REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAKURU
CRIMINAL APPEAL NO.327 OF 2000
(From original conviction and sentence in Criminal
Case No.1361/97 of the Chief Magistrate's Court
at NAKURU - M.. CHEPSEBA (MRS)

JUSTUS NDAKALA ALUKWE……APPELLANT

VERSUS

REPUBLIC……..…….RESPONDENT

J U D G M E N T

The Appellant was convicted by the Chief Magistrate's Court, Nakuru of one count of BURGLARY and STEALING contrary to 304(2) and 279(b) of the Penal Code and of one count in the alternative of Handling Stolen Goods contrary to Section 322(2) of the Penal Code. The Appellant's main ground of appeal was that he was a visitor in the house where the stolen things were recovered and that he did not know where the things came from. The Counsel for the State opposed the appeal on both conviction and sentence but conceded that the Appellant should not have been convicted of the main count as well as on the alternative count as happened in this case. In finding the Appellant guilty on the main count of Burglary and Stealing and in the alternative count of Handling the court observed:-

> ***"The charge of Burglary and Stealing was not proved against the three accused persons. Most of the prosecution witnesses' evidence touches on recovery. Although the accused 2 and 3 deny being found with the stolen items. This court is satisfied they were found with one item or the other. The 2 nd accused (now Appellant) was proved to have been found with the bicycle although he also led to the recovery of the other items. He could not lead to the recovery if he had not been in the Stealing team."***

The court then concluded:-

> "***I find the charge of Burglary and Stealing proved against the 2 nd accused person (Appellant) on count 1,II and III respectively."***

The charge facing the Appellant was count 1 and in the alternative to count one Handling Stolen Property. There was no count two or three facing the Appellant. The trial court acted on a wrong impression of the charges the appellant was facing before her court in a manner that smacks of carelessness at most and inadvertence at the very least. Whatever it was, the court proceeded and ended

on the wrong premise. It is also true that a court cannot enter finding on both a main and an alternative count. Findings of the court can only be entered either in the main count charged or the alternative count. In entering a finding on one count, the court declares in its Judgment that it enters no finding on the other count. That ensures that the Appellate court's hands are not tied and it can enter fresh findings in the same case.

The Appellant was therefore wrongly convicted on the main count and on the alternative count.

In the excerpts of the Judgment of the court quoted the basis of the conviction are clearly not fully stated. In the opening remarks the court found that the main count was not proved against the 2nd and 3rd accused. At that point the court found that evidence of the prosecution was mainly on recovery of exhibits. I then ended by finding that:-

> ***"Although the 2 nd and 3 rd accused deny being found with the stolen items this court is satisfied they were found with one or the other item."***

Nowhere in the court's Judgment are the alleged recovered items identified in relation to the Appellant except the bicycle.

On the bicycle, only PW5 made reference to its recovery and on that point his evidence went thus:-

> **"On 13/8/97 we went to the house of 2nd accused. We recovered a bicycle whose No. was not quite visible MF II. The 2 nd accused led us to the House of 3 rd accused we searched her House but did not find the sufurias Mentioned.**"

The evidence of PW5 did not disclose who led him and his two colleagues P,C. Martin and P.C. Charo to the Appellant's house. He was quite clear in respect of the house of the 3rd accused in the case.

Those other police officers were not witnesses in the case and they are the only ones who could have shed light on that issue.

PW4 the active youth winger cum elder who arrested the Appellant was very clear that on the 13th August, 1997, the 2nd accused (Appellant in the case) led him and 2 police officers whose names he does not disclose, to the house of the 3rd accused. He made no mention of the recovery of the bicycle.

The other prosecution witnesses, PW1 and PW3 husband and wife and also Complainant, identified the bicycle MFI 11 as theirs. They even had receipts for same. The means used to identify the bicycle was however not disclosed.

This court noted with consternation that all the exhibits in the case were produced by the investigating officer after crossexamination by the Appellant and the co-accused. That was defective and unprocedural and of course prejudicial to the defence.

After considering the case in details as explained, I find no evidence that any of the stolen items as particularised in the two charges facing the Appellant were recovered from him. The evidence before court of the recovery of the bicycle was vague and below the standard of proof expected of a prosecution case. In addition the only item clearly recovered from the Appellant was a T.V. set make "Samsung" which was not a subject of this proceedings.

I find that the convictions against the Appellant was defective, wrong and without any support in the evidence of the prosecution. I will accordingly quash the conviction and set aside the sentences and order that the Appellant be set free unless otherwise lawfully held. Orders accordingly.

Dated and delivered at Nakuru this 18th day of March, 2003.

JESSIE LESIIT

JUDGE