REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU

Criminal Appeal 185 of 2005

FRANCIS MUTURI GITITU…….....……..APPELLANT

VERSUS

REPUBLIC…….....…….……RESPONDENT

JUDGEMENT

Francis Muturi Gititu the appellant in this case was convicted of the offence of being in possession of public stores contrary to section 324 (2) of the penal code and he was sentenced to (18) eighteen months imprisonment by the Principal Magistrate's Court at Nyahururu. The appellant was dissatisfied with the conviction and sentence and he has therefore lodged this appeal.

The particulars of the charge preferred against the appellant states:-

On the 4th day of May 2003 at Oleshau village of Nyandarua District within Central Province was found being in possession of public stores to wit one Jersey, two jungle trousers, seven file covers – P 118, one case file – P 2, 32 statement forms, 12 post-mortem forms 23A, elimination forms C24, seven Kiganjo College Course report forms p 231, 13 P 3 forms, two envelopes (Khaki), Three Police note books, one jungle belt, one head force colours, ribbon, one revolver holster, one personal list card, one lap cover and one pair of handcuff, given properties being reasonably suspected of having been stolen or unlawfully obtained.

The evidence that led to the finding of a case to answer by the appellant was given by three prosecution witnesses mainly Police Officers from Nyahururu Police Station. According to P.C. **Charles Mwangi (PW 1)** they were investigating a case against the appellant with another person who had been arrested in connection with the case of planning a robbery within Nyahururu Town.

In the course of interrogation it emerged that the appellant had been formerly a C.I.D. Police Officer at Nyahururu Division who had been interdicted after he was charged in court with the offence of stock theft and was convicted. This witness decided to visit the home of the appellant in a bid of gathering more information and in the company of other three Police Officers and the appellant. They proceeded to the home of the appellant where they found different items of public stores in the appellant's house. The items that were marked as exhibits are:

1. **2 Green jungle trousers – MFI 1**
2. **one blue jersey MFI 2**
3. **7 police P11 file covers MFI 3**
4. **10 form 'c' 33 file covers MFI 4**
5. **one police file cover MFI 5**
6. **32 p2 B' statement forms MFI 6**
7. **12 23 a post-mortem forms MFI 7**
8. **4 eliminated finger prints forms MFI 8**
9. **7 p 2 course report form for Kiganjo police college MFI 9**
10. **40 bonds to attend court MFI 10**
11. **13 P3 forms MFI 11**
12. **13 P3 forms PMF 1. 11**
13. **3 police note books MFI 13**
14. **one jungle uniform belt MFI 14**
15. **one head ribbon force coloured MFI 15**
16. **one holster for revolver MFI 16**
17. **one kit inventory p 121 MFI 17**
18. **one cap cover MFI 18**
19. **one pair of handcuffs serial No. 3406/91 MFI 19**

According to PW 1, the inventory of the items found in the appellant's house was drawn up and it was signed by the appellant. The items were taken to the Police Station and the appellant was charged with the offence after it was established from the office of the O.C.P.D that the appellant had been interdicted and by a letter dated 5th April 2001, he was not supposed to have the items in his custody.

The evidence of PW 1 was corroborated by that of **P.C. Charles Nderitu (PW 2)** in every material aspect. **Tom Mutisya** the **Deputy O.C.P.D. Nyahururu (PW 3)** produced the letter dated 5th April 2001 in which he said the appellant was informed of his interdiction from service. This was in accordance with the police regulations once a police officer is arrested in connection with a Criminal offence, the Officer is supposed to be interdicted. The letter also required the appellant to surrender the police kit and all the items he was using as a Police Officer. All the items that were produced as exhibits ought to have been returned. The files, the P 3 forms, the post-mortem forms, bonds to attend court **are items** that are used at the police station by a police officer while on duty and the appellant was not authorized to have these items especially upon interdiction.

It is on the basis of the above summary of the evidence that the appellant was found to have a case to answer and he was put on his defence. The appellant gave a sworn statement of defence. In his defence

he said that he was interdicted on 9th April, 2001 following his arrest and was charged with a case of stock theft in which he was convicted and sentenced to 1 year imprisoned but the matter is still pending appeal in the High Court being Criminal Appeal No. 302/02. The appellant said that he was not aware that upon interdiction he was supposed to return all the Government stores some of which are documents which are used in the Police Station. He said in his evidence in chief that since he returned some items to Snr. Sergeant Ngaine he was not issued with a clearance certificate to indicate what he returned and what he did not return as per the forces standing orders. The appellant said that some of the items like the holster for revolver he had improvised it for himself since he joined the CID in 1994 and it was not a government store. Similarly the inventory card was supposed to be in his custody while the duplicate was held by the quarter master. According to the appellant he was wrongly charged with the present offence simply because he was found to have been a former police officer as the items were lawfully found in his possession.

It is on the basis of the above evidence that the trial court found the appellant guilty of the offence and convicted him and sentenced him to eighteen months imprisonment.

In the memorandum of appeal, the appellant challenged the validity of the charge and whether the ingredients of the charge were properly supported by the prosecution witness.

Secondly, the trial court was faulted for failing to consider that PW 1 agreed with the appellant that there was nothing wrong the appellant being in possession of the items since he was wrongly interdicted from the forces.

Further more, the appellant contends that he was not found using the items found in his possession and it was the former D.C.I.O. Nyandarua the former Inspector Mogaka who was supposed to supervise the withdrawal of the items or order the appellant on what to do with the items

Finally, the appellant faulted the trial court for failing to consider his mitigation or to consider the option of a fine.

On the part of the state, this appeal was opposed Mr. Koech supported the conviction and sentence on the grounds that it is not even disputed by the appellant that he was found in possession of government stores in his house and for which he acknowledged by signing the inventory. The appellant had been interdicted from the forces two years before and he was supposed to have returned the government stores. Some of the items found in possession of the appellant were supposed to be kept at a police station and thus no satisfactory explanation was offered by the appellant of how these items were found in his possession almost two years after he was interdiction from the forces.

This being the first appellant court, it is mandate to reconsider the evidence and subject it to its own independent scrutiny and draw its own conclusions. ***(See the case of Okeno -Vs- Republic [1972] E.A. page 32.)***

From the summary of the facts above, it is not at all disputed that the appellant was found in possession of the government stores, thus the issue for determination substantially turns on whether the appellant was supposed to be in possession of these stores or whether the explanation offered was satisfactory. The other issue is whether the mitigation by the appellant was ignored by the trial court and whether he should have been given an option of a fine.

It was clear from the prosecution's witnesses and even by the appellant upon cross-examination after his defence evidence, that certain items found in his possession such as witness statement forms, post-mortem forms, finger print forms, witness bonds to attend court, are items that are used in the police station. From the records there was no satisfactory explanation given by the appellant why they were found in his possession. The appellant had been interdicted from the forces after he was charged with a Criminal offence. He was subsequently tried and convicted of the same offence for which he said he had filed an appeal in the High Court. It therefore defeats common sense why the appellant could be keeping government stores in his possession, after he was served with an interdiction letter stopping him from

undertaking any duties of a police officer and requiring him to return the police kit, it was thus necessary for the appellant to return the items if indeed as he stated in his defence he was not using them.

From the above evidence I am satisfied that the appellant was properly convicted. As regards the appeal against the sentence, the offence committed by the appellant is described as a misdemeanor, taking the circumstances under which the items were found, the trial court must have overlooked these factors such as the appellant was interdicted from the police force when handing in the sentence of 18 months.

In the circumstances I hereby reduce the sentence of 18 months to seven (7) months. The appeal on conviction is dismissed and on sentence the sentence is reduced to seven (7) months.

It is so ordered.

Judgement read and signed on 13th July, 2006.

MARTHA KOOME

JUDGE