

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION
CRIMINAL APPEAL NO.176 OF 2003

(From original Conviction and Sentence Criminal Case No.218/386 of
2002 of the Chief Magistrate's Court at Kibera)

MOSES LIYAYI MOKANJERO APPELLANT

VERSUS

REPUBLIC RESPONDENT

JUDGEMENT

The appellant in this case is one Moses Liyayi Mokanjero. He was originally charged with one count of stealing by servant contrary to section 281 of the penal code in court one and three counts of handling stolen property. After the trial the appellant was acquitted of this one count but he was found guilty, and convicted on three counts of handling stolen property contrary to S.322 (2) of the penal code. For each of the three handling charges the appellant was sentenced to three years imprisonment which was to run concurrently. The appellant was dissatisfied with both the conviction as well as the sentence and filed this appeal. Mr. Nyangoro argued the appeal on his behalf while Mrs. Nyamosi appeared for the state.

In his memorandum of appeal the appellant challenged the magistrates finding to the effect that he was the one who received the alleged stolen goods namely 5 bottles of Gato Blanco Wines, 13 glasses of J.P. Chenet and 8 Grand Cru White wine Casks yet the appellant was absent from the house where the alleged goods were found. The appellant also takes issue with the finding that he handled the stolen property yet there was no evidence that anybody saw him handling such goods. It is submitted in the memorandum of appeal that evidence adduced during the trial showed that it was two women who were found in possession of the wines in the appellants absence yet none of the two ladies nor the house maid were called as to give evidence for the prosecution.

The appellant takes issue with the failure of the prosecution to provide evidence of breakage into the store or any other evidence of stealing.

The trial magistrate is also accused of failing to take the appellants defence into account or that of his witnesses before arriving to a conviction. According to the petition of appeal the charge of handling could not be sustained in the absence of evidence tending to prove the stealing charges.

I have considered Mr. Nyangoro's submissions while arguing the appeal. I have noted that Miss Nyamosi for the state did not support the conviction. My careful perusal of the lower courts record reveals that there was no conclusive evidence to prove that the appellant was the one actually found in possession of the stolen wines, nor the glasses in issue. Evidence on record shows that two ladies were found with the items in a house where a house girl was also present. None of these persons were called to give evidence in favour of the prosecution to explain how they came to possess these items or to connect the appellant with the ownership of the stolen items or the house where the alleged wine was recovered. According to P.W.1 the wine had no special marks and could be obtained in any super market within the country. P.W.1 has admitted that the appellant had bought several such wines from the complainant company in the past. Given the fact that only five wines are alleged to have been handled by him it is unfair to conclude that he could only have come across this small consignment which was sure no special marks by stealing or handling the same.

According to the trial magistrate there was no evidence to convict the appellant with stealing. It is therefore equally doubtful that evidence to convict him with the handling would be available more so

when the amount of wine involved is only five bottles which could have been acquired through any other means apart from acquiring the same through fraudulent means from his employer. There is also no evidence on record that the store was broken into and goods stolen. It is not shown how the appellant could have handled the wines yet he was not a store keeper and had no access to the stores from the evidence on record.

I am in agreement with the state counsel that the conviction of the appellant was based on unsafe grounds and that it is unsafe to sustain it. I therefore allow this appeal and set aside the sentence imposed in respect of the three counts. The appellant is set at liberty unless he is lawfully held.

Order accordingly.

R.M. MUTITU

JUDGE

28/3/2003

Delivered, dated and signed in the presence of Mr. Nyangori and the appellant and in the presence of Mr. Monda for Nyamosi for the state.

R.M. MUTITU

JUDGE

28/3/2003