REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KAKAMEGA

Criminal Appeal 3 & 4 of 2006

(Appeals against both conviction and sentence of [S. O. TEMU, DMII PROF. ESQ.] in Kakamega Chief Magistrate's Court in Criminal Case No.2896 of 2005)

JOSEPH KHAKAVO …….…… 1ST APPELANT

PATRICK MAJANI ……..…… 2ND APPELLANT

V E R S U S

REPUBLIC …… RESPONDENT

J U D G M E N T

The two appeals herein were consolidated on 5.7.2006 because they spring from the same case and judgment. The first appellant, Joseph Khakavo, was the 1st accused in Kakamega C.M. Criminal Case No.289 of 2005 and the 2nd appellant, Patrick Majani, was the 2nd accused. They were both charged under **section 323** of the Penal Code with the offence of having suspected stolen property. The particulars of the charge in respect of the 1st appellant were as follows:-

"**Joseph Khakavo:-** ***On the 14th day of December, 2005 at Shirere s/location in Kakamega District within Western Province, having been detained by S/SGT BOSIRE as a result of the exercise of the powers conferred by section 26 of the Criminal Procedure Code, had in his possession (1) 3 car batteries, (2) 1 motor vehicle radio cassette make Sony (3) 2 shirts (4) 4 jeans long trousers (5) 4 t/shirts (6) 1 plan (carpentry machine) make bailey, (7) 1 radio speaker and compacts reasonably suspected to have been stolen or unlawfully obtained".***

The particulars of the offence in Count II relating to the 2nd appellant were as follows:-

"**Patrick Majani** – On the 14th day ***of December, 2005 at Shirere s/location in Kakamega District within Western Province, having been detained by S/SGT BOSIRE as a result of the exercise of the powers conferred by section 26 of the Criminal Procedure Code, had in his possession (1) 1 car battery make Panasonic, (2) 4 CDS (3) one motor vehicle radio cassette, (4) 2 radio speakers and (5) 1 radio cassette make Naiwa reasonably suspected to have been stolen or unlawfully obtained".***

When the charge was read to the appellants on 22-12-2005 in a language which the trial court did not record, each appellant is recorded to have stated "*it is true.*" The language in which the appellants pleaded to the charge was also not recorded. This was a grave error. **Section 77 (1)(b)** of the Constitution of Kenya stipulates that an accused person must be informed of the charge "*in a language*

that he understands as soon as practicable …..” A trial court is enjoined to indicate the language the accused states he understands, as well as the language that the charge is read and explained him and the facts constituting the offence are stated. The accused's precise words in his plea must be recorded. The offence with which the appellants were charged is defined by **section 323** of the Penal Code, Cap 63, as follows:-

Section 323 – “**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 or having been stolen or unlawfully obtained, and who does not give an account to the satisfaction of the court or how he came by the same, is guilty of a misdemeanour.”**

The power of a police officer to detain and search persons, aircrafts, vessels is found in **section 26** (1) of the Criminal Procedure Code. Section 26 (1) (c) of the Criminal Procedure Code stipulates:-

Section 26 (1) **A police officer, or other person authorized in writing in that behalf by the Commissioner of Police, may stop, search and detain -**

(c) Any person who may be reasonably suspected of having in his possession or conveying in any manner anything stolen or unlawfully obtained.

In **CHARO v. R. [1982] KLR 1 Muli J**., as he then was summarized the ingredients of the offence under section 323 of the Penal Code thus:-

“**1. The ingredients of a charge under Section 323 of the Penal Code are that a person must have been detained pursuant to Section 26 of the Criminal Procedure Code (Cap 75); the person must be charged with having in his possession or conveying anything reasonably suspected of having been stolen or unlawfully obtained; and the person must have failed to give an account to the satisfaction of the court of how he came by the thing so suspects.’**

The court in the aforementioned case went on to hold –

“**It is fatal omission not to explain to the appellant all the ingredients of a charge and not to ask the accused to give an explanation as to how he came to be in possession of the property, when the charge is one of handling stolen property contrary to section 323 of the Penal Code. The facts of the charge must also support the charge.”**

The trial court did not ask either appellant to offer any explanation. The court proceeded convict the appellants after they admitted the facts. Omission to explain to an accused person all the ingredients of the charge and to ask him to give an explanation as to how he came to be in possession of the property has been held to be fatal. This was the position in these consolidated appeals. For good measure, **Porter J. added in Kimanzi v. Republic [1983] KLR 325 that even if an accused admits all the assertions set out in the charge under section 323 of the Penal Code, it is a mandatory requirement that he must be asked whether he has any explanation for his possession of the said property and failure to do this renders the pea a nullity.**

In the instant consolidated appeals, the trial court proceeded to convict and sentence the appellants without asking them to offer explanation as to how they came by the property.

The 5 grounds of appeal in each of the two appeals were identical. But it was grounds 2 and 5 in each appeal which were more spot on. In these grounds the appellants stated:-

“***2 – The learned trial magistrate erred in law in meting out harsh and unwarranted sentence against the appellant in respect of facts that did not disclose an offence.”***

“***5 – The learned trial magistrate erred in law in failing to follow the law governing taking of pleas and***

further erred in convicting the appellant when the plea was not unequivocal."

Mr. Samba, learned counsel for the appellants who referred to the above authorities, submitted that the principles enunciated in the above authorities were not followed and that the learned trial magistrate went into error.

Mrs. Ann Kithaka, Senior Principal State Counsel rightly conceded the appeal. She also drew the attention of the court to the fact that in the handwritten proceedings, the sentence was altered to two years ostensibly from one year.

I have perused the record of appeal and given due consideration to the able submissions of Mr. Samba and Mrs. Kithaka and I note with satisfaction that both counsel did their home work and cited relevant authorities in these appeals to buttress their submissions. Often times, the quality of the court's judgment is as good as the depth of the research and presentation by the members of the Bar. Advocates are encouraged to research and prepare their briefs properly to give good quality service to their clients and assist in enhancing the quality of court decisions and development of jurisprudence.

It is my finding in these appeals that the trial magistrate fell into a fatal error in omitting to ask the appellants for an explanation of how they came to be in possession of the properties. This error rendered the plea a nullity in that the offence had not been constituted unless the appellants had been required to give an explanation of how they had come to be in possession of the properties and had failed to give an explanation to the satisfaction of the court. The conviction by the trial court was improper. As pointed out by Mr. Samba, the facts themselves did not disclose the offence charged. As regards sentence, it is improper for a trial magistrate to alter the sentence meted out and where this occurs, the trial magistrate must countersign and date the alteration to show firstly that it was done by the court and secondly that it was deliberate and thirdly that it was occasioned by error while writing and for this purpose time of such alteration ought to be indicated in addition to the date so as to clearly show that it was not made afterwards when the trial magistrate was factus officio.

In the result, I quash the conviction and set aside the sentence. Unless otherwise lawfully held, the appellants shall be released and set free forthwith.

Delivered, dated and signed at Kakamega this 15th day of November, 2007

G. B. M. KARIUKI

J U D G E