stores came from was not altogether implausible.

With regard to the allegation that non-government stores were suspected to have been stolen, I have found that P.W.1 and P.W.3 did not demonstrate the basis of their suspicion. The non-government stores were ordinary items available in the open market to anyone including the appellant. There was no allegation that the appellant could not lawfully possess those items and no evidence was adduced that the said items were stolen as no other witness laid claim to them.

In the premises, I find and hold that the appellant was not convicted on sound evidence. That being my view of this appeal, it is not necessary to consider the rest of the grounds of appeal.

The upshot is that I am not satisfied that the appellant's conviction is safe. I am unable to uphold it. Accordingly, I allow the appeal, quash the conviction, set aside the sentences and order that the appellant be released forthwith unless he is otherwise lawfully held.

**DATED AND DELIVERED AT ELDORET
THIS 3RD DAY OF NOVEMBER, 2011.**

**F. AZANGALALA
JUDGE**

Read in the presence of:-

1. **Peter Njama Mwangi** – the appellant in person and
2. **Mr. Chirchir** for the Republic.

**F. AZANGALALA
JUDGE
3/11/2011**