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

Criminal Appeal 179 of 2006

ROBERT MUGAMBA NABUSABA……..…….……. APPELLANT

-AND-

REPUBLIC……...……...RESPONDENT

(An appeal from the Judgement of Senior Resident Magistrate Lucy Mutai dated 11th April, 2006 in Criminal Case No. 127 of 2005 at the Githunguri Law Courts)

JUDGEMENT

The appellant was tried on several charges of robbery with violence contrary to s.296(2) of the Penal Code (Cap.63), and on lesser alternative charges. This appeal relates to the alternative charges, upon which, alone, the appellant had been convicted.

One of the alternative charges was: handling stolen goods contrary to s.322(2) of the Penal Code (Cap.63); the other one was to the same effect. The particulars of the alternative charges were:

(i) that the appellant, on 12th January, 2005 at Githurai in Nairobi, otherwise than in the course of stealing, dishonestly received or retained two blankets and one bed sheet valued at Kshs.2,500/= the property of ***Danson Ng'ang'a Makumi***;

(ii) that the appellant, on 12th January, 2005 at Githurai in Nairobi, otherwise than in the course of stealing, received or retained one radio-cassette of make National Star, valued at Kshs.1,500/= the property of ***George Kamura Kamau.***

PW1, ***George Kamura Kamau***, testified that at 11.30 p.m. on 11th January, 2005 somebody banged his door as he slept with his family. Four men burst in, who stole his television set, a radio and three pairs of shoes all valued at Kshs.7,400/=. When he reported the matter at Kibichoi Police Station, he learned that some stolen items had been intercepted by the Police at Kasarani. The 1st complainant (PW1) went with the Police and was able to identify his radio, which had been stolen in the night. At the time of the theft, PW1 had not identified the robbers, due to darkness and lack of visibility.

The 2nd complainant, PW2 was sleeping in his house at 2.00 a.m. following the night of 11th January, 2005 when robbers broke into his house. He and members of his family lost various items, valued at Kshs.38,650/=. On the following morning he reported the matter to Kibichoi Police Station and, while there, learned that some stolen items had been recovered by the Kasarani Police. PW2 went with the

Police to see the stolen goods; and he was able to identify one bed-sheet and two blankets which he recognised as some of the items stolen in the night. PW2 was then shown the appellant herein as the person found in possession of the goods in question; and PW2 later said in Court that the appellant had been at his house when he had been robbed in the night.

The learned Magistrate acquitted the appellant of the robbery charge, on account of unsatisfactory evidence of identification.

PW5, ***Sgt. Muthuri*** had found the accused with luggage containing the stolen items, which included PW1's and PW2's stolen goods. The learned Magistrate found PW5's testimony truthful, and carrying much weight, in relation to the handling of stolen goods by the appellant. In the trial Court's words:

"***I [believed PW5's] evidence that he found [the] accused with …luggage which contained the items exhibited before the Court by the prosecution. The officer did not even know [of] the series of robberies [that] had taken place [at] Kibichoi. He did not know that the complainants herein had been robbed and lost some of the items exhibited before [the] Court. He did not even know the complainants herein. I did not believe that these exhibits by the prosecution were just planted on the accused person; instead I was convinced that the accused person was found in…physical possession [of those exhibits] inside a matatu plying the Ruiru – Nairobi road. The vehicle was from the Ruiru direction where these exhibits had been stolen. The accused was arrested at 6.00 a.m. on the morning following the material night. He was arrested some distance from the scene of crime. I was convinced that the complainants herein were robbed, as demonstrated by the items exhibited before the Court which I believe were indeed theirs, stolen from them on the material night. Even if [the] accused denied being in possession of the same, I find the evidence of PW5, Sgt. Muthuri very cogent and convincing; I have no reason to doubt the same. He arrested the accused while in possession of the same."***

The learned Magistrate held, in my view, quite rightly, that "the accused person had [the complaints' effects] in his possession…when he knew that the same had been stolen, or unlawfully obtained." She thus found the appellant guilty as charged, on the alternative counts. She sentenced the appellant to three years' imprisonment on each count, the terms to run consecutively.

In his appeal, the appellant contended that: the trial Magistrate erred in accepting the arresting officer's testimony, that he had found the appellant in possession of stolen goods; the trial Court convicted on insufficient evidence; the sentence was harsh and excessive; the defence evidence was not considered.

Learned State Counsel ***Mr. Makura*** submitted that PW1 had positively identified some of his stolen goods which were recovered in the appellant's possession, and the position was precisely the same with PW2. Counsel noted that PW5, the arresting officer, had arrested the appellant with the stolen goods, and the appellant had no reasonable explanation of how the goods came to be in his possession. This evidence, it was urged, and quite properly, in my opinion, was sufficient to sustain the conviction on the two alternative counts. As the appellant had no explanation for his possession of the stolen goods, he must have known they were stolen; or he got them dishonestly; or he was in the process of disposing of them for the benefit of another person. It was adequately proved that the goods in question were stolen from PW1, PW2 and PW3.

Learned counsel submitted that the trial Court had carefully considered the bare denials in the appellant's unsworn statement, and had rightly rejected the same.

Mr. Makura, on sentence, submitted that even though s.14 of the Criminal Procedure Code (Cap.75) allowed the imposition of sentences running consecutively, in respect of one offender, where offences form part of a series and are similar in character, it was prudent to impose sentences that run concurrently. He urged that the discretion of the learned Magistrate on sentencing had not been properly exercised, in the light of the appellant's mitigation address which had been recorded. He urged that concurrent sentence be substituted for the two consecutive ones.

The appellant, who had filed written submissions, had no particular objection to the turn in learned State Counsel's submission.

For reasons already apparent in this judgement, I hold that the appellant was rightly convicted on the two charges of handling stolen property.

As regards sentence, and in the context of the appellant's mitigation address centring on his state of health, and his being the family bread-winner, I would be minded to substitute the penalty imposed. The two offences in respect of which conviction was adjudged, are not only *inherently cognate*, but also constituted but *one series of contraventions of the law occurring simultaneously.* The sentencing discretion, in those circumstances, should ordinarily be applied to punish the relevant offences by concurrent sentence.

Being guided by the foregoing principles, I hereby uphold conviction, but set aside the sentence imposed by the trial Court, and substitute the same with two terms of imprisonment for three years each, as from the original date of judgement in the trial Court, running concurrently.

It is so ordered.

DATED and **DELIVERED** at Nairobi this 17th day of September, 2007.

J.B. OJWANG

JUDGE

Coram: Ojwang, J.

Court Clerk: Ndung'u

For the Respondent: Mr. Makura

Appellant in person