REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL NO. 59 OF 2006

COLLINS OMUKUBA ASIRA …….. APPELLANT

V E R S U S

REPUBLIC …….. RESPONDENT

J U D G M E N T

The appellant, **COLLINS OMUKUBA ASIRA**, was convicted for the offence of handling stolen property contrary to **section 322 (2)** of the Penal Code. He was then sentenced to imprisonment for three years.

In his appeal he complained that he had been convicted by one court on several different cases. It was his view that that court ought to have sent some of the cases to another court.

He also submitted that his conviction was not sound as it was based on the uncorroborated evidence of only the complainant.

In any event, the said complainant is said to have failed to prove ownership of the goods in issue.

The appellant also submitted that the trial court erred by allowing the Assistant Chief of another area to testify as a witness for the prosecution.

Finally, the appellant pointed out that when he was arrested, he was not found with any of the items that had allegedly been stolen. He therefore asked this court to allow the appeal, set aside his conviction, quash the sentence and set him free.

Although the appellant did not say so when canvassing the appeal, he had, in his written grounds of appeal, asked this court to order that the sentences he was serving should run concurrently.

In answer to the appeal, the State submitted that the evidence adduced by the prosecution was clear and consistent. Mr. Karuri, the learned State Counsel, submitted that the evidence was sufficient to prove the case against the appellant, beyond any reasonable doubt. Therefore, in his view, the conviction was safe.

He also noted that the alibi fronted by the appellant, as his defence, was in relation to a date other than when the offence was committed.

Finally, the State expressed the view that the sentence imposed was justifiable because the appellant was not a first offender.

I have given consideration to all the evidence on record, and re-evaluated the same.

PW1, JULIANA OSITA, testified that she had locked her son's house on the night of 1/3/2005. However, on the morning of 2/3/05, when she woke up, she found a hole in the wall of the said house. On opening the house, she found a table, suitcase, a blanket, a jembe and a spade, all missing. She reported the matter to the village elder and later to the police.

Two months later, on 10/10/2005, the items were recovered from the appellant's house.

During cross-examination, PW1 said that the items which had been stolen from her son's house were very well known to her.

Although she did not produce receipts or any other documents to prove ownership, I hold that that did not in any way diminish her assertion as to ownership. That is because there is no legal requirement that ownership can only be proved through receipts or other documents.

PW2, SGT. SIFUNA, said that he was a police officer attached to the Butere Police Station. He recalled that on 2/3/2005, PW1 reported to him that her son's house had been burgled and things stolen therefrom.

He also said that on 10/10/2006, the Assistant Chief Caleb Alunga Wanda, (PW3) had phoned him to report that many things which had been stolen had been recovered from the appellant's house. Amongst the recovered items were those that had been stolen from PW1's son's house.

However, as the appellant had run away when he saw PW3 approaching his house, in the company of youth wingers, it was not until 15/10/2005 when the appellant was arrested.

PW3, CALEB ALUNGA WANDA, testified that he received information from an informer, that the appellant was handling stolen property. He therefore informed the police, through phone, and he also organized his youth wingers so as to go over to the house of the appellant. On reaching the home, PW3 found the appellant, but the latter ran away upon seeing the Assistant Chief and the Youth wingers.

When PW3, and the police officers who arrived shortly after him, searched the house, they recovered many items from a big hole which had been dug inside the said house.

As is clear from the above, the prosecution called three witnesses. It is therefore not clear to me why the appellant submitted that his conviction was founded on the evidence of the complainant alone.

When put to his defence, the appellant said that he had taken his sick sister to hospital. That sister of his was in Kisumu. On returning home, he found that his mother had been arrested, presumably for being found in possession of stolen items. However, on 11/10/2005 the appellant went to the police station and produced receipts for the said items.

The appellant also said that PW3 told him that he was revenging because the appellant had refused to carry things for him on his "boda boda" bicycle.

It is noteworthy that the appellant said that he took his sister to hospital on 9/10/2005. He also said that he took receipts to the police station on 11/10/2005.

However, the appellant said absolutely nothing about 10/10/2005, which is the material date, when the stolen items were recovered from his house. In other words, he tendered no defence to the case that had been made out against him, by the prosecution.

The fact that PW3 was an Assistant Chief from "another area" was not reason enough to bar him from giving evidence in the case. There is no legal requirement that only those persons who hold positions of leadership in the area where an offence was committed can testify in a case.

Having re-evaluated the evidence, I find that the prosecution case was clear and well corroborated. I also find that the attempt to accuse PW3 of being on a revenge mission against the appellant was nothing more than an afterthought, as the appellant did not raise the issue when he was cross-examining that witness.

In the result, I find that the conviction was safe as it was based on sound evidence which proved the case beyond any reasonable doubt.

As regards the sentence, it is lawful and I find no reason to warrant interference with the discretion exercised by the learned trial magistrate.

Also, just because the said magistrate had heard other cases involving the appellant was not a basis for not hearing the case which gave rise to this appeal.

It is noteworthy that no allegations of impropriety have been made by appellant against the magistrate. Had the appellant had any misgivings about the independence of the trial magistrate, he should have raised the issue before that court. He did not do so. Therefore, he cannot complain at this stage.

Finally, the appellant was not a first offender. He had been convicted and sentenced for other offences, in respect to which he had been tried separately. As the details of those cases were not made known to this court, I do not know if the said cases arose from the other items which were recovered from the appellant's house on 10/10/2005. Had that been the position, the appellant would, ordinarily, have been faced with several charges within one case.

For now there is no legal basis for me to order that the sentence handed down by the learned trial magistrate should run concurrently with sentences handed down in other cases.

In the result the appeal is without merit, and is dismissed. I uphold both conviction and sentence.

Dated, Signed and Delivered at Kakamega, this 4th day of June, 2008

FRED A. OCHIENG

J U D G E