

REPUBLIC OF KENYA

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

Criminal Appeal 113 Of 2004

JAMES OLE SILANGA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

JAMES OLE SILANGA was jointly charged with five others with **CLINIC BREAKING AND STEALING** contrary to **Section 306(a)** of the **Penal Code**. The Appellant was in the alternative charged with **HANDLING STOLEN PROPERTY** contrary to **Section 322(2)** of the **Penal Code**. After a full trial, the learned trial magistrate, **MRS. ASENATH ONGERI**, convicted the Appellant of the alternative count and proceeded to sentence him to three years imprisonment. It is against the conviction and sentence that he now appeals to this court. The appeal is opposed by the State.

In brief the facts of the case were that PW1, the Complainant in this case left the clinic where she works at 3.00 a.m. on the night of 31st January and 1st February 2002. The next morning at 6.00 a.m. when she went to work, she found a Blood Pressure Machine and a Stethoscope missing. The matter was reported to police. The person suspected to have committed the offence was one “major”. The said major was said by PW3, a Complainant for an offence for which the Appellant and his co-accused were not charged, of having led police to the house of the accused persons in the case. He was himself released by the police. PW4, **APC MUROKI**, the police officer who went with PW3 and arrested the accused persons in this case including the Appellant denied that “major” went with them. PW4 contradicted PW3 further by saying that in fact it was PW3 who identified the suspects’ houses to him. The Appellant was arrested by PW4 while selling water. The Appellant was taken to a house where the Blood Pressure Machine and stethoscope were recovered. The Appellant in his defence denied being found with any exhibits.

The Appellant has raised five grounds of appeal summarized as follows: -

One, that the learned trial magistrate erred in convicting him for handling stolen property without evidence to prove such items were found in his house; two, that the learned trial magistrate erred in relying on hearsay evidence; three that the prosecution case was not proved beyond any reasonable doubt; four that the learned trial magistrate erred in basing the conviction on uncorroborated evidence and four that the sentence imposed was excessive.

I have re-examined and re-evaluated the evidence adduced before the lower court and drawn my own conclusions as required of me as a first appellate court. See **OKENO vs. REPUBLIC 1972 EA 32**. I will deal with the issues raised by the Appellant systematically.

On the lack of evidence that the stolen Blood Pressure Machine and Stethoscope were recovered from the Appellant’s house, **MR. MAKURA**, learned counsel for the State submitted that the evidence of recovery was given by PW3 and PW4 and the recovered exhibits identified by PW1 and PW2. There is no doubt that PW1 and PW2 identified the recovered machines as those belonging to the clinic where both of them were working. On the recovery, PW3 said that she had gone to the Chief’s camp and taken PW4, **APC MUROKI** for investigations relating to loss of PW3’s properties. PW3 said that one “major” who was in their company identified the various houses of various suspects to PW4 who searched and recovered various stolen items. PW4 on the other hand denied that he was in company of anyone else except PW3. In fact PW4 went further to say that it was PW3 who identified the houses to him before

conducting the searches which yielded several recoveries. The two witnesses contradicted each others evidence as to who identified the suspects houses including that alleged to belong to the Appellant. That being the case, there was no reliable evidence to show that the two machines in question were recovered from the Appellant's house. Neither PW3 nor PW4 said that they knew the Appellant's house at any one time.

On the issue of hearsay evidence, the learned counsel submitted that if there was any such evidence, the same was severable from the rest of the evidence without affecting the case. The Appellant did not elaborate on the so called hearsay evidence. However, I was disturbed by the inclusion of PW3's evidence regarding her own loose as part of the evidence. PW3's evidence was not relevant even as *Res Gestae*. It ought not to have been admitted save for the bit of the evidence touching on the recovery of exhibits. That is the much I would say on that point.

On the third and fourth grounds that the prosecution did not prove its case as required and that the evidence on record was uncorroborated, **MR. MAKURA** submitted that the case had been proved as required.

The only evidence against the Appellant was that he was arrested while selling water. The Appellant's arrest at the time was connected to PW3's complaint. Even though PW4 said that he recovered the two machines from the Appellant's house, the person he alleged identified the Appellant's house to him (PW3) denied knowing his house. There was no other evidence implicating him. The Appellant's complaint that there was no proof of the case against him on the required standard was not without merit.

On the issue of uncorroborated evidence, PW4's evidence that PW3 identified the Appellant's house to him failed to attract corroboration but worse still, it was directly contradicted by PW3. That complaint too had merit.

Having carefully considered this appeal, I find it had merit. The conviction entered herein was clearly unsafe and should not be allowed to stand. I will therefore allow the appeal, quash the conviction and set aside the sentence. I direct that the Appellant should be set free unless he is otherwise lawfully held.

Dated at Nairobi this 27th day of February 2006.

LESIIT, J.

JUDGE

Read, signed and delivered in the presence of;

Appellant - present for the state- present

Huka CC

LESIIT, J.

JUDGE