



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT BUSIA
Criminal Appeal 33 of 2010

MOHAMMED HASSAN.....APPELLANT
VERSUS
REPUBLICRESPONDENT

(From the Conviction and sentence of N.Wambani, SRM in Bungoma Cr.Case No. 1478 of 2008)
JUDGEMENT

The appellant, Mohamed Hassan was charged with the offence of handling stolen property contrary to Section 322(2) of Penal Code. He was tried, and convicted and sentenced to pay a fine of Kshs. 25,000/=, in default to serve prison sentence of 12 months. He appealed against the conviction and sentence.

The prosecution facts are as follows: On 21.7.2008 at 1.00 p.m. one Vipul Rikal Dodhia, a director of Cherangani Hills Ltd. Sent his driver, Maurice Masinde Mutoka and his conductor, Evans Sikuku to Nzoia Sugar Co. Ltd. to collect some purchased 700 bags of sugar. The two had used the company motor vehicle Reg. No. KAU 864 U for the purpose. Apparently they were attacked as they carried the bags of sugar and brutally murdered. The sugar was stolen possibly through a robbery. The truck aforementioned was later discovered, although in a vandalized state, in that its canvas, spare tyres, batteries, iron bars jack, tripillars and ignition keys, were all found stolen. All these items and the bags of were valued Kshs. 1,750,000/=. The properties either belonged to the Cherangani Sugar Co. Ltd. or to the above mentioned director Vipul Rikal Dodhia.

There was some other evidence that the 700 bags of sugar were released to the complainant under the sugar loading tallies Nos. 7935 and 7936 before the robbery was staged. Apparently the sugar was transported to some place called Mundika for storage before being brought to Busia for sale. Those who were hired by the appellant or appellant's agent to transport the sugar from Mundika to Busia Town for sale through two or more outlets gave evidence. The end result was that after investigations, the appellant and Josephine Kemunto Oyaro, were arrested and charged with the offence of handling stolen property.

When the appeal came for a hearing the Attorney-General through Mr. Akeyo, the State Counsel, conceded the appeal on several grounds. He conceded that the sugar was not properly and conclusively identified to be the sugar stolen from the complainant's driver and conductor. That all that could be said about it is that it originally was manufactured by Nzoia Sugar Company Ltd. and nothing more. That although all bags carried a number of serialization, no evidence was led on that to prove that the actual bags which were bought and later stolen, were the same that were impounded by the police from the

appellant's store.

Secondly, he conceded that there was no evidence that the sugar was received and handled otherwise than in the course of stealing. In other words those charged with handling could have been thieves who actually stole the sugar from the complainant's driver and turnboy and should first and foremost have been charged of theft with the alternative charge of handling.

Thirdly, the state conceded that the sugar bags impounded by the police from the appellant's premises may not have been connected to those stolen from the complainant's driver. The evidence accordingly did not prove the required mens rea that the appellant knew or suspected that the impounded 687 bags of sugar were stolen prior to his purchase of them.

I have carefully considered the submissions. I am in agreement that there was no sufficient evidence upon which the trial magistrate should have convicted. There was no sufficient proof that the impounded 687 bags of sugar from the appellant were the same as those stolen from the complainant's driver's lorry. If all bags of manufactured sugar coming out of Nzoia Sugar Company Ltd. are serialized as put in the prosecution evidence, it would not be hard to prove that the bags impounded from appellant's store were the same ones sold to Cherangani Hills Co. Ltd. belonging to the complainant. No such evidence was led.

The court also understands that those charged with handling of the stolen property found in their possession could be the thieves themselves. The charge of handling should accordingly be an alternative charge to a charge of theft. This was not so here.

Finally, mens rea is crucial in cases of handling. The prosecution has to prove that-

- a) The handling was otherwise than in the course of stealing
- b) The accused received the goods knowing or having reason to believe that the goods are stolen
- c) The accused dishonestly undertook or assisted in retention, removal or disposal or realization of the goods by or for the benefit of another.

In this case the appellant nowhere admitted that the 687 bags of sugar or any of them were stolen or he bought them with knowledge that they were stolen or had reason to so suspect. Adding that to the fact that there was no proper identification that any of the bags was one of those stolen, the court does not see how the trial magistrate would have convicted. In the circumstances this appeal has merit and is hereby allowed. The conviction is quashed and the sentence is set aside. Since the appellant paid the fine, the same should be refunded to him. The 687 bags of sugar impounded were exhibits. They should be returned to the appellant in the circumstances of this case, without barring the complainant of filing a civil suit to show that the bags were actually his and were part of the consignment purchased from Nzoia Sugar Co. Ltd but stolen in course of being transported by the complainant. Orders accordingly.

Dated and Delivered at Busia this 22nd Day of September 2010

D.A. ONYANCHA

JUDGE

