REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

APPELLATE SIDE

Criminal Appeal 251 2003

(from Original Conviction and Sentence in criminal case No. 776 of 2002 of the Senior Resident Magistrate's Court at Kangundo: N. N. Njagi Esq. on 23.12.2002)

MARTIN MATI MWIKYA ……. APPELLANT

VERSUS

REPUBLIC ……. RESPONDENT

J U D G E M E N T

Martin Mati Mwikya appeals from the judgement of Senior Resident Magistrate's Court Kangundo in Criminal Case 776/03. In the lower court he was charged with the offence of stealing contrary to section 275 of the Penal Code and alternative charge of handling stolen property contrary to Section 322(2) of the Penal Code. After the trial, the court found him guilty of the offence of handling stolen property on both counts and sentenced him to run consecutively.

The appellant raised 3 grounds of appeal which in sum are that the case was not proved beyond any reasonable doubt.

The State opposed the appeal on conviction but had reservations on the sentence as the State Counsel found it to be on the higher side.

The case before the lower court was that P.W.1 and P.W.2 had washed their clothes and hanged them out to dry. They were stolen. This was on 4.12.200. P.W.4 police constable Mwangi received information that the appellant was selling suspected stolen goods. P.W.4 approached the appellant, found him with some clothes and later led him Airport village where P.W.4 recovered more clothes which were identified by P.W.1 and 2 as their stolen goods. Meanwhile appellant led P.W.4 to the house of P.W.3 where more clothes were recovered. P.W.3 said the appellant had given him some wet clothes to keep for him which he could collect later but he later came with police who took possession of the clothes.

The appellants defence was a mere denial. As submitted by the State Counsel there was overwhelming evidence against the appellant. P.W.4 just stopped and found him with clothes identified by P.W.2. Appellant then led them to P.W.3's house where more stolen clothes were recovered. Appellant offered no explanation as to how he came by the said goods. The clothes had been stolen between 4th and 5.12.2002 when wet and were recovered on 7.12.2002. When handed over to P.W.3 they were still wet. Though the court found the appellant guilty of handling stolen property, the court should have drawn the presumption that the appellant was the thief as he was in recent possession of the clothes. Even having found the way that trial court did, this court finds that the conviction is safe and cannot be faulted.

As regards sentence the court finds that it is manifestly harsh and excessive. The appellant was treated as a first offender. There were no aggravating circumstances to warrant a sentence of 12 years to run consecutively. The court should also look at the value of the goods stolen. The magistrate should have explored the possibility of placing the appellant on probation or Community Service Order. The appellant was sentenced to jail on 23.12.2002. So far he has served one year (1) and nine months. The period so far

served is in my view sufficient and I will therefore set aside the sentence of 12 years on each count and replace it with the period so far served by the appellant on each count and they will run concurrently. The upshot is that the appellant is set free forthwith unless otherwise lawfully held.

Dated, read and delivered at Machakos this 13th day of October 2004.

Read and delivered in the Presence of

R. V. WENDOH

JUDGE