REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KERICHO

CRIMINAL APPEAL NO. 43 OF 2009

JAMES MBOGA OLUOCH…….....…….. APPELLANT

VERSUS

REPUBLIC …….....……. RESPONDENT

(Appeal from the judgment of the Senior Principal Magistrate at Kericho, Hon. W. Nyarima given in Kericho SPM CR. C. NO. 16 of 2007)

JUDGMENT

The Appellant, **James Mboga Oluoch**, was convicted on 5th August, 2009 by the Senior Principal Magistrate, Hon. W. Nyarima in Kericho S.P.M. Criminal Case No. 16 of 2007 of the offence of Stealing contrary **to Section 275** of the Penal Code, **Chapter 63** of the Laws of Kenya and sentenced to imprisonment for a term of two years. The particulars of the offence were that the Appellant ***"on 16th April, 2007 at Ongata Rongai Police Station in Kajiado District of Rift Valley Province stole a micro tape recorder Serial Number 2500728, Make Sony, a micro cassette and a microphone valued at the sum of Shs. 8,500/=, the property of Kenya Anti-Corruption Commission".***

Aggrieved by the conviction and sentence, the Appellant through his advocates, **Messrs Onyango Jamsumba & Company** filed the appeal herein against conviction and sentence. In his Petition of Appeal, he put down nine grounds of appeal in which he contended that the charge sheet was defective, that the trial court misdirected itself in evaluating evidence, that the trial court shifted the burden of proof, that the prosecution evidence was contradictory, that the trial magistrate erred in law and fact in finding that the guilt of the Appellant had been proved, and that the trial magistrate erred in not finding that some elements of the evidence adduced by the prosecution was in bad faith. In ground 9 of the Petition it was contended that the trial Magistrate failed to record evidence and submissions that favoured the Appellant's case.

The appeal was summarily rejected on 6th October, 2009 by the Hon. Lady Justice Ang'awa under **Section 352(2)** of the **Criminal Procedure Code (Cap 75)** but the Court of Appeal on 1st April, 2010 set aside the order of the Hon. Lady Justice Ang'awa and in lieu thereof ordered that the appeal be admitted to hearing because the Petition of Appeal clearly indicated that the substance of the grounds of appeal clearly indicated that the conviction was against the weight of the evidence. It ordered that the appeal be heard on priority basis.

A supplementary Petition of Appeal was filed in Court on 28th June, 2010. It contained the following twelve grounds.

1. that the trial court erred in law and fact by convicting the Appellant on the basis of a defective Charge Sheet.

2. that the trial court erred in law by failing to comply **with Section 77(2) (b) (c) (f)** of the Constitution as read with **Section 198** of the Criminal Procedure Code (Cap 75) Laws of Kenya.
3. that the charges were not proved beyond reasonable doubt as required by the law.
4. that prosecution failed to call critical witnesses to the prejudice of the Appellant.
5. that the trial court erred in law by convicting the Appellant against the weight of evidence adduced.
6. that the trial court erred in law by shifting the burden of proof to the Appellant contrary to the law.
7. that the trial court erred in law and fact by failing to resolve material contradictions and inconsistencies in favour of the Appellant.
8. that the trial court erred in law by allowing written submissions contrary to well settled common law principles of law.
9. that the court erred in law by relying on uncorroborated evidence to corroborate.
10. that the trial court erred in law and fact by misapprehending the facts and applying wrong legal principles to the prejudice of the Appellant.
11. that the trial court erred in law by failing to analyze the entire circumstances and evidence in favour of the Appellant.
12. that the trial court failed to record evidence favourable to the appellant.

When the appeal came up for hearing before me on 14th July, 2010, Mr. Ondieki, learned Counsel for the Appellant made submissions in support of the grounds set out in the Supplementary Petition of appeal while Mr. Kivihya, the learned State Counsel, conceded the appeal.

This case has a sad ring to it. It reflects the flexing of muscles between law enforcement officers and sleuths and their large egos as well as abuse of both authority and law in a game in which the officers tried to outwit one another while using a member of the public as a pawn. In the end, the police got the member of the public, Paul Maina Nyambura who is also referred rightly or wrongly as Paul Maina Njuguna, charged at Kibera with unlawful possession of bhang and escaping from lawful custody etc while KACC sleuths got Police Constable James Mboga Oluoch (the Appellant) charged, *inter alia*, with stealing a micro tape Serial No. 2500725, make Sony, a micro cassette and a microphone.

On 13th April, 2007 PW3, Inspector Martin Wekesa of KACC fitted Paul Maina Nyambura with a tape with mini cassette and a microphone which ostensibly KACC had in their office. Senior Sgt. Robert Karani of KACC played back the tape on 16th April, 2007 and found that it contained sheng which was unsuitable. On 16th April, 2007, IP Martin Wekesa fitted the gadgets again on Paul Maina Nyambura who proceeded to Ongata Rongai Police Station in the hope of taping the Appellant taking the bribe. But the Appellant seems to have smelt a rat when Paul Maina Nyambura returned to the station on 16th April, 2007. The Appellant got hold of Paul Maina Nyambura and pushed him into the cell with the assistance of his two colleagues. While doing so, he detected the recording gadgets on Paul Maina Nyambura and disconnected the cassette. That is the last time the gadgets were seen. Irked by this, the Appellant alleged that he had found bhang on Paul Maina Nyambura but the Appellant's colleagues who assisted him to push Pual Maina Nyambura to the cells, namely PC Joseph Anyona Mutesa and PC Tyipisa denied seeing bhang on Paul Maina Nyambura at the time. One cannot fail to see vendetta by the Appellant. The evidence of PW1, is unsafe for the simple reason that there is doubt whether PW1 had the gadgets on him when the Appellant pushed him into the cells especially in view of the relationship between PW1 and the Appellant who were trying to nail each other. Other circumstances in the case do not show that an irresistible inference can be made on the culpability of the Appellant. The test to be applied before inferring guilt in a case based on circumstantial evidence was spelt out in the case of **SIMON MUSOKE V. REPUBLIC [1958] EA pg 715** and particularly at page 716 where the then Court of Appeal held that ***…"in a case depending exclusively on circumstantial evidence, the Court must, before deciding upon a conviction, find that the inculpatory facts are incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of guilt".*** In the present case the direct evidence given by PW1 is shaky and unreliable unless corroborated to ensure that it is safe to convict on it. The circumstantial evidence does not corroborate PW1's evidence by showing that the Appellant took the property referred to in the charge. Applying the test in **Musoke's case**, it cannot be said that there are inculpatory facts that are incompatible with the innocence of the Appellant and incapable of explanation upon any other reasonable hypothesis than that of guilt. In these circumstances the court cannot but give the Appellant the benefit of the doubt. The trial court went astray in this regard.

Mr. Kivihya, the State Counsel, correctly conceded.

In the result, I allow the appeal, and quash the conviction and set aside the sentence. Unless otherwise lawfully held, the Appellant, if held, shall be released and set free forthwith.

DATED at **KERICHO** this 28th day of October, 2010

G.B.M. KARIUKI, sc
RESIDENT JUDGE
COUNSEL APPEARING
Mr. P. Kiprop State Counsel for the Respondent
Appellant in person