REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

Criminal Appeal 24 of 200

(From the original conviction and sentence of the Chief Magistrate's court at Nakuru in

Criminal case No.544 of 2004 – H. M. Nyaga – S.R.M)

FELISTA AUMA SIMBA……....……APPELLANT

VERSUS

REPUBLIC……..…….……..PROSECUTOR

JUDGMENT

The appellant Felista Auma Simba was charged with others with the offence of **House breaking and Stealing** contrary to **Section 304(1)** as read **with Section 279(b) of the Penal Code**. The particulars of the offence were that on the 3rd of March, 2004 at Lake View Estate, the appellant with others broke into and entered the dwelling house of Margaret Wanjiru Maina and stole therefrom one Television set, one Sony CD Player and one Video deck, the property of the said Margaret Wanjiru Maina. The appellant alternatively faced the charge of **Handling stolen property** contrary to **Section 322(2) of the Penal Code**. The particulars of the offence were that on the 3rd of April, 2004 at Kivumbini Estate, otherwise than in the course of stealing, the appellant handled one television set make Hyundai knowing or having reason to believe the same to be stolen. The appellant pleaded not guilty to the charge. After a full trial, the appellant was acquitted on the main charge of theft but was convicted on the alternative charge of handling stolen property. The appellant was sentenced to serve seven years imprisonment. She was aggrieved by her conviction and sentence and has appealed to this court.

Although she raised several grounds of appeal challenging her conviction by the trial magistrate, at the hearing of the appeal Miss. Opati learned state counsel submitted that she did not wish to oppose the appeal. She submitted that the evidence on record did not warrant the conviction and sentence that was meted out on the appellant. She submitted that the appellant was of advanced age and should be given the benefit of doubt because she was gullible at the time the offence was committed. She submitted that when the television set was taken to the house of the appellant, she did not believe that the same was stolen property. Mr. Gai for the appellant agreed with the submission made by the State counsel. He urged this court to allow the appeal, quash the conviction and set aside the sentence imposed.

This being a first appeal in a criminal case, this court is mandated in law to re-evaluate and to reconsider the evidence adduced before the trial magistrate so as to arrive at an independent decision whether or not to uphold the conviction of the appellant. In reaching its decision, this court is required in law to put in mind the fact that it neither saw nor heard the witnesses as testified. (*See* **Okeno vs Republic [1972] E.A 32**). The issue for determination by this court is whether the prosecution established the guilt of the appellant to the required standard of proof beyond reasonable doubt.

I have carefully evaluated the evidence that was adduced before the trial magistrate's court. There is no doubt that the appellant was found in possession of the television set which had been stolen from the house of the complainant. The appellant admitted in her testimony that the said television set was in her

possession when the police went to her house, searched it, and recovered the said stolen television set. Her explanation on the circumstances that the said television set was found in her possession was that the same had been left at her house by one of her co-accused in the subordinate court who was convicted of the offence of stealing and another man known as Salim Abdallah.

The appellant told the court that she did not know that the said television set was stolen. The subordinate disbelieved her evidence and convicted her for the offence of **handling stolen property** contrary to **Section 322(2) of the Penal Code**. Having carefully analysed the said evidence adduced by the prosecution witnesses and the defence which was offered by the appellant, I am not prepared to find that the trial magistrate erred when he found the appellant guilty of the offence of handling stolen property. The appellant, knew or ought to have known in the circumstances that the said television set was left in her possession, that the same was stolen. By feigning ignorance, the appellant was only stating what would save her skin. Her testimony was self serving. I hold that the trial magistrate properly evaluated the evidence and convicted the appellant for the offence of handling stolen property. Her appeal against conviction lack merit and is therefore dismissed.

On sentence, the appellant was sentenced to serve seven years imprisonment for the offence of handling stolen property. The maximum sentence for a person who is convicted for the said offence is fourteen (14) years imprisonment with hard labour. When the appellant mitigated her sentence before the trial magistrate's court, it was stated that she was a first offender. Her co-accused were convicted for the offence of breaking and stealing and were sentenced to serve a lesser term in prison than the appellant.

In the premises therefore, I do hold that the trial magistrate did not consider all the circumstances of the case before he arrived at the said decision in sentencing the appellant. The trial magistrate did not consider the age of the appellant before he arrived at the said decision. It is therefore clear that the trial magistrate wrongly exercised his discretion when he sentenced the appellant. I will therefore set aside the said sentence imposed on the appellant.

I will substitute the said sentence with a sentence of this court commuting the sentence of the appellant to the period already served. The appellant was convicted and sentenced on the 24th of January, 2006. She has been in prison for a period of slightly over ten months. I think she has learnt her lesson. She is ordered set at liberty and released from prison unless otherwise lawfully held.

It is so ordered.

DATED at NAKURU this 29th day of November, 2006

L. KIMARU

JUDGE