



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

**Criminal Appeal 104 of 2010**

**1. MORIS ONDANYI MADIDA  
2. VERONICA MBINYA.....APPELLANTS**

**VERSUS**

**REPUBLIC .....RESPONDENT**

**R U L I N G**

The Appellants herein were the accused persons in the lower court. They were charged with **stealing** contrary to **section 275** of the **Penal Code, Cap 63**. It was alleged in the particulars of the charge that on 6th **January 2009** at Isinya Township in Kajiado District of the Rift Valley Province, jointly with others not before court, they stole 5 fridges valued at **KShs. 296,000/00**, the properties of **Kenya Breweries Limited**. There was an alternative charge of handling stolen goods contrary to **section 322(2)** of the Penal Code.

The Appellants were tried and acquitted under **section 210** of the **Criminal Procedure Code, Cap. 75**. The court found that they had no case no answer for lack of evidence. The paucity of evidence was occasioned by the fact that not all prosecution witnesses attended court to testify, despite numerous adjournments having been granted to the prosecution.

Upon acquittal, the lower court ordered that all 5 fridges the subject of the charge be released to the Appellants. Only the photograph of one of the fridges was produced before court. The fridge itself was not produced. No photographs or even particulars of the other four fridges were given in court. All the fridges had remained at **Isinya Police Station** during the trial.

The Republic objected to the order releasing the fridges to the Appellants, and it applied to this court for the revision of that order.

On **3<sup>rd</sup> March 2010** this court set aside the order of the lower court. The court directed that the matter be remitted to the lower court, but to be presided over by a different magistrate, to take evidence as required by **section 177 (a)** of the Criminal Procedure Code regarding ownership of the one fridge that had featured in the trial. In respect to the other four fridges that had not featured in the trial, this court directed that the lower court do take appropriate proceedings under **section 17** of the **Police Act, Cap 84** and thereafter make appropriate orders.

Section 177(a) of the Criminal Procedure Code provides as follows:-

**“Where, upon the apprehension of a person charged with an offence, any property is taken from him, the court before which he is charged may order**

(a) that the property or apart thereof be restored to the person who appears to the court to be entitled thereto, and , if he be the person charged, that it be restored either to him or to such other person as he may direct; or

(b) ....”

Section 17 of the Police Act provides as follows:-

“17. (1) It shall be the duty of a police officer to take charge for unclaimed property handed to him by any other person or found by such police officer to be unclaimed, and to furnish in inventory or description thereof to a magistrate having jurisdiction in the area in which the property is found by, or handed to, him and such magistrate shall give orders for the detention of the property, and shall cause a notice to be posted in a conspicuous place in his court and at such police stations as he considers necessary, describing such property and requiring any person who may have a claims property and requiring any person who may have a claim thereto to appear and establish such claim within six months from the date of the notice:

**Provided that-**

(i) if the property is liable to rapid decay, or if the magistrate is of the opinion that its immediate sale would be to the benefit of the owner thereof, he may direct it to be sold, or, if he deems it advisable so at to do, may cause the property to be destroyed, and

(ii) If the property is a firearm or ammunition the magistrate may order that it shall be disposed of in such manner as the commissioner may direct.

(2) If no owner establishes his claim to the property within six months from the date of such notice, it may be sold in such manner as the magistrate shall direct.

(3) Where such property has been sold in accordance with this section the proceeds of sale shall be paid to the person who establishes his claim thereto, or, if no lawful claim to it has been established, shall be dealt with in the following manner-

a) such proportion as the magistrate may direct shall be paid to the finder of the property;

b) the balance (if any) shall be paid into the Consolidated Fund.”

It is now apparent that the four fridges that did not feature in the trial of the Appellants were not unclaimed properties. The same had been claimed by the complainant as special owner thereof. They had also been claimed by the 2<sup>nd</sup> Appellant. So, proceedings under section 17 of the Police Act were not appropriate.

On 26<sup>th</sup> March 2010 the lower court took evidence under section 177 of the Criminal Procedure Code as directed by this court in order to determine ownership of the 5 fridges. A total of 5 witnesses testified. They included the two Appellants.

In a considered ruling delivered on 7<sup>th</sup> May 2010 the lower court was satisfied that the 5 fridges belonged to **Frigorex East Africa Limited** who had leased them to **Kenya Breweries Limited**. The court ordered that the 5 fridges be released to **Frigorex East Africa Limited** through its representative, **Lavina Owuor**, who had testified on its behalf in court. The court also found that the fridges had been stolen while leased to Kenya Breweries Limited and placed at various shops or hotels at the direction of Kenya Breweries Limited. It was that ruling and orders that provoked the present appeal. The appeal is yet to be heard and disposed off.

The Appellants have now come to court by notice of motion dated 27<sup>th</sup> May 2010. They seek one main order, that the court be pleased to issue an order to release the 5 fridges to them pending disposal of the appeal. The application is stated to be brought under section 356 of the Criminal Procedure Code. That section provides for bail and stay of execution pending the entering of an appeal. It is hardly an appropriate provision for the Appellants' application. But be that as it may.

It is apparent that the order now sought cannot be granted without setting aside the order of the lower court appealed against. Although stay of execution of the order of the lower court was sought in the present application, it was so sought only pending disposal of this application. It was not pending disposal of the appeal. Even if stay had been sought pending disposal of the appeal, the court would be reluctant to grant an order whose effect would be to determine the appeal itself unheard.

The Appellants have expressed the fear that the 5 fridges the subject matter of this appeal might perish or get destroyed before the hearing and determination of the appeal herein. That is hardly a reasonable fear. Fridges are hardware that last for years and years. They are not perishable items.

It is also unreasonable to expect that Frigorex East Africa Limited would not properly take care of the fridges pending disposal of the appeal. They claimed ownership of those fridges, and the lower court agreed with them. Would they destroy their own property? I do not think so.

I find no merit in the present application and I must refuse it. It is hereby dismissed. But I will order Frigorex East Africa Limited not to sell, lease or otherwise dispose of the 5 fridges the subject of this appeal pending disposal of the appeal, or until further order of the court. It is so ordered.

**DATED AT MACHAKOS THIS 7<sup>TH</sup> DAY OF JULY 2010**

**H. P. G. WAWERU**  
**JUDGE**

**DELIVERED THIS 9<sup>TH</sup> DAY OF JULY 2010**