REPUBLIC OF KENYA

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

Criminal Appeal 275 of 2006

SAMSON MUSYOKI NZUKI……..……..……..…APPELLANT

VERSUS

REPUBLIC ……RESPONDENT

(From original conviction and sentence in Criminal case No. 3488 of 2005 of the Chief

Magistrate's Court at Kibera Mrs. Muketi P.M.)

J U D G M E N T

SAMSON MUSYOKI NZUKU, the appellant, was charged in the subordinate court jointly with another with one count of robbery with violence contrary to section 296(2) of the Penal Code. He was also charged alone with two counts of handling stolen goods contrary to section 323 of the Penal Code. After a full trial, the appellant and his co-accused were acquitted of the offence of robbery with violence. The appellant was however, convicted on the two counts of handling stolen goods and sentenced to serve four (4) years imprisonment on each of the two offences, which sentences were to run concurrently. Being aggrieved by the decision of the learned magistrate, the appellant has now appealed to this court. His grounds of appeal are that –

1. The learned trial magistrate erred in law and facts for ignoring that he was charged under section 323 and the maximum sentence was 2 years but he was sentenced to 4 years in each count.

2. The learned magistrate erred in not considering that the alleged radios were found in his possession having been brought for repairs.

3. The learned magistrate erred in not considering that the radios when recovered one had no battery and serial while the other was dismantled meaning it could not remit any communication and was also not charged with interfering with any company frequencies.

4. The trial magistrate did not consider his sworn defence which remained unshaken by the prosecution side.

The appellant also filed written submissions in support of his appeal.

Learned State Counsel, Mr. Makura, conceded to the appeal. Counsel submitted that the charges on which the appellant was convicted were not proved. Counsel contended that the appellant was convicted on the evidence of PW4 who testified that the appellant was found with a Nokia mobile phone while the charge related to possessing Motorola phone. Counsel also submitted that the arresting officer was not called to testify. Counsel also submitted that the appellant gave sworn defence and that the magistrate

erred in convicting the appellant because as a technician he could easily dismantle the phones.

I have perused the charges, the evidence on record and the judgment. The charges against which the appellant was convicted were count 2 and count 3 in the trial court. In count 3 the complaint was that the appellant was found in possession of pocket phone make, Motorola GP340 serial number 672 TAHM443 black in colour, reasonably suspected to be stolen or unlawfully obtained. In count 3, the complaint was that he had in his retention a pocket phone make Motorola without serial number black in colour reasonably suspected to have been stolen or unlawfully obtained. After the close of the prosecution case the appellant gave a sworn defence that he was a technician and those items were given to him for repair by one Simon Kitonga, with whom he was arrested (and who was apparently not charged nor did he give evidence).

In convicting the appellant, the learned magistrate stated –

"**As regards the two communication sets – the second accused was found with the same – he was not authorized and in court he asked for the unit and dismantled it with such case – meaning he had handled the same before. His story that he was a technician is not tenable. He had left one in the house but he was found with one in his pocket. His saying that he was looking for part (sic) of it is not true. He has not given a reasonable explanation as to how he got into possession of the two. This is not to shift the burden of proof but it would have cast reasonable doubt on the prosecution evidence."**

With due respect to the learned trial magistrate, the above statement was a misdirection. The appellant gave a full explanation on oath on how he came to possess the two items complained of. His sworn testimony was not challenged by the prosecutor. The prosecutor appears to have asked the appellant only one question to which the answer was – "I was found with the two radios." In my humble view, the finding by the learned magistrate that the appellant did not give a reasonable explanation, was a misdirection as it was not based on the evidence on record.

Secondly, it is trite that in a criminal case, the burden is always on the prosecution to prove the case against an accused person beyond any reasonable doubt. See **MUIRURI –VS- REPUBLIC [1983] KLR 205**. In our present case, in my view, there should have been a complainant who could be said to be the owner or special owner of the items or at least evidence that those items belonged to so and so or such and such an institution. The charges allege that the items were reasonably suspected to be stolen or unlawfully obtained. The question is "reasonably suspected to be stolen or unlawfully obtained from whom)". The issue was not whether the appellant could easily dismantle the items, because he was not charged with an offence of knowledge of dismantling the items. There was no evidence that the subject items belonged to the police, the post office or anybody. The charge against him was not related to his ability to communicate using the police communication system. Therefore, in my view the prosecution did not adduce evidence that was sufficient to prove the charges against the appellant. The appellant gave a reasonable explanation as how he came to possess those items which were for repair. I will allow the appeal against conviction.

The learned magistrate sentenced the appellant to serve four (4) years imprisonment on each of count 2 and count 3. Both offences were under section 323 of the Penal Code and they are described as misdemeanours and no specific sentence is provided for under the section. Therefore, in my view, the sentencing section applicable is section 36 of the Penal Code, which provides –

"**36. When under this code no punishment is specifically provided for any misdemeanour, it shall be punishable with imprisonment for a term not exceeding two years or with a fine, or with both."**

In my humble view therefore, the sentence of 4 years imprisonment for each count meted out by the learned magistrate were unlawful. However, I have found that the conviction is unsafe and cannot be sustained. I will therefore not say more on the sentence imposed. The learned State Counsel conceded to the appeal, and rightly so.

For the above reasons, I allow the appeal, quash the convictions and set aside the sentences imposed by the subordinate court. I order that the appellant be set at liberty unless he is otherwise lawfully held.

Dated and delivered at Nairobi this 24th day of October, 2007.

George Dulu

Judge

In the presence of –

Appellant in person

Mrs. Gakobo of State

Eric – court clerk