



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

Criminal Appeal 55 of 2006 & 56 of 2006 (Consolidated)

GEOFFREY KIPKOECH KIRUI.....1ST APPELLANT

SAMWEL KIPNGETICH TIROP.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The appellants herein were tried and convicted on a charge of **being found in possession of property reasonably suspected to have been stolen** contrary to **Section 323** of the **Penal Code**. They faced other charges of **Stealing goods** contrary to **Section 279 (c)** and **handling stolen goods** contrary to **Section 322 (2)** of the **Penal Code** but were acquitted on the said charges for lack of sufficient proof.

The particulars of the respective charges under **Section 323** were that on 4th February 2006, the appellants, having been detained by PC George Momanyi (No.66578) at Londiani Police Station and as a result of an exercise of powers under **Section 26** of the **Criminal Procedure Code** were found in possession of various goods reasonably suspected to have been stolen or unlawfully obtained. The first appellant, Geoffrey Kipkoech Kirui was found in possession of 11 pairs of long trousers, 4 kilograms of rice, 2 kilograms of sugar, 1 ½ litres of juice and 2 kilogram's of baking flour. The 2nd appellant, Samwel Kipngetich Tirop was found in possession of 11 long trousers, 4 kilograms of sugar, 4 kilograms of cooking fat and a cap.

The genesis of the charge were that the two appellants had been caught by members of the public at Londiani Junction as they boarded a public service vehicle, (a minibus) while having in their possession sacks containing various items. The members of the public who testified as PW2, 3, 4 and 5 had received information that people were stealing from public service buses at night as they slowed down at the place called Londiani junction. PW2 who owns a hotel nearby testified that a passenger who had alighted at the junction on 31st January 2006 had informed him of some three people who were removing things from the boot of a bus at the first speed bump as one approached the center from the Nairobi direction. PW2 alerted PW3, PW4 and PW5 and they all agreed to lay an ambush. They sat by a fire at the bus stage from about 11.00 p.m. until 5.00 a.m. and were able to witness people opening the side boots of buses as they slowed down and pulling out luggage. They observed persons, whom they believed were the appellants, remove luggage and place it aside. At about 5.00 a.m. the appellants came to the bus stage, each carrying a sack, when a minibus/matatu arrived the appellants boarded it. The "vigilantes" alerted the minibus crew and asked them to drive the vehicle to the Londiani Police Station. PW2, PW3, PW4 and PW5 all boarded the matatu. They tricked the appellants that the matatu was the subject of a warrant of arrest and that was why it was being driven to the Police Station. At the police station the witnesses

reported their arrest of the appellants together with a third person in their company and handed them over to the police. The three were re-arrested. After some interrogation in respect of the luggage in their possession, they were charged with the offences as stated here before.

Meanwhile, a passenger by the name Peterson M. Mwangi (PW1), travelling in a bus bearing a registration No.KAR 879Y from Nairobi to Kakamega and which had passed the said Londiani junction on the said night and whose goods had been loaded into the side boot of the bus by the conductor, PW6, discovered, on arrival of the bus at Kakamega on 1st February 2006, that the said goods were not on the bus. PW1 said he was a shoe vendor and that he had bought several pairs of Mitumba (2nd hand) shoes from Nairobi for vending in Kakamega where he conducted his business. He testified that the shoes were similar to the ones found with the appellants. He was not, however, able to prove ownership of the same to the satisfaction of the court.

The appellant's appeal against their conviction and sentence is founded on similar grounds, to wit, that:

- (1) They were convicted on insufficient evidence.
- (2) They were not properly identified as to connect them with the offence.
- (3) There was no complainant to prove that the goods found in their possession were stolen property.
- (4) They were not found to have been armed with any dangerous weapons.
- (5) That the sentence of 3 years imprisonment was harsh and excessive.

The State, represented by the learned state counsel Mr. Koech, submitted that the conviction and sentence were proper because the appellants were found with goods suspected to have been stolen in circumstances which were clearly explained by the prosecution witnesses. That the appellants claim to have bought the said goods at different places and were travelling to different destinations was disbelieved by the trial court on the basis that the items were so similar and very unlikely to have been purchased separately. He asked the court to uphold the conviction and sentence.

The two appellants on their part asked this court to examine the record of the lower court, to analyse the evidence adduced thereat and to find mainly that they were unarmed when arrested, meaning therefore that they were wrongly suspected. Also that the goods found on them were theirs.

As stated earlier in this judgment, the appellants were acquitted of both the "stealing" and "handling" charges. After considering the facts of the case as appearing in the prosecution evidence and weighing the defence evidence on the basis of which the learned trial magistrate found that the appellants had failed to satisfy the court as to how they had come across the items found in their possession, the learned trial magistrate convicted them for the offence under **Section 323**. The learned trial magistrate noted in his findings that:

"It is not possible that three people purchasing goods at three different locations and who are not doing it in consultation would purchase almost similar items."

The learned trial magistrate correctly considered the provisions of **Section 323** when he found that:

"Section 323 of (the) Penal Code places the burden on the person found in possession or conveying in any manner anything (which) may be reasonably suspected of having been stolen or unlawfully obtained."

This is so in view of the fact that the provision provides that:

"Any person who has been detained as a result of the exercise of the powers conferred by Section 26 of the Criminal Procedure Code and is charged with having in his possession or conveying in any

manner anything which may be reasonably suspected of having been stolen or unlawfully obtained, and who does not give an account to the satisfaction of the court of how he came by the same is guilty of a misdemeanour.”

However, my understanding of **Section 26 (1) (c)** of the **Criminal Procedure Code** is that the provision authorises a police officer such as PC. George Momanyi or any other person authorised in that behalf by the Commissioner of Police to:

“stop, search and detain any person who may be reasonably suspected of having in his possession or conveying in any manner anything stolen or unlawfully obtained.”

Clearly from the facts herein the detention of the appellants was not in exercise of any power under **Section 26** of the **Criminal Procedure Code** by the said PC. George Momanyi. The stopping and detention of the appellants occurred at Londiani Junction and was done by PW2-Samwel Kipngeno Mutai, PW3-Geoffrey Ngetich, PW4-Antony Korir, PW5-Joel Lelei who are neither police officers nor persons authorized by the Commissioner of Police as envisaged in the section. It is quite clear from the said PC George Momanyi’s evidence that he did not exercise any powers under **Section 26** of the **Criminal Procedure Code** as stated in the Charge Sheet. He testified as PW7 and said the accused:

“Were brought by members of the public i.e. Antony Korir and two others.... I re-arrested and detained the luggage...They were brought in a Nissan. It is alleged that the 3 were stealing along the road at the Londiani junction. I took them off the motor vehicle after Geoffrey Ngetich called me (PW3). He told me they had arrested people stealing from buses. At that time the 3 accuseds were at report office. Each of the accused had a luggage....I recorded what each was carrying...After I ‘recovered’ the items. I searched accused and locked them up. They had no identification papers... I handed over the items to Crime (office) which were later handed over to CID Kericho.”

The said George Momanyi received the appellants at the police station and re-arrested them. He detained them after searching what was in the luggage they carried. I do not consider that to be an exercise of the powers envisaged under **Section 26 (1) (c)** of the **Criminal Procedure Code**. A purported exercise of power does not in my view amount to a proper exercise of a power conferred by Statute. In my considered view, the appellants were not detained as a result of the exercise of powers conferred under **Section 26** of the **Penal Code**. The power under **Section 26 (1) (c)** of the **Criminal Procedure Code** having been either wrongly exercised by unauthorized persons or having not been exercised at all in regard to the appellants, I find that, given the facts of the case the conviction and sentence herein are clearly wrong and do constitute a miscarriage of justice. In this regard I am guided by the persuasive authority of **CHARO vs REPUBLIC [1982] KLR 308** where Muli J, held that one of the ingredients of the offence under **Section 323** of the **Criminal Procedure Code** is that a person must have been detained pursuant to Section 26 of the **Criminal Procedure Code (Cap.75)**.

As regards the sentence I find that even if the offence had been proved, the sentence passed herein was also erroneous since the sentence prescribed by law for an offence under **Section 323** of the **Criminal Procedure Code** is two years imprisonment.

For the above reasons I do not accept the learned State Counsel’s submission that the convictions and sentence should be upheld. I allow the appeals, quash the conviction and set aside the sentence.

Accordingly the two appellants herein are to be set free forthwith unless they be otherwise lawfully held.

DATED, signed at delivered at NAKURU this 31st day of July 2008

M.G.MUGO

JUDGE

In the presence of: