



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

Criminal Appeal 366, 367 & 368 of 2004

(From original conviction (s) and Sentence(s) in Criminal Case No. 816 of 2001 of the Senior Principal Magistrate’s Court at Kibera (Wanjiru Karanja - SPM)

STEPHEN VILJOEN..... APPELLANT

VERSUS

REPUBLICRESPONDENT

CONSOLIDATED WITH

CRIMINAL APPEAL NO. 367 OF 2004

(From original conviction (s) and Sentence(s) in Criminal Case No. 816 of 2001 of the Senior Principal Magistrate’s Court at Kibera (Wanjiru Karanja - SPM)

PAUL KIARIE NYORO..... APPELLANT

VERSUS

REPUBLICRESPONDENT

CONSOLIDATED WITH

CRIMINAL APPEAL NO. 368 OF 2001

(From original conviction (s) and Sentence(s) in Criminal Case No. 816 of 2001 of the Senior Principal Magistrate’s Court at Kibera (Wanjiru Karanja - SPM))

JOHN MUNGAI KARIUKI..... APPELLANT

VERSUS

REPUBLICRESPONDENT

J U D G M E N T

STEPHEN VILJOEN, the 1st Appellant, PAUL KIARIE NYORO, the 2nd Appellant and JOHN MUNGAI KARIUKI, the 3rd Appellant were the 1st, 2nd and 3rd accused during the trial before the lower court and had been charged together with WINSTON ASWAN

NGAIRA, the 4th accused in the trial as follows: -

Count 1:

STEALING contrary to **Section 275** of the Penal Code.

On diverse dates between 27.6.1998 and 29th August 2000 in Nairobi within Nairobi Area province, jointly with others not before court stole 600 empty gas cylinders of different sizes valued at Kshs.6.7 million the property of Global Gases (K) Ltd.

Alternative Charge

Handling Stolen property contrary to Section 322(2) of the Penal Code.

On 12th October, 2000 at Express Kenya Limited, Kitui road Nairobi within Nairobi Area Province, jointly with others not before court otherwise than in the course of stealing dishonestly retained 348 empty gas cylinders of different sized valued at Kshs.4.4 million to property of Global Gases (K) Limited knowing or having reasons to believe the same to have been stolen or unlawfully obtained.

Alternative Charge

Handling stolen property contrary to Section 322(2) of the Penal Code.

On the 25th October 2000 at B.O.G. Kenya limited Kitui Road Industrial Area, in Nairobi within Nairobi Area Province, jointly with others not before court otherwise than in the cause of stealing dishonesty retained 169 different sizes of empty gas cylinders of different sizes valued at Kshs.1.6 million the property of Global Gases Kenya Limited knowing or having reasons to believe them to have been stolen or unlawfully obtained.

Alternative Charge

Handling stolen property contrary to Section 322(2) of the Penal Code.

On the 7th day of February 2001 at BOG (K) Ltd. Kitui Road Industrial Area Nairobi Area Province, jointly with others not before court otherwise than in the cause of stealing dishonestly retained 84 empty gas cylinders of different sizes valued at Kshs.700, 000/- the property of Global Gases (K) Ltd knowing or having reasons to believe them to have been stolen or unlawfully obtained.

After the trial in which the prosecution called thirteen witnesses and the defense eight witnesses the Appellants were convicted in all three alternative charges of **HANDLING STOLEN PROPERTY** contrary to **Section 322(2)** of the **Penal Code**. They were each sentenced in the 1st Alternative Charge to 1,000,000/- fine in default 12 months imprisonment, in the 2nd Alternative Count, fine of Kshs.500,000/- in default 12 months imprisonment and in the 3rd Alternative Count to Kshs.200,000/- in default 12 months imprisonment. All three Appellants were aggrieved with the convictions and sentences and therefore lodged these appeals. I have consolidated their appeals for convenience of hearing and disposal since both parties were happy with the consolidation and since the appeals arose out of the same trial.

The Appellants filed similar grounds of appeal dated 28th January 2003 through their advocates Kaplan and Straton. Later on, the Appellants changed their advocate to Bowry & Co. Advocates who, after grant of leave of this court on 19th July 2004, amended the petitions of appeal. In the amended petitions of appeal dated 30th July 2004, the Appellants raised 41 grounds of appeal. With due respect to the Appellants' advocates these grounds were largely argumentative and repetitive in nature and included in them evidence and statements from the bar. In the counsel's lengthy submissions these 'grounds' were not argued systematically in numerical order making the work of the Court quite onerous indeed. I think that time has come for the law to be amended to provide for a format in this regard and to regulate the nature and substance of grounds of appeal filed in Court. The appeals were opposed. **Mr. Bowry** argued the appeals on behalf of all three Appellants while **Mrs. Gakobo**, learned Counsel for the State represented the Respondent.

The brief facts of the prosecution case was that the Complainant **DEEPAK MEHTA**, PW1 and the Managing Director and owner of Global Gases (K) Ltd. Herein after referred to GG, started operating his business of manufacture and distribution of Industrial and Medical Gases in 1998. The Complainant said that he imported 90% of his cylinders from BOC (UK) and some from BOC (Indonesia). He said that he imported four types of cylinders and he exhibited several documents showing the imports and purchases as exhibits 1 to 18 both inclusive. The Complainant said that he started full operations in 1998, June. That overtime, his company realized that their cylinders were not being returned to them regularly and that they started experiencing a problem selling gas. That eventually the Complainant learnt that a competitor, BOC (K) Ltd. was retaining their cylinders whereupon he called the 1st accused, the Managing Director of BOC (K) to intervene. The 1st Appellant in this case was the Managing Director of BOC (K) while the 2nd Appellant was the Internal Auditor and the 3rd Appellant the Company Secretary of the same Company. Upon informing the 1st Appellant of his findings, the 1st Appellant promised to investigate the matter. The Complainant said he waited in vain to see any action by the 1st Appellant and that is when he decided to put up an advertisement in the press media. Still there was no change. The Complainant said that he then decided to report to the Police. He said that he reported to the PCIO Central **ACP Onguti**, PW8, on 29.8.2000. By that date, the Complainant said, he reported that around 500 cylinders were missing. The PCIO decided to call both companies BOC (K) and GG, to discuss the matter but nothing fruitful came out of it. Subsequently in October 2000, PW8 called the Complainant to Express (K) Limited godown in Industrial Area where PW7 identified 350 out of 500 cylinders as belonging to the Complainant's Company. PW8 called again and PW7 identified 180 cylinders at BOC (K) Limited offices in February 2001. The Complainant said that 80 or 85 more cylinders were identified by PW7 after PW8 reportedly found them in BOC (K) Ltd. Eventually the Appellants and the 4th accused were arrested and arraigned in court on 6th February 2001.

The Appellants' line of defense revealed that they too were carrying out investigation to unravel why cylinders belonging to BOC (K) had remained unaccounted for and why the numbers of these cylinders were rising from 600 in 1999 to 2900 in 2000. The Appellants were also investigating another matter that was worrying them which was why there were cylinders in the Kenyan Market which bore BOC markings but which did not belong to them. They were concerned about these cylinders for other reasons which were that their test period had expired and their safety could not be guaranteed and yet if any accidents occurred as a result of those cylinders, BOC (K) may be liable to pay for damages.

The Appellants' defense disclosed that they reported first to the Police, then to Department of Occupational Health and Safety and finally to Kenya Bureau of Standards. When nothing was done, they hired a private investigator, **Rtd Brigadier Mukungusi** who was DW5. They were able to intercept 500 cylinders which they kept at Express (K) until action was taken. The 500 cylinders either were out of test, or had been grinded on shoulders instead of being marked below the valve as required or had markings for both BOC (K) and GG.

The cylinders were part of those police confiscated and produced in court as exhibits in support of the charges.

I have carefully analysed and evaluated afresh the entire evidence adduced before the trial court as required of a first appellate court but while bearing in mind that I neither saw nor heard the witnesses and giving the due allowance. See **OKENO vs. REPUBLIC 1972 EA 32**. As I started by saying, the Appellants have through their counsel raised 41 grounds of appeal. With due respect to the Appellants' advocate, and as I stated earlier, these grounds are argumentative and repetitive and at most should have served best as submissions or skeletal arguments for the Appellants' appeal. For that reason, I will not deal systematically with them as pleaded. In any event, the Appellants' advocate did not himself attempt to argue each of them but, in his submissions, argued most of them consolidatively.

Mr. Bowry made very good submissions but most of the time, without the notice of the Court, failed to state which grounds of appeal they were in support of, except in few occasions. That has given this court a heavy burden of studying all 41 grounds in order to make out what the Appellants were challenging in each ground. Having given myself the liberty of studying them I have classified the grounds into 7 main grounds as follows: -

Ground 1 deals with the defectiveness of the charges and these are contained in grounds 27 and 28 of the petition. They state as follows:

27. The Learned Senior Principal Magistrate erred in law by not appreciating that the said stranger cylinders came into possession of the Appellant company by trickling in over a period of time in the ordinary course of business, and that no offence had been shown to have been committed by them or anyone by setting them aside to await a proper investigation by the Authorities, and especially after acquitting them on charges of theft.

28. The conviction of the Appellant is against the weight of the evidence adduced.

Ground 2 deals with police impropriety during their investigations and this ground is covered in grounds 2, 3, 4, 6, 8, 9, 10, 12, 24 of the petition of grounds of appeal

2. Pursue, and (allegedly) investigate Mr. Mehta's complaint with "dispatch" at end of August 200 against BOC Kenya Ltd, immediately after the Appellants had refused to resolve criminal matters and the complaint...."round a table...." as proposed to them by Police Deputy Commissioner Mr. Onguti, who expressed the wish to treat the matter as a"Trade Dispute" on 3rd October 2000.

3. Suggested to the Appellant and BOC (K) Ltd, that their complaint of tampering with, and/or theft, and/or loss of approximately 5,000 of their cylinders was...." Trade Dispute"...that...."could be resolved round a table."

4. Despite the fact that Embakasi Police were under the same umbrella as Nairobi Area Police which was expected throughout to liaise with Embakasi Police as an outpost in another country or District (allegedly and refused, or declined to co-operate, or liaise because (allegedly) Police procedure is"...we never interfere with another Police Station's investigation...." and did not appreciate that Nairobi Area Police were thus being totally and arbitrarily selective in their approach, and showed blinkered partiality and bias.

6. The Learned Senior Principal Magistrate erred in fact and law by ignoring, or not appreciating, that all the activities of the Kenya Bureau of Standard's relevant officers, and those of the Directorate of Occupational Health and Safety in this cases strongly suggested compromise and/or total dereliction of their duties, and failed to appreciate that the Report Exhibit 44, actually produced by the prosecution, showed in many vital respects that it corroborated the Defense of the Accused.

8. The Learned Senior Principal Magistrate erred in law by ignoring, or not appreciating that after the arrest of the Appellant and his being charged in Court, the Police did nothing, either before, or thereafter to investigate and/or prove the genuineness of Mr. Mehta's complaint as against that of BOC (K) Ltd and relied from inception solely on Mr. Mehta's bald assertions and accusations, and did nothing whatsoever to evaluate his allegations, despite the fact that in law the onus is on the prosecution to prove the charges beyond reasonable doubt against the Appellant, or at least his show a prima facie case before arresting them.

9. The Learned Senior Principal Magistrate erred in fact and law by ignoring, or not appreciating the evidence, that the complainant Mr. Mehta had since 1998 told numerous untruths and cheated repeatedly to obtain from BOC (UK) second-hand similar cylinders despite being aware of BOC (UK) policy not to sell such cylinders to any rival in countries where BOC manufactured gas, and did not appreciate the evidence of MR.HUW RODERICK of BOC (UK) D.W-(6) which showed unequivocally Mr. Mehta to be totally unreliable, untruthful and discredited witness, who had (inter alia) conspired with COTECNA in UK to hide from BOC (UK) that the said second-hand cylinders were destined for Mombasa, Kenya, and NOT Dubai, as alleged by him, and asserted for , and indented in his documentation EX 75.

10. *The Learned Senior Principal Magistrate erred in fact and law by ignoring, or not sufficiently appreciating that the Police investigation did nothing to discount or confirm that Appellants 2 and 3 averments and assertions in their Police inquiry States (EX 45) and EX 67, and that the Police investigation (so-called) was, ab initio, totally flawed, inadequate, selective, partial, motivated and biased.*

12. *The learned Senior Principal Magistrate erred in fact by ignoring, or not sufficiently appreciating, that the Police are not permitted by Police Standing Orders No.17 of (CAP 46), and the law, to act selectively at the Express Go-down by taking into custody only those cylinders asserted to as being relevant by the complainant's Manager MR.RAHUL (P.W.7) and declining to take the rest, some of which had stenciled: Global Gases Limited markings on them because they may not accord with the complainants or Police case, and that such procedure undermines completely the prosecution's case in law, and shows selectively and bias.*

24. *The Learned Senior Principal Magistrate erred in fact and law by not appreciating that there cannot be an "exchange" of the said cylinders in accordance with the "industry Practice" unless both parties agree that the said stranger cylinder, the fact that the party in possession of the same are awaiting the Government Authorities or the Police to bestir themselves and to do their duty to investigate properly, or at all cannot be held to have shown any intention to "...deprive anyone permanently, or at all..." by segregating them on their Advocates' advice to await such proper, or any investigation.*

The third ground deals with the identification of the cylinders as property of the Complainant Company i.e. Global Gasses and is covered by grounds 1, 16, 17, 18, 19, 20, 22 and 23 as follows;

1. *The learned Senior Principal Magistrate misdirected herself in fact and law by not appreciating that the whole of the prosecutions case depended largely on the evidence of Prosecution Witness (P.W.1) MR. MEHTA the complainant, and (P.W.2) MR. JAMES MUCHENE, both of whom were motivated, and were shown to be prima facie perjurers who had committed several serious criminal offences as part of the Res Gestae as hereinafter set out, and unworthy of any credibility whatsoever.*

16. *The Learned Senior Principal Magistrate erred in Law by not taking into consideration that in law differing claims to ownership of an article is best litigated for in civil jurisdictions, and that the Appellant on behalf of the BOC (K) Ltd. had filed on 8th November 2000 in the High Court of Kenya, on the advice of the Company lawyer (Accused 4 Mr. Ngaira,) Civil Suit No.1991 of 2000 (Exhibit 30) BOC KENYA LTD VERSUS GLOBAL GASES KENYA LTD on the same issues regarding ownership of the same said cylinders, and in the Defence, and Replying Affidavit MR.MEHTA dated 15th January 2001, in that suit he had, prima facie committed several serious offences set out in paragraph 1 of this Petition of Appeal.*

17. *The learned Senior Principal Magistrate erred in fact and law by failing to appreciate that other than MR.MEHTA'S bald assertions, no evidence had been produced in Court to show beyond reasonable doubt at least that the said cylinders, or any of them, the subject matter of the said charges, actually belonged to Global Gases Ltd at any time.*

18. *The Learned Senior Principal Magistrate erred in fact and law by ignoring or not sufficiently appreciating that;*

(a) *Clause 27 "EXHIBITS" in part IV of Police Guide to Criminal Investigation (Chapter 46), and in Law, must be strictly construed, and ALL Exhibits must be placed in safe custody.*

AND

(b) *Leaving outside Nairobi Area Headquarters in the open and accessible to the public since 12th October 2000, several dozen of the cylinders, doe not accord with the law, or the said Guide;*

(c) *nor does it amount to lawful and proper identification for MR. MEHTA (PW1), MR. RAHUL (PW7), or MR. CHEPKWONY (PW8) the Investigating Officer, to refer to only a list of numbers, and purport to allegedly identity (all marked) the several dozen cylinders outside the 2 containers, and merely say that "...the bulk of the cylinders of several hundred (unseen) inside the 2 containers..." were on the said list"...without taking each one out, verifying the number, and identifying it individually, with the said list especially as several of the said cylinders outside the containers had clearly stamped on them "...E A Oxygen Co..." on the shoulder, so that even Mr. Mehta had to volunteer to the Court at the time of the alleged identification that they could not possibly belong to his firm Global Gases Ltd which only started in Kenya in or about 1998.*

19. *The Learned Senior Principal Magistrate erred in law by ignoring, or not appreciating the fact that when the Police on 12th October 2000 took selected cylinders out of the Express Go-Down leaving behind many with "...Global Gases Ltd" stenciling on them, during the (alleged) identification of them on that date by MR.RAHUL (P.W.7) this selectively itself was not only contrary to Police Standing Orders (CAP 46) and the Law, but undermined Global Gases Ltd. assertion that all or any, of the said "stranger" cylinders belong to them.*

20. *The Learned Senior Principal Magistrate erred in law by ignoring, or not appreciating the fact that bearing in mind the evidence adduced regarding the ease with which serial numbers, can be ground off and new ones hammered on in seconds on the said cylinders, and no attempt was ever made by Police to find out from Global Gases Ltd's stock if any serial number had been duplicated, in itself seriously undermined the prosecution's case, as does the fact no witness was called to confirm the original numbering, and no numbering tools was ever sought, investigated, or produced to the Court, or any Expert called by the Prosecution or Police evidence adduced to prove that the said numbering tools were the ones used originally hammered onto the said cylinders (allegedly) "identified" as belonging to Global Gases Ltd.*

22. *The Learned Senior Principal Magistrate erred in fact and law by ignoring, or not appreciating, that the acquittal by her of the 4th Accused MR.WINSTON NGAIRA the BOC (K) Company Ltd Lawyer on a "No Case to Answer," Submission, that his arrest and*

charging with the said offences had been effected in her words”without a shred of evidence against him”...that his evidence as D.W.8 on behalf of the Appellant fully corroborated the Appellant’s case, and showed that his original arrest and prosecution was malicious, vindictive and motivated, and rendered the evidence of MR. ZEBEDEO ONGUTI, (P.W.10) the Deputy Commissioner of Police and the evidence of INSPECTOR CHEPKWONY (P.W.8), the Investigating Officer discredited, and suspect, and that prima facie their acts were not in good faith.

23. *The Learned Senior Principal Magistrate erred in fact and law by not appreciating that there cannot ownership of an article is the main issue between two parties, the police cannot determine that by usurping the Courts jurisdiction to decide that issue by favoring only the assertions of one party and ignoring, or hiding evidence of the other party and then prosecuting the other party (as was done) with no or no meaningful investigation being done thereafter to show on what basis the arrest and prosecution had been made.*

The fourth ground challenges the Appellants’ convictions on the basis of the evidence adduced and in this ground it is the Appellants; contention that the conviction was against the weight of evidence. This ground is supported by grounds 5, 7, 11, 26, 27, 30, 32, 33, 35 and 37 which provided as follows

5. *The Learned Senior Principal Magistrate erred in fact and law by overlooking or not appreciating that the Nairobi Area Police activities in this case effectively usurped the jurisdiction of the Court by refusing to investigate and prosecute for reasons unknown BOC (K) Ltd’s complaint, and or relegating it, and choosing to pursue Mr. Mehta’s complaint made for the first time 4 months later, and that such conduct amounted to selectivity by them and bias.*

7. *The Learned Senior Principal Magistrate erred in law by not appreciating that the totality of the prosecutions’ case on the relevant issues, as mainly reflected in paragraphs: 1-12 of this Petition of Appeal amounted to no more than worthless discredited evidence of relevant prosecution witnesses, upon which no Court could base any conviction in law.*

11. *The Learned Senior Principal Magistrate erred in fact and law by ignoring, or not sufficiently appreciating that a relevant Schedules and Documentation were handed previously to the Police by the 2nd Appellant Mr. Nyoro showing that by the time of their arrest they had already shown unequivocally that 146 of the said cylinders by the police from the Express Go-down made by the Appellant Mr. Nyoro, was also contrary to Police Standing Orders and the law.*

26. *The Learned Senior Principal Magistrate erred in law in some instances by implying that there was any onus on the Appellant in the circumstances of the case.*

27. *The Learned Senior Principal Magistrate erred in law by not appreciating that the said stranger cylinders came into possession of the Appellant company by trickling in over a period of time in the ordinary course of business, and that no offence had been shown to have been committed by them or anyone by setting them aside to await a proper investigation by the Authorities, and especially after acquitting them on charges of theft.*

30. *The Learned Trial Magistrate erred in law by failing to consider the duplicity of the charges advanced by the prosecution and therefore the indictment was tainted with illegality rendering the Learned Magistrate’s conviction an affront to justice and rule of law.*

32. *The Learned Trial Magistrate erred in law and fact by disregarding weighty evidence adduced by the Defence showing the incredibility of the evidence of the prosecution which evidence was a central issue in the fair dispensation of justice.*

33. *The Learned Trial Magistrate erred in law by relying and considering irrelevant and extraneous matters instead of considering and examine the legal ingredients of the offence charged.*

35. *The Learned Trial Magistrate erred in law by imposing sentences on the three alternative counts founded upon the same act rendering the said sentences illegal and bad in law.*

37. *The Learned Trial Magistrate erred in law failing to acquit the Appellant of handling stolen property on the three alternative Counts, having found as a fact that the cylinders were not stolen but merely kept by the Appellant in the trade dispute between the Appellant’s company and the complaint’s company.*

The fifth ground is that the Appellants’ defense was not given due consideration. This ground is contained in grounds 13, 14, 21, 25 and 31 of the petition which provides as follows;

13. *The Learned Senior Principal Magistrate erred in fact and law by ignoring, or not appreciating fully the significance of the contents of EX 77 the fax by MR. MEHTA from his Amaan Chemicals Agency of Dubai to a MR.WALKER of BOC (UK) in which in it he denies his own identity and any connection with Global Gases Kenya Ltd, and shows him to have no regard for the truth whatsoever, and prima facie to be a businessman of no business morality, devious, crooked and “desperate” to acquire second-hand BOC (UK) cylinders by any means which, from his own description of himself, shows him to be worthless discredited witness, who tried by every means to convert (BOC (K) Ltd. Cylinders into Global Gases Ltd. Cylinders, by grinding off identification marks, and superimposing Global Gases Numbers, and then claiming such cylinders to be those of this company.*

14. *The Learned Principal Magistrate erred in fact and law by ignoring, or not fully appreciating that the Appellant, on behalf of BOC (K) Ltd. Had as early as 10th March 2000 (EX.21) and 12th April 2000 (EX.23) offered in writing the said tampered cylinders to the Directorate of Occupational Health and Safety Services, and to the Kenya Bureau of Standards respectively, for safe custody and investigations by them in accordance with their Acts, but were declined, and, on the advice of Mr. Ngaira (4th Accused – BOC (K) Company lawyer were placed in the Express Company Go-Down by his firm Waruhiu, Nganga and K’Owade while awaiting a proper*

investigation by them, which showed that in law there was”...no intent permanently to deprive the general or special owner.....of” in accordance with Section 268 (2) (a) of the Penal Code, and failed to show “....any fraudulent intent.....” under S.268 of the Penal Code, and failed to prove “without a claim of right as required by law.

21. *The Learned Senior Principal Magistrate erred in fact and law by ignoring, or not fully appreciating, that the Police Statements (EX.49) EX.50) and evidence of Prosecution Witness JOSEPH MUKIRI (P.W.3) corroborated completely the Defense of the Appellants, and disclosed the modus operandi of MR.MEHTA in the grinding, defacing and renumbering generally of BOC (K) Ltd said cylinders, and that the suppression of that evidence and investigation, and/or its relegation, and refusal to prosecute Mr. Mehta, on BOC (K) Ltd’s complaint disclosed avert selectivity and bias by the Nairobi Area Police.*

25. *The Learned Senior Principal Magistrate erred in fact and law by ignoring the facts adduced which showed that the Police selected the evidence to produce to the Court which they thought went to support their charges, but ignored, suppressed and hid relevant evidence given to the Police by the Appellant, as well as documents and schedules to support the ownership by BOC (K) Ltd of some of the said stranger cylinders, and that such actions amounted to a gross violation of the law and procedure.*

31. *The Learned Trial Magistrate erred in law and fact by failing to consider the legal and requisite ingredients of the offence under section 322 of the Penal Code (Cap.63, Laws of Kenya), under which the Appellant was charged and convicted on the three Counts.*

The sixth ground raises legal issues in which five findings in the learned trial magistrate’s judgment are challenged. This is contained in grounds 15, 36, 37, 38, 39, 40 and 41 of the petition which provide as follows: -

15. *The Learned Senior Principal Magistrate erred in fact and law by ignoring, or not appreciating that the written replies from both the Directorate of Occupational Health and Safety Services (EX.22) and Kenya Bureau of Standards (EX.24 & 25) in declining to investigate, or to take custody of the said cylinders were, in all the circumstances so extraordinary, that the Appellant feared that their officers had been compromised, and tried to trace back the true owner themselves on the advice of their Company Lawyers, and by the date of their arrest (5th February 2001) had actually established that 146 belonged to BOC (K) Ltd., and handed over to Police Investigating Officers the said Schedules and Documentation showing this, all of which were suppressed and not produced in Court at the hearing.*

36. *The Learned Trial Magistrate erred in law and in fact in her finding which was against totality of evidence-The prosecution’s witnesses were dishonest, incredible and their line of evidence doctored to rhyme with the complainant’s evidence.*

37. *The Learned Trial Magistrate erred in law failing to acquit the Appellant of handling stolen property on the three alternative Counts, having found as a fact that the cylinders were not stolen but merely kept by the Appellant in the trade dispute between the Appellant’s company and the complainant’s company.*

38. *The Learned Trial Magistrate erred in law by proceeding to enter conviction against the Appellant for handling stolen property, having found as a fact that the Appellant did not have any intention to permanently deprive the complainant of the cylinders.*

39. *The Learned Trial Magistrate erred in law and fact in failing to appreciate and recognize that a civil case was pending in the High Court between the Appellant’s company and the complainant’s company in respect of exactly the same subject matters and therefore subsequent preferment of criminal charges against the Appellant in the subordinate Court was an abuse of the process of the Court and meant to harass and pressurize the Appellant.*

40. *The Learned Trial Magistrate erred in law by assuming jurisdiction to try in a criminal case matters pending in the High Court in a civil case.*

41. *The Learned Trial Magistrate erred in law and misdirected herself in law by failing to find that the Appellant did not act dishonestly or fraudulently but merely stored the cylinders at Express Kenya Limited and at the Appellant’s company premises pending investigations and resolution of the dispute between the Appellant’s company and the complainant’s company.*

The seventh ground challenges the legality of the sentence and is contained in paragraph 34 of the petition which provides as follows: -

34. *The Learned Trial Magistrate erred in Law and fact in failing to appreciate and to find the charges preferred against the Appellant as laid were not proved by the prosecution evidence beyond reasonable doubt.*

Going back to the submissions in support of the petition, **Mr. Bowry** spent several days on his feet to make his submissions which I have carefully considered at length. Due to the multiplicity of the grounds of appeal and their repetitive and argumentative nature it may not be necessary to include all his submissions in this judgment.

The first ground of appeal argued dealt with the defectiveness of the charges and was two pronged. **Mr. Bowry** submitted that the charges were not properly drawn especially the alternative counts. The charges comprised of one principle charge of **STEALING** contrary to **Section 275** of the **Penal Code** and 3 alternative counts of **HANDLING STOLEN GOODS** contrary to **Section 322(2)** of the **Penal Code**. **Mr. Bowry** submitted that the three alternative counts had different dates each; 12th October 2000, 25th October 2000, and 7th of February 2001. Two legal questions arise, learned counsel for the Appellant argued. The first issue was if the first alternative count of **HANDLING** was an alternative count to the principle charge of theft to which count were the 2nd and 3rd alternative charges of **HANDLING** alternatives to?

Mr. Bowry submitted that the Appellants were arraigned in court first on 6th February 2001. Counsel asked how the Appellants could be charged of handling stolen goods one day before the date of the alleged offence. The second issue argued by **Mr. Bowry** was that the plea was not properly taken. Learned counsel submitted that whereas the 4th accused in the case faced only count 1 and the 1st Alternative count, the Court record indicated that the 4th accused pleaded to all the counts including those for which he had not been charged.

Mrs. Gakobo for the State submitted that the charges were properly framed and that they dully complied with the provisions of **Section 137** of the **Criminal Procedure Code**. Learned counsel further submitted that the charges disclosed an offence both in the Statement of the charge and in the particulars. Counsel submitted that if there were any defects in the charges, the same were curable under **Section 382** of the **Criminal Procedure Code** as they had not occasioned a failure of justice. Furthermore, Counsel submitted that the Appellants should have raised the issue of those defects earlier during the proceedings as they were duly represented by Counsel throughout the trial in the lower court.

Mrs. Gakobo raised a pertinent issue concerning the timing of raising the issue of the defectiveness of the charge. **Section 382** of the **Criminal Procedure Code** provides: -

‘ 382 Subject to the provisions hereinabove contained, no finding, sentence or order pleaded by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:

Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.”

The section deals with the issue when a finding, order or a sentence may be reversible by reason of error or omission in the charge or other proceedings. The section provides that in determining the issue of ‘when’ to reverse, the court must have regard to two points; one has the error or omission occasioned a failure of justice and; two should the objection have been raised at an earlier stage in the proceedings.

Section 137 of **Criminal Procedure Code** which the learned State Counsel cited as having been duly complied with and as the basis of her contention that the charges were proper was not what **Mr. Bowry** has complained about. **Section 137** of the **Criminal Procedure Code** sets out the rules for the proper framing of charges and information. It was not the framing of the individual charges that the learned counsel for the Appellants has complained about and the cited provisions under **Section 137** of the **Criminal Procedure Code** are not in issue.

The Appellants and the 4th accused were arraigned in court on 6/2/01. At that time there were five accused persons named in the charge. The fifth accused was BOC (K) Limited. The charge sheet was composed of one count of **STEALING** contrary to **Section 275** of the **Penal Code** and two alternative counts of **HANDLING STOLEN GOODS** contrary to **Section 322(2)** of the **Penal Code**. On 20th February 2001 the prosecution applied to put in a substituted charge which the trial court allowed. In the substituted charge, the charges against the 5th accused BOC (K) limited were dropped. The substituted charged comprised one principle count of stealing and three alternative counts of handling stolen goods. Before substituting the charge, this is what **CIP Kemboi**, the court prosecutor said: -

“Prosecutor: -

I have an application to make. I wish to amend the charge on the 1st alternative count instead of 4.7m to read 4.4m.

We also wish to include another count of stealing. I therefore ask to withdraw the former charge sheet to substitute a new one.

MRS. KARANJA

SPM.”

Even though the prosecutor indicated that the prosecution intended to increase the principle charge of stealing to two counts, only one principle charge was preferred against the Appellants.

The second issue raised by the Appellants’ advocate albeit at the conclusion of his submissions was that the investigations carried out by the Police in this matter were tainted with impropriety. Counsel submitted that this was demonstrated by two facts. One the police carried out two different investigations at the same time. Secondly the fact that the complaint made by BOC (K) limited was never investigated properly or at all. That same was proof that the police were partisan in their investigations.

Mrs. Gakobo did not respond to this issue in her submissions except to say that investigations carried out were two, one of which was the subject matter of this case and the other one involving cylinders recovered in Kisumu and held by Embakasi Police Station.

From the evidence adduced in this case, it is quite clear that there were in fact more than two investigations going on at the same time. The investigations which culminated with the charges in this case were one of them. There was evidence that PW1 lodged a complaint with PCIO Central then, **ACP ZEBEDEO ONGUTI, PW10** in this case, on 29th August 2000. The Complaint was that 500 out of their 7000

cylinders were missing from the market.

That was not the first time that **Onguti, PW10**, was handling the Complaint. **Onguti** was aware of investigations being carried out by **Rtd. Buigidian Mukunguzi** on behalf of BOC (K) as early as June 2000. The second investigations were by Superintendent **John Maritim**. PW13. **SP Maritim** received a complaint from the 2nd Appellant and another one **Mwangi** made on behalf of BOC (K) on 24th May 2000. Their complaint was loss of their cylinders from the market which by then stood at about 3000 cylinders. **SP Maritim** assigned one **PC Mwashigandi** and one **PC (W) Waruguru** to investigate. The results of their investigations was not stated but **SP Maritim** admits that 30 gas cylinders were recovered and he also admits receiving a report from them on 20.11.00 and submitting it to the **PCIO** then, **ACP Onguti**, who sent it to the Director of CID on 26th March 2001. Prior to this PW9, **Dr. William Sakari**, had received a complaint from the 2nd and 3rd Appellant on 24.2.000 followed by a written request through letter exhibit 42. **Dr. Sakari** sent officers who made a report exhibit 43 followed by his, exhibit 44, in which he declined to take any action. **Dr. Sakari** was Director Occupational Health and Safety Department. The Complaint made by the 2nd and 3rd Appellant concerned unsafe gas cylinders in the market.

After **Dr. Sakari** declined to take any action, BOC (K) limited through its servants approached Kenya Bureau of Standards. The complaint was made through a letter written by the 4th accused in the case. The Complaint by BOC (K) limited was that G.G was using their cylinders. PW4 **Engineer Okello** said in his evidence that he visited GG and confirmed that GG had cylinder bearing two serial numbers but that PW1 was able to explain to him to his satisfaction that the said cylinders were imported from BOC (UK). **Eng. Okello** also visited Express (K) and while there saw four categories of Gas Cylinders. Some were bearing BOC (K) or East Africa Oxygen which was the same company. Second category was those bearing GG, third category had markings of either Welgas or Personal Property both which were different gas companies. The fourth category had double markings of GG and BOC (K). PW4 still took no action because according to him there was no proof that the cylinders were unsafe. It is rather strange for a whole Government Departmental Head to require proof of want of safety of products while it was the sole responsibility of that department not only to ensure but also to satisfy itself that safety standards were maintained.

It was after PW4 **Eng. Okello** and PW9 **Dr. Sakari** declined to act that the 2nd and 3rd Appellants visited **SP Maritim** on 24.05.00 to report their loss.

Issue is whether there was impropriety in police action. I think that the police did not take the complaint by BOC (K) limited seriously and thus the assignment of the case to junior Police Officers and the failure to take action despite the fact that some 30 cylinders belonging to BOC (K) were "recovered" by **PC Mwashigandi** and **PC (W) Waruguru**. Both officers were not witnesses in this case. The fact that cylinders recovered in the investigations conducted through **PCIO ACP Onguti** culminated in action being taken against the Appellants in this case demonstrates partisanship. I also believe that, from the evidence of **ACP Onguti**, it is clear that he took reconciliation of PW1 and the Appellants more seriously than investigations into the complaints by BOC (K). Of course that changed when GG 'made' their complaint. He attempted to reconcile the two parties on 20th June 2000 and 20th September 2000 by inviting both groups to his office. These attempts were made long before PW1 made any complaints against the BOC (K) until August 2000. I found it quite curious that **ACP Onguti** reported receiving a complaint from the Complainant in August 2000 while he had all along been involved in the Complaint by BOC (K) against GG. That is further proof of partisanship in the investigations conducted in this case and bearing in mind that **ACP Onguti** was the more senior police officer in this investigations, it is not difficult to tell why his investigations carried the day.

The third set of grounds of appeal raised issue with the identification of the gas cylinders. The learned counsel for the Appellants contended that there was not sufficient identification of the cylinders the subject matter of this case, as property of GG on the required standard. Counsel submitted that in fact the Complainant admitted that cylinders of various gas companies did get intermingled and that companies restored strange cylinders in their possession to their owners after collecting a number of them overtime. Counsel submitted that part of the cylinders produced as exhibits in this case were defaced and others had more than one company label and that in the circumstances the determination of ownership was a civil and not criminal matter.

The issue of identification is a very critical one and if at all there was any dispute, this definitely ought to have arisen during the trial. The investigating officer of this case **IP Chekwony**, who was PW8, was present when PW7, **Mr. Rahul Marain** identified 346 cylinders out of 500 at Express (K) as property of GG. PW8 admitted that indeed 19 cylinders in the lot at Express (K) bore markings of GG and yet were not identified by PW7 as theirs.

I have perused the record of proceeding and I see from it that the identification of cylinders was a key issue throughout the proceedings. What concerned this court is the fact that both PW1 and PW7 admitted that they had tampered with all cylinders in their possession which they claimed they had originally imported from BOC (UK). The tampering that both admitted was by adding new serial numbers on top of those inscribed on the cylinders by BOC (UK). The added serial numbers, both admitted, was imposed some by stencil, others by grinding and others by stamping. It is clear from the proceedings that BOC (K) discovered tampering on their cylinders including grinding which raised their concern for reasons of safety and liability in case of injury or damage to consumers as stated elsewhere in this judgment. It was that discovery that led the three Appellants to take action by reporting to Department of occupational health and safety Kenya Bureau of Standards and the Police. The 1st Appellant in his defence stated that their company, BOC (UK) was not aware of any imports of cylinders by GG from BOC (UK) until much later after they complained to the police. Even though there was not documentation to prove it, the contention of the Appellants was persuasive that BOC (K) never sold their used cylinders for use in counties where they do business. The reason that is obvious and it also explains why the situation that gave rise to this case arose which precisely is the issue of identification of the cylinders. Having admitted as they did that they had to put their own serial numbers to other existing ones bearing the markings of BOC, GG had a lot of explaining to do whether what the serialization they tampered with did not extend to cylinders owned by BOC (K) and which were in the market before they started business.

That possibility could not be ruled out what with the police investigations and those by KBS through Engineer Okello yielded cylinders bearing markings of both BOC and GG, including those both companies could not determine ownership on the issue of identification. Cylinders therefore, the evidence before the court was contentious and benefit ought to have been given to the Appellants.

The fourth issue challenges the convictions on the basis that the convictions were against the weight of evidence. Mr. Bowry submitted that PW1, Mr. Mehta and MD of GG and PW2, former financial controller of BOC (K) were of questionable credibility and their evidence ought not to have been believed. Mr. Bowry attempted to discredit Mr. Mehta's evidence by asserting that he was guilty of forgery having denied his own name to party's not witnesses to this case, had been involved in bad business practice and had used other persons including PW3 to acquire cylinders for GG and tampering with markings on cylinders belonging to other companies including BOC and imposing theirs. Mr. Bowry also challenged the credibility of PW2 and PW3. Concerning PW2 Mr. Bowry submitted that one had a long and outstanding dispute with BOC (K) limited and for that reason his evidence ought not to have been accepted.

Concerning PW3, Mr. Bowry submitted that this witness statement to Police, which was produced by the defence as their exhibit 23, contained admission that the Complainant has used him to remove BOC markings on some cylinders and in their place imposed GG markings. That witness admitted comprising with the Complainant to do some unlawful act and his evidence ought not to have been believed.

Mrs. Gakobo learned counsel for the State submitted that he trial court was the best Judge of demeanour since it had the opportunity to observe witnesses as they testified in court. Counsel submitted that in regard to PW1, the learned trial magistrate at page J11 of the judgment found the Complainant credit worthy notwithstanding documents tendered by the defence to question the same. Counsel submitted further that the court also assessed PW2 at page J15 of the judgment and found him to be a credible and forthright witness despite all the insinuations on his credibility. Mrs. Gakobo urged the court to find the witness credible.

It is quite true that a trial court is the best judgment of demeanour of witnesses having had the opportunity to see and hear them and to test their demeanour. See OKENO vs. REPUBLIC 1972 EA 32 .

The position is that once a trial court forms an opinion as to the demeanour of a witness appearing before it, an appellate court may not interfere with such a finding unless there are other circumstances quite apart from manner and demeanour which may show whether a statement or unless is credible. See PANDYA vs. REPUBLIC 1957 EA 336.

PW1 the Complainant in this case is demonstrated in this case to have involved himself in some questionable trading practice. It is questionable that he brought into this country cylinders that were so similar to those used by a competitor in the same market and then took it upon himself to interfere with through grinding and defacing of the cylinders using all manner of methods including crude methods of grinding. The fact that he did not disclose that element of the likelihood of confusion in the identification of the cylinders in the market to BOC (K), knowing fully well that he had sourced the cylinders from the parent company of BOC without the knowledge of the local company and had bought second hand ones fro that matter clearly shows that the Complainant in this case was not a virtuous virgin. If his conduct of defacing and altering markings on cylinders is taken together with the obvious partisan investigations into this matter on the part of the police demonstrated by their partisan and quick response to the Complainant's complaint received in August 2000 as opposed to their slackness in the manner in which the complaint by BOC (K) through the Appellants was received and mishandled on five months before the Complainant's complaint clearly shows more was going on than meets the eye. In fact, considering this matter closely one gets the uneasy feeling that the Complainant's complaint to ACP Onguti in August 2000, was intended to circumvent or preempt the complaint made by BOC (K). this circumstances go deeply to show that the Complainant's credulity was definitely questionable and his evidence ought to have been treated with caution. The learned trial magistrate's finding that his credibility was above board and was therefore a serious misdirection.

PW2 does not need to much scrutiny. The Court of Appeal holding in the case cited by Mr. Bowry of Ndungu Kimanji vs. Republic [1979] KLR 282 is a good guide to determine the issue in regard to PW2 Madan, Miller and Potter JJA held: -

“The witness in a criminal PW2 was discredited in the evidence of the 1st Appellant and that of DW4 Jesse Musyoka. PW2 had fallen out with BOC (K) his employer and the likelihood of bias or exaggeration against that company could not be over looked. PW2's evidence directly imputed bad faith on the 1st Appellant in a manner that smacked of personalization. Some of the remarks by PW2 seem to have influenced the trial courts final findings in its judgment. For instance, PW2 alleged that he 1st Appellant had said that cylinders belonging to GG be hoarded in order to push the company out of business. That was one of the trial courts findings in this case and I will get back to this later. However on the credibility of PW2, he demonstrated his tendency to personalize and exaggerate issues. The threats he gave DW4, looked at in the context of PW2's own evidence is clear proof he may not have been trustworthy but may have been influenced by other ulterior motives.

PW3 does not appear to me to be a false witness. He had lost his job with GG after suffering harassment at the hands of DW5 Brig. (Rtd) Mukunguzi and others. He gave clear and straight forward evidence and clearly had he been braised, then he could only have been biased against GG. I do not find PW3 doubtful integrity or one who created doubts as to his credit worthiness.

Mr. Bowry submitted further under his head that from the evidence of PW4 Eng. Okello, it was quite clear that the segregation of cylinders was a continuous process carried out by all Gas manufacturing and selling companies including GG and BOC (K) Limited. Eng. Okello in his evidence, Mr. Bowry submitted, admitted that he found several gas cylinders kept in an open yard by BOC with specific labels i.e. “strange cylinders” and “condemned cylinders”. Counsel submitted that the evidence of PW4 clearly negates any criminal intent on the part of the Appellants and BOC (K).

I have already stated that the evidence of identification adduced before the lower court was a contentious issue which was not resolved I will get back to this pint later in this judgment.

The other ground argued by Mr. Bowry was that the defence case was not adequately considered. Mr. Bowry was unhappy with the

approach adopted by the learned trial magistrate to consider the Appellants' defences together instead of each Appellants' defences separately. Counsel submitted that it was an escapist approach adopted also in the manner documentary exhibits were handled and certain issues, like whether cylinders were safe or not, were ignored. Counsel submitted that the learned trial magistrate did not in her judgment say whether she believed the Appellants. Mr. Bowry submitted further that the evidence of defence witnesses was also dealt with en masse without weighing each evidence and without giving any reasons why each evidence was unworthy of belief.

Mrs. Gakobo did not agree with Mr. Bowry's submission. Counsel submitted that the learned trial magistrate considered all the evidence adduced before it including each Appellant's defence. Counsel submitted that the learned trial magistrate duly considered the defences case alongside that of the prosecution before rejecting the defence case for which, counsel contended the trial court ought not to be faulted.

A trial court is expected to analyse and evaluate all the evidence adduced before it by both the prosecution and the defence before determining the issues arising out of the case and giving reasons for the decision reached.

I have read the learned trial magistrate's judgment. I am convinced that the learned trial magistrate was fully conscience of the provisions of **Section 169 (1)** of the Criminal Procedure Code and of her duty as a trial court while writing the considered judgment of the court and took care to include every required item of the content of the judgment. The learned trial magistrate may have been brief in her analysis of the defence case. However, brevity per se cannot be challenged. It is quite clear to me that the learned trial magistrate did not 'ignore' the defence case but analysed and evaluated it before convicting the Appellants.

What I believe about the defence case is that the learned trial magistrate formed an unbalanced view of the evidence adduced before her and reached a decision which was unsupported both by the evidence adduced by the prosecution and that by the defence. I do not wish to say here what I will say in the judgment next while considering the remaining grounds of appeal. In order to avoid being repetitive suffice it to say, one from the evidence by the 1st Appellant, it is clear, him as the Managing Director of BOC (K) had various complaints against GG which touched on unfair trade practice e.g. poaching of large numbers of their employee and loss of business due to untruthful and misleading adverts by GG posing as marketers of Argo shield Gas. The 1st Appellant had more serious complaints which I have alluded to earlier which is comprised safely of cylinders due to tampering and to being out of test and the obvious loss of their cylinders and double serialization in various cylinders. The 2nd Appellant on his part demonstrated why he was involved in investigations with the 3rd Appellant. The reasons included those given by the 1st Appellant in his defence. The 2nd Appellant defence was that what prompted investigations from the word go was the loss of their cylinders and his duty was to trace them. It was in the process of tracing them that the anomalies I have mentioned were discovered. The 2nd Appellant stated the reason why BOC (K) went to a private investigator, DW5 when police proved reluctant to investigate.

The 3rd Appellant's evidence was in tandem with that of the 2nd Appellant. The other important evidence was that of DW5, the private prosecutor Mr. Mukunguzi stated that he approached PW9, ACP Onguti which Onguti did not deny, for police assistance. In his investigations, Mukunguzi said that ACP Onguti had informed him that the matter was a civil case. Mukunguzi said that he was surprised to see the Appellants charged with criminal cases by the same person who declared the matter civil.

DW8 was another important witness. This witness, the 4th accused in the case Mr. Ngaira, stated that BOC (K) instructed his firm of advocates to write letters to GG among others. To GG, Mr. Ngaira said that the firm was instructed to inform them to comply with set down practice in the gas business. He also cautioned GG not to use BOC cylinders. Despite the letter, Mr. Ngaira said that various cylinders with dual 'ownership' markings and others which did not meet safety requirements came to their clients through normal business. Mr. Ngaira said that he advised BOC (K) to store the said cylinders in a safe place. Express (K) was chosen and PW6 stated as much in his evidence. Mr. Ngaira said that BOC (K) then tried to pursue the two issues with the authorities including Kenya Bureau of Standards and Department of Occupational Health and Safety and of course the police.

It is my belief that the evidence of the prosecution considered alongside that of the defence would not have resulted in any convictions. I find that the learned trial magistrate formed an unbalanced view of the evidence and reached a decision which was unsupported by the evidence before her as I said earlier. Had the learned trial magistrate given due consideration and weight to the evidence before her, I believe that she would have arrived at a totally different conclusion. See **PANDYA vs. REPUBLIC 1957 EA 336**

The other ground argued is what I classified as legal points raised in seven grounds of the Appellants' petition of appeal.

The first such ground is the one numbered 15. Mr. Bowry submitted that the issues or question of ownership could only be determined in a civil case. He relied on the case of **ALINYO & ANOTHER vs. REPUBLIC [1974] EA 544** which was case A29 in his bundle.

The Court of Appeal for Eastern African in that case held: -

“Disputes concerning ownership of property should be litigated in a civil court.”

With respect to Mr. Bowry, the case was cited out of context. In the cited case, the matter involved use by police as exhibits of motor vehicles seized by customs officers at Musoma in Tanzania. After the trial, the Court did not make order of forfeiture and the Appellant's applied by summons to the Court of Appeal for release of the vehicles to them. The Appellants had not been party to the criminal case and therefore the court struck out the appeal on two grounds.

One, that an appeal in a criminal matter may only be brought by someone convicted and;

Two disputes concerning ownership of property should be litigated in a civil court.

The facts of the cited case are different and easily distinguishable from those in the instant case. The cited case does not apply.

In grounds 38 and 39, the Appellants through counsel contended that the trial court lacked jurisdiction in the fact of the pending High Court Civil matter. He relied on the case of Republic vs. Commissioner of police *ex parte* Tarus t/a Tarus & Co. advocates (2003) KLR 584 holding 3 thus: -

“Where a remedy is elsewhere provided and available to a person, to enforce an order of a criminal court in his favour is no valid reason why he should be permitted to involve the assistance of criminal law for the purpose of enforcement.”

I agree with my sister J. Khaminwa’s holding in the cited case. However, with due respect to the learned counsel Mr. Bowry, that case is easily distinguishable from the instant case. In the cited case an advocate’s client disagreed with the advocates, the Applicant in the cited case, over payment of money received by the advocate/Applicant on behalf of the said client. The advocate refused to pay until the dispute was resolved. The client decided to report to *inter alia*, the police. That is when the advocate filed an application for judicial review which was the subject matter in the cited case. In that context, the learned judge’s holding fully applies. Mr. Bowry also relied on the Judicial Review case of Republic vs. Chief Magistrate’s Court Mombasa, *Ex parte* GANIJEE [2002] 2 KLR 703. This case is good for the proposition that criminal charges should not be allowed to stand if their predominant purposes is to further an ulterior motive. I have no quarrel with the courts holding in this case. However the best applicable case is ***Mule vs. Republic [1983] KLR 246***. In this case, the Appellant had caused damage in a bar as he fought the Complainant. The learned Judge Porter Ag. J. held: -

“Civil and criminal cases may run concurrently and the fact that an accused person may be liable in damages does not mean that he cannot be prosecuted for a criminal offence revealed in his action.”

I wish not to say any more. I am persuaded by this authority and I believe that it has the correct principle of law that criminal and civil cases can run concurrently if in fact there is reasonable cause and liability to justify their institution.

The other sets of grounds are similar and are grounds 36, 37 40 and 41. In ground 36 the conviction of the Appellants is challenged on the basis that the court having found that there was no theft could not convict the Appellants at all in ground 37 the conviction of the Appellants is challenged on the basis that the trial court having found that the Appellants had no intention to permanently deprive the Complainant of the cylinders. In ground 40 the convictions of the Appellants are challenged on grounds the court found that there was no dishonestly and no fraud proved on the part of the Appellants. In ground 41 the learned counsel for Appellants argued that having found that no *mens rea* was proved, then no convictions could be entered.

Mr. Bowry quoted extensively from various authorities in a bid, which I must say was more than successful, to demonstrate what constitutes a Handling charge and what could be a probable defence. As I have said already, I agreed with the *reci denti* in the cited cases and since they were repetitive I will quote from only selected few.

In ***Tembere vs. Republic [1990] KLR 353***, Githinji J, as he then was held: -

“One of the important elements of the charge of handling stolen property is that the accused must know or have reason to believe that the goods were stolen another vital element is that the accused must dishonestly receive or retain the goods.”

This case says it all and to put it simply, there can be no Handling under **Section 322 of the Penal Code** if there was no theft of the item alleged to be handled. The prosecution in support of a charge of Handling Stolen goods must first and foremost prove that the goods were stolen, and then only would the prosecution be required to prove that at the time the accused person “received” or “retained” them, the accused person knew or had reasons to believe that they were stolen. In that context therefore, the learned trial magistrate having found that the cylinders in issue in the case had not been stolen and having found that there was no dishonestly or fraud on the part of the Appellants, could not have convicted the Appellants for any of the charges preferred against them. I will refer to the sections of the learned trial courts findings on these points. At page J15 of judgment the learned trial magistrate found as follows: -

“Why then did they detain them? In my considered new, BOC (read accused 1, 2 and 3) did not have the slightest noble or honest intentions when detaining the complainant cylinder. They may not have had the intention to deprive the Complainant permanently of the same but how long did they intend to keep them. how....

Their intention was certainly to harass and frustrate PW8 (sic) and possibly cripple his operations and push him out of business....

This analysis shows that although it is not clear how long the accused persons intended to keep the cylinders their overt intention was not possibly to steal them. Then intention was to cripple the Complainant’s business’. They wanted to finish “Johnny come lately” who had dared to come and interrupt them hitherto unchallenged monopoly in the gas industry...”

The reason advanced by the learned trial magistrate in the quoted excerpt of her judgment as above brought the entire conduct of the Appellants in the way she viewed them, outside the purview of criminal law. There was no justification to enter a conviction on any of the Appellants following the findings arrived at by the learned trial magistrate in her decisions.

I need not go any further than that but to say sadly that from the language of the learned trial magistrate, she definitely went overboard and used language that had no place in the judgment. I say so no more.

Let me quote from **Malingi vs. Republic 1989 KLR 225 at page 227** to emphasis the need to prove not just ‘possession’ of an item but that the item was stolen it stated thus: -

“The trial court has a duty to decide whether from the facts and the circumstances of the particular case under consideration the accused person either stole the item or was guilty or innocent receiver. By the application of the doctrine the burden shifts from the prosecution to the accused to explain his possession of the item complained about. He can only be asked to explain his possession after the prosecution has proved certain basis facts. Firstly that the item he had in his possession had been stolen; it had been stolen a short time of its loss to the time the accused was found with it was, from the nature of the item and the circumstances of the case, recent; that there are no co-existing circumstances which pointed to any other person having been in possession of the item. The doctrine being a presumption of fact is a rebuttable presumption. That is why the accused is called upon to offer an explanation in rebuttal, which if he fails to do an inference is drawn, that he either stole it or was a guilty receiver.”

I find that for the reasons I have given in this judgment the convictions entered against the Appellants were based on serious misdirection of fact and also law, and that the learned trial magistrate formed an unbalanced view of the evidence before her which evidence was conflicting and contentious in nature and which conflicts remained unresolved. There were material elements the court ignored in the demeanour and manner of witnesses which was material in determining their truthfulness. After carefully weighting these appeals and the evidence and material adduced before the trial court and after a full consideration and analysis of the same, I have come to the conclusion that the learned trial magistrate was wrong to come to the conclusion that she did. The convictions were unsafe. I will therefore allow all the three appeals quash the convictions and set aside the sentences. Having done so, the last ground of appeal being that on sentence need not be considered.

I am aware that the Appellants paid fines in view of the imprisonment terms imposed in default thereof. The fines so paid should be refunded to the accused persons in full.

Dated at Nairobi 4th day of October 2006

.....

LESIT, J.

JUDGE

Read, signed and delivered in the presence of;

Appellant(s)

Mr. Bowry for the Appellants

Mrs. Gakobo for State

Ann – CC

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LESIT, J.

JUDGE