REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUSIA

Criminal Appeal 25 of 2004

JOSEPH ANYANGA…….....
…….APPELLANT

VS

REPUBLIC…….....……
RESPONDENT

JUDGMENT

The appellant, *Joseph Anyanga Olubeleera* was charged jointly with others and convicted on a charge of breaking into a building and committing a felony therein contrary to section 306 (a) of the Penal Code and sentenced to serve 3 years imprisonment on count 1.

He was equally charged jointly with others and convicted on count 2 on a charge of handling stolen goods contrary to section 322 (2) of the Penal Code and sentenced to serve 3 years.

The particulars on count 1 are that on the night of 3rd and 4th May 2003, at Yala Township in Siaya District of the Nyanza Province jointly with other not before the court broke and entered into a building, namely, bookshop and stole therein two computers, four monitors, one photocopy machine, one radio cassette, one pocket radio and one mountain bicycle all valued at Ksh.330,150/=, the property of *Pamella Akoth Okoth*.

The particulars on count two are that on the 6th day of May, 2003 at Mundeku village in Butere/Mumias District of the Western Province otherwise in the cause of stealing, dishonestly received or retained one mountain bicycle and one pocket radio knowing or having reason to believe them to be stolen goods.

The two other appellants, namely *Zakaria Injene Okeno* and *Michael Chache Obundere* have fully served their sentences. The fourth and last appellant *Michael Ombudia Akwane* passed on while in custody.

At the hearing *Mr. Ashioya,* for the appellants, sought leave to withdraw the appeal as against *Zakaria Injena Okeno, Michael Chacha Obundere* and *Michael Ombudia Akwana.* As the state counsel did not oppose the withdrawal, I accordingly, ordered the appeals as against the aforesaid withdrawn.

As regards the appeal of *Joseph Anyanga Olubeliera, Mr. Ashioya,* for the appellant sought leave to argue ground 1,2 and 3 together and ground 4 separately. There being no objection, by the state counsel,

I ordered so.

For the appellant, it was argued, on ground 1, 2 and 3, that the judgment of the trial court is in breach of section 169 of the Criminal Procedure Code, in that it does not lay out the points for determination and does not give decision and/or reasons for the decision. That in any event the appellant was never convicted. The court went straight to the sentence.

That in respect of the sentence the trial court did not distinguish which count the sentence is in respect of notwithstanding that there was the main count and alternative count. That these errors are incurable by reason of the fact that the appellant is sentenced on the alternative count in respect of which he was not charged. That the sentence of 3 years custodial sentence, on both limbs, to run concurrently was therefore erroneous.

That in any event the ownership of the alleged stolen property is and was in dispute on the evidence. Whereas Pamela Akoth Okoth (PW1) contends that she is the complainant and the stolen property belonged to her, Charles Aoko Owako (PW2), the husband to PW1, states at page 7, of the proceedings at paragraph 22 thus:

*"…… **PW1 is my wife and employee. She is not part of the ownership ……"***

That if the charge was based on the premise that stolen property belonged to Pamella Akoth Okoth (PW1), yet Charles Okoth Owako (PW2) refutes the fact of ownership, then the ownership is in dispute. Property stolen must have a certain owner to sustain a charge of theft. If the charge of theft is not firmly laid and proved then the collateral charge of handling cannot stand on its own.

Mr. Onderi, for the state, conceded the appeal, and in my view correctly. He urged me to find that the trial court failed to comply with the mandatory provisions of section 169 of the Criminal Procedure Code.

That the charge sheet has one main count and alternative count but the court sentenced the appellant on both counts when he was not even charged on the alternative count.

On sentence, *Mr. Onderi*, urged me to find that the sentence is not based on any conviction. In any event if the court convicts on the main count, it cannot convict on alternative count. The sentence was thus irregular. Mr. Onderi finally took the position that the court can remit back the file to the trial court to correct the irregularity under section 354 of the Criminal Procedure Code (Cap 75) Laws of Kenya.

I have carefully analysed the rivaling arguments. In my view, once it is conceded that the trial court did not comply with the mandatory provisions of section 169 of the Criminal procedure Code, the whole edifice on which the conviction is based crumbles and with it the sentence.

A charge of theft is based on the premises that the stolen property belongs to a given individual or legal entity. When ownership is in dispute the charge of theft is not sustainable in law. On the evidence, I find and hold that ownership is uncertain and to that extent theft was not proved beyond reasonable doubt as required by law.

Furthermore, the appellant was never convicted by the trial court. Hence the sentence imposed not being based on conviction was misplaced.

Last but not least, it is axiomatic that if a court of law convicts on the main count in a criminal charge, it does not proceed and convict on an alternative charge. The sentence, to that extent was irregular.

I have been urged by the learned state counsel to remit the file back for retrial so as to correct the irregularity in sentencing. But I have not been urged to remit back the file to correct the conviction that does not comply with the provisions of section 169 of the Criminal Procedure code.

The circumstances in which a court of law would remit the file back to the trial court is now well

settled. It suffices to say/mention that does not include a situation where both conviction and sentence are flawed. ***See FETHALDI NANJI -VS- REPUBLIC (1966) E A.343***, where the East African court of Appeal said as follows:_

"***In general a retrial will be ordered only when the original trial was illegal or defective. It will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purpose of enabling the prosecution to fill up gaps in its evidence at the first trial; even where the conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame it does not necessarily follow that a retrial should be ordered. Each case must depend on its peculiar facts and circumstances and an order for retrial should only be made where the interest of justice require it and should not be ordered where it is likely to cause any injustice to the accused person."***

Most significant, is that two of the appellants have served their sentences fully and their appeals have been withdrawn by counsel. The other appellant has since passed on while in custody. In the premises, a retrial would work injustice to the appellant. In the result, I take the view that the justice of this case demands that the appeal be allowed. Accordingly, I allow the appeal, quash the conviction and set aside the sentence. The appellant is henceforth set free unless lawfully held for some other lawful reasons.

DATED and DELIVERED at BUSIA this 31st day of July 2006.

N.R.O. OMBIJA

JUDGE

NA for appellant.

Mr. Ashioya for defendant

Appellant Present.