REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU
CRIMINAL APPEAL NO. 22 OF 2004

BETWEEN

BENSON MWENDA …… APPELLANT

AND

REPUBLIC …… RESPONDENT

(Being an appeal from the judgment and sentence of A.N. Kimani, SRM in Chuka Criminal Case No. 822 of 2001 dated 6.2.2004)

REASONS FOR JUDGMENT OF THE COURT

The appellant herein, BENSON MWENDA MBURINI was charged with the offence of kiosk breaking and committing a felony contrary to section 306(a) of the Penal Code. The appellant was the third accused in Chuka Criminal Case no. 822 of 2001.

The particulars of the offence are that on divers dates between **15th June and 5th July 2001 at unknown time at Chogoria Township, Chogoria Sub-Location, Chogoria Location in Meru South District within the Eastern province, jointly broke and entered a building namely a kiosk and committed therein a felony namely stealing**. Details of the items stolen were given in the charge sheet, all of which were valued at Kshs. 9,925/=, the property of JEREMIAH NYAGA.

In the alternative the appellant was charged with handling stolen goods contrary to section 322(2) of the Penal Code. The particulars of the offence are that between 15th June 2001 and 5th July 2001 at unknown time at Chogoria Township Chogoria S/Location, Chogoria Location in Meru South District within the Eastern province, otherwise than in the cause of stealing dishonestly received or retained 1 forked jembe, 1 bell, hammer, 4 chisel, 1 screw reflector, 1 spanner ring knowing or having reason to believe them to be stolen goods.

After hearing the case, the appellant was found guilty and convicted on the alternative count. He was sentenced to 2 years imprisonment. The facts of the case are that the complainant realized that items were disappearing from his kiosk. Some two suspects were arrested and the two suspects led the complainant to the appellant from whom the items listed in the alternative charge were recovered and positively identified by the complainant Jeremiah Nyaga who gave evidence as PWI. When the items were recovered from the appellant, PW2 PC John Ndirangu of Ntumu Police station was present. PW3, PC Samuel Korir also testified that the items as enumerated in the alternative count were recovered from the appellant.

The appellant gave a sworn statement in which he told the court that he was taken from his home at about 10.00am when he was preparing to go to work. He was questioned by PC Ndirangu Njue and the complainant regarding the complainant's missing items. When he stated that he did not know anything about those items, he was handcuffed and made to open his kiosk from which the police recovered the items which the police alleged he had handled otherwise than in the course of stealing. The appellant added that he was a trader in assorted scrap metal.

He was then taken to Ntumu Police Station in the company of two parking boys. He also stated that when he refused to part with a bribe of Kshs. 5,000/= demanded by the police, he was charged together with the parking boys. He denied during cross-examination that the items were recovered from his kiosk and that the whole case against him was as a result of collusion between the police and the complainant. After hearing the case, the learned trial magistrate found that there was overwhelming evidence against the appellant. That the appellant was found in possession of recently stolen property. He was thus convicted as charged and sentenced to serve two (2) years imprisonment.

The appellant has appealed both against conviction and sentence. The appellant initially filed his petition of appeal on 20.2.2004 comprising four (4) grounds of appeal; ground four thereof being that the proceedings in the lower court were conducted by an unqualified prosecutor. On 9.12.2004 the appellant filed supplementary grounds of appeal to augment the grounds in the petition of appeal filed on 20.2.2004. The four (4) supplementary grounds of appeal were that:-

1. That learned magistrate erred on a point of law in convicting the appellant on a defective charge.

2. The learned magistrate erred on a point of law and fact in making a finding that the stolen items were recovered from the appellant.

3. The learned magistrate erred in a point of law in not taking into account the explanation given by the appellant regarding the recovery of the stolen items.

4. The learned magistrate erred on a point of law in applying the doctrine of recent possession against the appellant.

When the appeal came up for hearing before me, Mrs. Ntarangwi for the appellant argued the appeal mainly on the basis of ground number 4 of the petition of appeal dated 19.2.2004, namely that the proceedings in the lower court had been conducted by an unqualified prosecutor; one Sgt Musila. She also argued that the charge of which the appellant was convicted and sentenced was defective for duplicity. That the charge alleges that the appellant either received or retained the suspected stolen property. That the charge as framed contravened the provisions of section 322(1) of the Penal Code.

Mrs. Ntarangwi cited the Court of Appeal decision in Criminal Appeal No. 68 of 1999 – Selimia Mbeu Owuor and Another V Republic. Mr. Oluoch for the respondent conceded the appeal on the following three grounds:-

1. That the defects on the face of the charge sheet were fatal and not curable under section 382 of the Criminal Procedure Code (CPC).

2. Part of the proceedings in the lower court were conducted by an unqualified person to wit a police sergeant.

3. That since the allegedly stolen items were returned to the complainant, he would not be praying for a retrial.

The appeal was allowed. I quashed the conviction, set aside the sentence of two (2) years. I now give reasons for that judgment. Mrs. Ntarangwi abandoned all the grounds of appeal except ground number four (4) of the original petition of appeal dated 19.2.2004 and ground number one (1) of the supplementary grounds of appeal.

I shall deal first with the ground that part of the proceedings in the lower court were conducted by an unqualified prosecutor which Mrs. Ntarangwi submitted was contrary to the provisions of section 85 of the C.P.C. Section 85 of the C.P.C. provides as follows:-

“85(1) The Attorney General, by notice in the gazette, may appoint public prosecutors for Kenya or for any specific area thereof and either generally or for any specific case or class of

cases.

(2) The Attorney General by writing under his hand may appoint any advocate of the High Court or person employed in the public service not being a police officer below the rank of Assistant Inspector of Police, to be a public prosecutor for the purposes of the Act."

From the record of the proceedings in the lower court the appellant's case was partially conducted by one Sergeant Musila, who was a police officer below the rank of Assistant Inspector of police.

In ELIREMA AND ANOTHER V. REPUBLIC Criminal Appeal No. 67 of 2002 (Mombasa) the appellants' case in the lower court had been conducted in the main by two corporals and it was only at the stage of delivery of judgment that an inspector was present for the prosecution. In dealing with the issue of the corporals having conducted the prosecution's case, the learned judges of appeal (Omolo, Tunoi and Lakha JJA) had this to say:-

"Going by the provisions of the Code…… it is clear that the Attorney General has no power to appoint a police officer below the rank of Assistant Inspector to be a public prosecutor ……. (the two corporals) were clearly acting as public prosecutors. They did not for example ask the trial magistrate to give them permission under section 88(1) of the Code to prosecute as private persons. They were clearly not entitled to act as public prosecutors …….. We were ……"

So the point has been made that a police officer below the rank of Assistant Inspector of police cannot competently conduct a case against an accused person. I therefore concur with both Mrs. Ntarangwi and Mr. Oluoch that the appellant's conviction cannot be sustained. The learned trial magistrate did not at all deal with this issue in his judgment. Perhaps if he had been vigilant enough he would have found that the prosecution's case had to fail for lack of a competent prosecutor throughout the trial.

In conceeding to the appeal, Mr. Oluoch submitted that he would not be asking for a retrial on the ground that the stolen items were all recovered and returned to the complainant. Be that as it may, the Court of Appeal in the **Elirema Case (above)** also dealt with the issue of whether or not an incompetently conducted case can be ordered retried or whether the same is null and void abnitio. The holding of the court was that such a trial was a nullity and I so find the appellant's prosecution to have been.

Mrs. Ntarangwi also submitted that the charge of which the appellant was convicted was defective for duplicity. The particulars of the charge were that **"the appellant…….. otherwise than in the course of stealing dishonestly received or retained …….. knowing and having reason to believe them to be stolen goods."** Section 322(1) of the Penal Code is clear on what constitutes or amounts to a person handling stolen goods. A person handles stolen goods if he, otherwise than in the course of stealing dishonestly.

(i) Receives

(ii) Retains

(iii) Undertakes or assists in their retention removal, etc

It therefore behoves the prosecution to make a deliberate choice as to which of the three limbs of the section to charge an accused person under. It can only be one of them and not two or all three limbs at once. As was held by the Court of Appeal in the case of Selimia Mbue Owuor and another V. Republic (above)

"…….it is not open to them (prosecution) to combine dishonest receipt with dishonest retention in one charge, if they do that the charge would be bad for duplicity. The point is that an accused person is entitled to know whether it is being alleged that he dishonestly received the goods or that he dishonestly retained the goods or that he dishonestly retained them and so on."

It is clear in this case that the appellant having been charged with either dishonestly receiving or retaining

the stolen goods, the charge against him was bad for duplicity and on that ground, the appeal succeeds. It was for these reasons that I allowed the appeal on 24.2.2005, quashed the conviction and set aside the two (2) year term of imprisonment imposed upon the appellant. Orders accordingly.

Dated and delivered at Meru this 4th day of May 2005.

RUTH N. SITATI

Ag JUDGE

4.5.2005