REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL APPEAL NO. 943 OF 2003

SAMUEL MUGENDI KAMUNDIA……...…….……APPELLANT

VERSUS

REPUBLIC……..……...……RESPONDENT

CONSOLIDATED WITH

CRIMINAL APPEAL NO. 105 OF 2004

MOSES SIMIYU WANYONYI……..……APPELLANT

VERSUS

REPUBLIC…….……RESPONDENT

JUDGMENT

The appellants, **SAMUEL MUGENDI KANUNDIA** and **MOSES SIMIYU WANYONYI** were convicted for **HANDLING STOLEN GOODS** contrary to section 322(2) of the Penal Code; and for **ROBBERY**, contrary to section 297(1), respectively.

PW1, Stanley Nganga Gitau, was the complainant. He testified that 3 thugs raided his house on the night of 22nd June 2003. The thugs began hitting his doors with stones, and also put off the lights. PW1's wife was screaming, but he prevailed upon her to stop. But as the thugs threatened to come into the house, come what may, PW1 had the door opened for them.

The thugs took Kshs 3,000/= from PW1, together with the family Television, Video and radio. According to PW1, the thugs locked them up in his bedroom, and then proceeded to ransack other rooms in the house. Finally, the thugs left, and PW1 phoned the police. When the police arrived PW1 told them he suspected the workers whom he had hired to build a water tank. He went with the police to Ndeiya, where he found the workers asleep. PW1 then testified as follows:

> **"We returned home. At Kwanbera, I came to Kiboko stage where there is an Hotel. That was about 4-5 a.m. We found 3 vehicles and people.**
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> **I saw carton and sack wrapped and a person standing nearby. I sent Chege to make a call. He went towards the Hotel to make a call then one followed him and asked if he can call a watchman of the hotel. The one standing near the goods started to move away. We decided to arrest him. He is the 1st accused. We were with Chege and three others. I found him wearing my kofia. "cap MFI". It is labeled S.N. (Stanley Nganga). We found T.V. MFI 2. This is the**

remote they left…"

PW1 said that the police were called and they arrived and arrested the 2nd Appellant.

PW2, Paul Kinyanjui Gitau, said that he is the son to PW1. He told the trial court that the thugs first locked his house from outside, before moving to his fathers house. After the thugs left PW2 broke his door, and went to open his father's house. He corroborated the testimony of PW1 about going with the police to Ndeiya, where they found the workers asleep. He also confirmed that the 2nd appellant was wearing PW1's cap, at the time he was arrested at Kiboko stage.

PW3, Joseph Gathoni, is a matatu driver. He was at the Kiboko stage on the morning of 22nd June 2003, at about 4.-00 a.m. He was talking with customers who had luggage. However, the owner of the luggage arrived and blocked them. When he learnt that the luggage was stolen, they arrested the 2nd appellant. However, the others ran away.

PW4, SGT Josphat Kizingo, said that he was an officer with the CID, based at Kikuyu, where he is involved in general investigations. At about mid-day on 22nd June 2003, the OCPD Kiambu instructed him to take over the 2nd Appellant's case. He therefore went to Tigoni Police where he collected the 2nd appellant, with the exhibits which had been recovered earlier. He took the 2nd appellant, with the exhibits to Kikuyu Police Station. Early the next morning, at 5.30 a.m. the 2nd appellant led the police to the houses occupied by the 1st appellant, and the 3rd accused respectively. At the house occupied by the 1st appellant, PW3 recovered a mobile phone, which was later identified by the complainant as belonging to him.

In his defence, the 1st appellant only said that he was a visitor at the house where he was arrested. His said defence is the foundation of the current appeal. It is his contention that the prosecution could easily have verified the ownership of the house by calling either neighbours or the Assistant Chief of the area.

First, it is clear that the only things that connected the 1st appellant to the offence was the mobile phone, and the fact that the 2nd appellant led the police to him.

The 1st appellant does not deny having been in the house where the mobile phone was recovered. But he says that he was only a visitor at that house. Whilst every care must be taken when handling the evidence of a co-accused, in this case, the information provided by the 2nd appellant led police to recover one of the stolen items from the house wherein the 1st appellant was arrested. That, to my mind, can only confirm the information given by the 2nd appellant, to the effect that the 1st appellant was in on the commission of the offence.

It is my considered view that it is not necessary for the prosecution to establish the actual ownership of a premises in order to prove that the occupant was in possession of a stolen item found inside such premises. Provided that the prosecution is able to prove that the person was in possession of the stolen items, whether or not the he owned the premises where the goods were found, the prosecution would have discharged the burden of proof.

In this case, the 1st appellant contends that he was only a visitor at the house where he was arrested, and from where the mobile phone was recovered. He is, in effect, saying that he knows nothing about the phone. The question that arises, in the circumstances, is whether the appellant was or was not the sole occupant of the house at the material time. If he was, he would be held accountable. However, if there were other persons in the house, either at the time of his arrest or prior to that, the appellant might not have to be called to account for the presence of the mobile.

From the evidence on record, it is not clear whether or not the appellant was the sole occupant of the house either at the time of his arrest or prior to that date. In the circumstances, although the mobile phone was recovered in the house where he was arrested, it would be wrong for this court to assume that the 1st appellant was in possession of the said mobile phone. In other words, there was a possibility that his defence was true, and that he did not have anything to do with the theft. The benefit of the doubt that has

arisen must be given to the 1st appellant.

On his part, the 2nd appellant has first challenged the validity of the proceedings. He says that as the rank of the prosecutor on 2nd July 2003, was not disclosed to the trial court, the proceedings were rendered a nullity. The 2nd appellant submitted that just because on 16th July 2003, the prosecutor was I.P Kimemiah, it would be wrong for the court to presume that that was the same Kimemiah who conducted the prosecution on 2nd July 2003. The appellant says that the court cannot make any presumptions, but must go by the record. Furthermore, he says, the failure to disclose the prosecutor's rank on 2nd July 2003 was prejudicial to the accused persons.

First, I must confess that I am unable to comprehend how the omission of the prosecutor's rank was prejudicial to the accused persons. To my mind that omission could not in any way enhance the prosecution case against the appellant, or alternatively lessen his defence. The omission did not and could not have any impact on the evidence which was to be adduced. Also it could not have changed the charges, as read out to the accused persons.

But in any event, by the very next court session, the prosecutor was I.P Kememiah. Was he the same person as the one who was cited as the prosecutor on 2nd July 2003? I do not know.

Learned State Counsel, Mrs. Toigat submitted that the omission of the title of the prosecutor from the record of the proceedings on 2nd July 2003 was not fatal to the prosecution. Section 382 of the Criminal Procedure Code provides as follows:

> **"Subject to the provisions hereinbefore contained, no finding, sentence or order passed 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."**

To my mind, the failure to cite the rank of the prosecutor in the record of 2nd July 2003 falls squarely within the ambit of S. 382, above. Therefore, the said omission cannot form the basis for the reversal or alteration of the judgment of the learned trial magistrate.

Furthermore, if I were to hold that the proceedings were a nullity simply because of the omission, I would be making an assumption that the prosecutor was not qualified to be so appointed. There is no basis for me to make such an assumption. If anything, it would appear more likely that the prosecutor was I.P Kememiah, as submitted by the learned State Counsel.

The 2nd appellant has also submitted that even though he was at the Kiboko stage, at the hour in contention, he was not in possession of the goods allegedly stolen from the complainant. He may have been near the goods, but so also were other people who were at the stage. He also says that whereas the other people ran away, he did not run, because he was innocent. Viewed from that perspective, the 2nd appellant would appear to have a point.

But then again, the 2nd appellant seems to have overlooked the evidence of PW1 and PW2, to the effect that he was found wearing the cap belonging to the complainant. The said cap was identified by the applicant as it had his initials "S.N", which stand for Stanley Nganga. Furthermore, PW1 testified that the 2nd appellant was negotiating the price of hire of a vehicle, to ferry items. PW2 also said that the 2nd appellant was found negotiating the "price" of hiring a motor vehicle. And PW3, the matatu driver corroborated the evidence of PW1 and PW2, when he testified that the 2nd Appellant negotiated with him the hire charges for ferrying the luggage.

In the light of all that consistent and corroborative evidence, connecting the 2nd appellant to the goods which had been stolen from the complainant, some 4 hours earlier, I hold the considered view that there was sufficient evidence to sustain his conviction.

In conclusion, I do now quash the conviction against the 1st appellant and set aside the sentence. He is to be set free unless he is otherwise lawfully held.

But in relation to the 2nd appellant, I find no merit in his appeal. It is therefore dismissed, and I uphold both his conviction and sentence. It is so ordered.

Dated at Nairobi this 2nd day of December 2004

FRED A. OCHIENG

AG. JUDGE

Appellant present

Mr. Odero Court Clerk