REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CRIMINAL APPEAL 240 OF 2004

MICHAEL KIRIMI……..……APPELLANT

Versus

REPUBLIC……...……...…….RESPONDENT

(Being Appeal against the sentence and conviction by P. C. Tororey, Senior Resident Magistrate, in the Senior Resident Magistrate's Criminal Case No. 2169 of 2002 at Nanyuki)

JUDGMENT

The Appellant was convicted of the offence of handling stolen goods contrary to *Section 322(2)* of the Penal Code and was sentenced to serve seven years imprisonment with hard labour. Particulars alleged that on 5th day of December 2002 at Ngushishi Market, the Appellant, other than in the course of stealing, dishonestly received or retained one radio cassette make sonny knowing or having reason to believe it to be stolen good.

From the evidence during the trial the said radio, identified as Serial Number 0413615 had been robbed from P.W.1, John Kathawe Luka on the 18th day of December 1999. Some three years thereafter P.W.1 saw and identified the radio on 5th December 2002 in a repair shop of P.W.6 Edward Gitonga but when the radio was recovered the following day on 6th December 2002, it was in possession of P.W.4, an Administrative Police Constable called James Muriuki. Following that recovery, the Appellant was arrested and charged with robbery with violence contrary to *Section 296(2)* of the Penal code. He faced the alternative count of handling stolen goods as stated earlier.

The Appellant filed eight grounds in this appeal which he prosecuted himself, the State Counsel for Respondent being Mrs Ngalyuka.

To be brief, the radio in question may have been the one robbed from P.W.1 some three years prior to the date of its recovery but I do think that the evidence relating to the recovery of that radio is not consistent suggesting unreliability.

P.W.1 told the court that on 5th December 2002 having identified his stolen radio – while in the repair shop of P.W.4 Gitonga, he told Gitonga "to detain" the radio until P.W.1 returned to the shop "with a police officer". But when P.W.1 returned to the shop with the police on 6th December 2002 the radio was not there and they were informed the radio had been taken "by Kirimi and Muriuki who was a police

officer".

Instead of going to where the "police officer" Muriuki was, they went to the business place of Kirimi and that was on 7th December 2002 in the company of two A. P. officers colleagues of A. P. Muriuki. The Appellant who seems to have thought the radio P.W.1 was talking about may have been the one Muriuki had taken for repair at P.W.6's shop, led P.W. 1 and the police officers to Muriuki's place where the radio was found and recovered and thereafter the Appellant arrested and charged.

In his defence, the Appellant who claimed was the owner of a similar radio Serial Number RX CT 84000266 which P.W.6 may have mistaken for the stolen P.W.1's radio, told the court that he knew P.W.4 had a radio for repair by P.W.6 because P.W.4 had sought financial support from the Appellant to meet repair costs. As the Appellant obtained money later and followed P.W.4 to go and pay the money at the shop of P.W.6, the Appellant found P.W.4 had taken the radio away and therefore returned to his place - only to be subsequently arrested and charged with the offences herein.

Without going into more details, it is noted that the Appellant did not accept he committed the offence and produced a receipt he said was of his radio which P.W.6 had mistaken for the one P.W.1 was claiming in court. No effort was made by the prosecution to disprove that claim by having the Appellant's claimed radio in court to clear with P.W. 6. The Appellant who was in custody said his radio was at his home and produced its receipt.

Further, the robbery claimed by P.W.1 having been an event of three years prior to the offence of handling alleged to have been committed by the Appellant in this case, no evidence showing the time when the Appellant received the stolen radio and how he received it was adduced. That was more important especially since the stolen radio was found in actual possession of P.W.4 and not the Appellant, at the time of the recovery.

Expanding on that, the circumstances called for evidence to prove why the Appellant was in law a handler of stolen goods, when P.W.4 was not and was made to be a credible witness. Why was P.W.4 not an accomplice for his evidence to require corroboration?

Further while it may be assumed that the radio in question had been stolen at the alleged robbery of the complainant, I find completely no evidence proving two essential ingredients of this charge of handling, first, that the Appellant "dishonestly" received or retained the radio cassette, and secondly that the Appellant received or retained that radio "knowing or having reason to believe it to be stolen goods"

without those two important ingredients having been proved, evidence of mere possession of stolen goods does not, in the normal circumstances as is apparent in this case, prove the offence of handling under *Section 322(2)* of the Penal Code to the required standard to sustain a conviction.

With the above said, I hold the view there ought to have been no conviction of the Appellant on the basis of the evidence on record in this matter. I do therefore allow the Appellant's appeal. Quash his conviction and set aside the sentence imposed upon him. I do order that the Appellant be released forthwith unless lawfully detained in some other cause.

Dated this 19th day of February 2007.

J. M. KHAMONI

JUDGE