



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

**HCCRA NO.14 OF 2007**

**1. JOSEPH OGANDO LUDIRU)**

**2. JAMES OUMA OGANO ).....APPELLANTS**

**VERSUS**

**REPUBLIC .....RESPONDENT**

*(From the judgement of E.H. KEAGO, SRM in Busia criminal case no.1864 of 2006)*

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

The appellant Joseph Ogando Ludiru and James Orwa Ogando were jointly charged with the offence of breaking into a building and committing a felony contrary to Section 306 (a) of the Penal Code with an alternative charge of handling stolen goods contrary to Section 322 (2) of the Penal Code. The Busia Resident Magistrate convicted the appellants of the offence of handling and sentenced them to serve seven years imprisonment.

The appellants challenge the conviction on grounds that there was no sufficient evidence to convict them. According to them, the goods in question were found in the house of one Caxton the son of the 1<sup>st</sup> appellant and brother to the 2<sup>nd</sup> appellant. Nothing was recovered in the houses of the appellants. It is alleged that Caxton of the house was charged in cr. Case no.1858 of 2006 where the same exhibits were produced.

The State Counsel opposed the appeal on grounds that the evidence of recovery upon which the conviction was based was cogent. The appellants did not explain possession of the goods in defence.

The evidence of the prosecution was that on the 20/07/06 around 6.00p.m, PW1 the pastor of New Testament Church at Marenga Beach Port in Victoria town of Busia County locked the church door securely and went home. Inside the church were several goods including plastic chairs, phone charge and an electric fan. The following morning PW1 found the church broken into and three (3) plastic chairs, the phone charger and the electric fan missing from therein. PW3 a police officer attached to Port Victoria Police Station received the report of the church building break in and theft. Acting on information, PW3 accompanied by other officers visited the house of 1<sup>st</sup> appellant where the electric fan chairs were recovered. In the house of the 2<sup>nd</sup> appellant who is the son of the first appellant, the three plastic chairs were recovered. The exhibits were recovered. The exhibits were later identified by PW1 as the items stolen from the church on the material day.

The 1<sup>st</sup> Appellant denied that nothing was recovered from his house but in the house of his son one Caxton. The second appellant said the exhibits recovered from the house of his brother Caxton had been

stolen by Caxton and not by himself.

The trial court believed the evidence of PW3 who made the recoveries. During cross-examination of PW3, the appellants did not raise the issue that the houses did not belong to them. PW3 even explained that the electric fan was recovered in the bedroom of the 1<sup>st</sup> appellant and the plastic chairs in the house shared by the 2<sup>nd</sup> appellant and his brother Caxton. The 2<sup>nd</sup> appellant was found in the house during the recovery.

The appellants were duty bound to explain the possession of the exhibits found in their houses. This was not done in the defence. The trial court in its judgement correctly found that there was no evidence to support the offence of breaking into the building. However the evidence before the court proved the charge of handling stolen goods contrary to Section 322 (2) of the Penal Code. The court noted that from their defences and in cross-examination of the witnesses, the appellants knew that the goods in their houses were stolen. It was that knowledge that the appellants kept the goods. The appellants did not disclose the source of the stolen goods or show PW3 where Caxton was if they knew that he was the one who had committed the offence of breaking into the church and brought the goods to the houses of the appellants. During the trial Caxton was still at large. It appears he was arrested much later and charged in another case with the same offence. During the hearing of the appeal, none of the appellants talked of the outcome of the Caxton case. This could mean that the case was still pending or that the appellants did not want to disclose the outcome for reasons known to them.

The issue of Caxton being charged with the same offence was raised in this appeal. The appellants were convicted of the offence of handling stolen goods which is different from that of breaking into the church building. When police arrested Caxton, they must have gathered evidence to charge him with breaking into the building and committing a felony. The charging of Caxton and the charging of the appellants in different cases was properly done. If the two cases result in convictions of the different offences, there would be no miscarriage of justice provided there is cogent evidence to sustain the convictions in each case. Using the same exhibits in both cases was also proper in law because the facts of the case were similar.

I come to a conclusion that the conviction was based on watertight evidence and that there was no miscarriage of justice in the action of the prosecution to institute the two criminal cases one against the appellants and the other Caxton.

On the issue of sentence I find that the two appellants were given the maximum sentence under the law. The two appellants were first offenders and pleaded for leniency. The value of the property found in their possession was ksh.2500 for 1<sup>st</sup> appellant and sh.1500/- for the 2<sup>nd</sup> appellant. The value was therefore negligible.

In the light of the circumstances in this case, the appellants ought to have been considered for a more lenient sentence. I therefore reduce the sentence to four (4) years imprisonment. The appellants were convicted on 28/05/07 which is four and a half (4 ½) years ago. The sentence of four (4) years has been fully served. The appellants are therefore released forthwith unless otherwise lawfully held.

**F.N. MUCHEMI**  
**J U D G E**

Judgement dated and delivered on the 14<sup>th</sup> day of December 2011 in the presence of the appellants and the State Counsel Mr. Okeyo.

**F.N. MUCHEMI**  
**J U D G E**