REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI (NAIROBI LAW COURTS)

HIGH COURT CRIMINAL APPEAL 445 OF 2005

ANTONY ITOGU MUMBI…….....……..APPELLANT

Versus

REPUBLIC…….RESPONDENT

(From the decision by M.N. Murage P.M. in Criminal Case 25 of 2004 (Kikuyu)

J U D G E M E N T

Anthony Itogu Mumbi (***the appellant)*** has filed the appeal against both conviction and sentence.

The appellant was charged with two others for robbery with violence contrary to Section 296 (2) P.C that on the 16th day of October 2004 at Nyathaine village in Kiambu District within Central Province, jointly armed with dangerous weapons, namely guns, robbed Anthony Macharia Karungo, one mobile phone make Erickson T-10, wrist watch (Omega) and cash Kshs. 500/- plus ten dollars all to the total of Kshs. 4550/- and at or immediately before or immediately after the time of such robbery used actual violence to the said Macharia Karungo.

They all faced an alternative charge of handling stolen goods contrary to Section 322 (2) of the Penal Code that on the 16th day of October 2004, at Nyathaine village, otherwise than in the course of stealing, dishonestly retained one mobile phone Erickson T 10 valued at Kshs.3800/- , knowing or having reason to believe it to be stolen goods.

The appellant was convicted on the alternative charge of handling stolen goods and sentenced to serve ten years imprisonment while his co-accused were placed on three years probation.

The appellant appealed on the following amended grounds: -

1. That the ownership of the mobile phone and the sim card in question was not proved by prosecution to the required legal standard.

2. That the learned trial Magistrate erred in failing to find that the police officers who recovered the alleged exhibits gave conflicting evidence.

(3) That his defence was not adequately considered.

3. That the sentence involved was manifestly

harsh and excessive considering all the circumstances in the matter.

In his submissions to the Court, the appellant stated that

PW1 failed to produce any documentary evidence to substantiate to the court that he owned the said mobile phone and he did not even mention its model or give the serial number or the pin number of the alleged sim card.

The appellant points out that in his evidence, PW1 told the Court this-

> ***"I knew the serial number, I had bought it in town, Receipt lost".***

Yet PW1 never stated that serial number which he claimed to know. Appellant sought to rely on the decision in ***Shaban Bin Donard V.R (1940) EACA 76*** where the Court held:-

"***It was unsafe to act on evidence of a witness who was unable to tell how he could identify his article".***

The learned state counsel did not oppose the appeal and conceded that the charge of handling stolen goods was not proved because for such a charge to be proved, the owner of the goods must positively identify the said stolen goods yet the evidence given by PW1 was not conclusive on identification having not produced any receipt nor given the phone's serial number. With regard to the said phone PW1's testimony was as follows

"***My phone was recovered plus the sim card. One screw was lost. I knew the serial number. I had bought the phone in town. Receipt was lost.***"

What were the distinguishing features that made PW1 determine that the said phone number was his stolen one? None is recorded in the proceedings. He refers to one screw being lost, but in Court he did not point to a lost screw on the phone which was produced nor is it clear whether that phrase means it had a lost screw prior to the incident or after the incident. Since the receipt was said to be lost and the appellant knew the phone's Serial Number why then didn't he give it to Court to confirm that it matched the one that was recovered and that PW1 could positively identify the phone by its serial number which he claimed to know?

It is also not clear how he was able to determine that the sim card produced was his – no identification mark or feature is referred to and I agree that there was no positive identification by the complainant and this position is fortified by the decision in ***Shaban's*** (infra) regarding identification of one's articles.

The present case was therefore not proved to that required legal standard.

As regards the appellant's defence, the learned trial Magistrate did not analyse it, and the State Counsel submits that the learned trial magistrate simply gave a one line summary that they told the Court they were found by police in accused 1's house and arrested". Thus in her finding, she stated-

"***They offered no satisfactory explanation of prosecution of the stolen phone".***

Was there anything to analyse beyond what the learned trial Magistrate considered in the defence? I have read the appellants defence, really there was nothing material which the trial magistrate could have analysed, the relevant part of his defence simply is that police went to his house, found him with his friends, beat them up and arrested them. So that limb of his appeal holds no water. Was the sentence manifestly harsh and excessive? The learned state counsel submitted that it was observed that appellants co-accuseds were ordered to serve a probation period of three years whilst Appellant was sentenced to ten years (10) imprisonment. Appellant was said to be the first offender and learned State Counsel submits that this was an improper exercise of discretion by the learned trial magistrate especially considering the disparities in the sentences. It seems initially that the learned trial magistrate called for a probation report in respect of all the three persons charged, but when the reports were presented to court, the appellant was

not suitable for a probation sentence. That may explain why the appellant was given a custodial sentence. However having said that, I think ten years imprisonment for having stolen phone worth 3800/- or 2800/- was rather harsh on the appellant. From the aforegoing then, the conviction cannot hold and is quashed. The sentence is set aside and appellant set at liberty forthwith unless otherwise lawfully held.

Delivered, Signed and dated at Nairobi this 23rd day of April 2008.

H.A Omondi

Judge