REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

crim app 117 of 02[1]

SAMSON MWAGANGA ……..…….. APPELLANT

VERSUS

REPUBLIC ……..…….. RESPONDENT

CONSOLIDATED WITH

CRIMINAL APPEAL NO.118 OF 2002

JOSEPH KICHAWERE …… APPELLANT

VERSUS

REPUBLIC ……...…….. RESPONDENT

AND

CRIMINAL APPEAL NO.119 OF 2002

JOSEPH MUKAE MWAHOLA …… APPELLANT

VERSUS

REPUBLIC …….. REPONDENT

AND

CRIMINAL APPEAL NO.120 OF 2002

MICHAEL MUTUNGA …… APPELLANT

VERSUS

REPUBLIC ……..…….. RESPONDENT

AND CRIMINAL APPEAL NO.121 OF 2002

PASCAL CHARO ……. APPELLANT

VERSUS

REPUBLIC ……..…….. RESPONDENT

AND

CRIMINAL APPEAL NO.122 OF 2002

BERNARD OKWARO ……. APPELLANT

VERSUS

REPUBLIC ……. RESPONDENT

(All being Appeals from Original Convictions and Sentence in Criminal Case No.471 of 2001 of the Snr. Principal Magistrate's Court at Taveta)

JUDGMENT

Criminal Appeal Numbers 117, 118, 119, 120, 121 and 122 all of 2002 were consolidated and were heard together. The Appellants in all these appeals together with another who is the Appellant in H.C.Cr. A.409

of 2001, were jointly charged with the offence of Breaking in a Building and committing a felony contrary to Section 306(a) of the Penal Code in that on the night of 18th and 19th October 2001 at Chachewa Village Taveta in Taita/Taveta District within Coast Province, they jointly broke and entered a building namely store of AHMED DEROW and stole from therein 43 bundles of Robins knitting threads, seven (7) bundles of sheets (kikoi) and 18 bundles of Maasai lessos and one carton of sweets all valued at Kshs.464,000/-. In the alternative Bernard Okwaro (Accused No.5 in the court below who is the sixth Appellant herein, Pascal Charo, Accused No.6 in the court below who is the 5th Appellant in this appeal, Joseph Kichawere, the 7th Accused in the subordinate court and who is the 2nd Appellant herein) were each separately charged with an offence of handling stolen goods contrary to Section 322(2) of the Penal Code, whereas Joseph Mukae Mahora and Yassin Mahora were together charged in the alternative with the offence of jointly handling stolen property contrary to Section 322(2) of the Penal Code and likewise Michael Mutunga and Samson Mwangangi were also charged with the offence of jointly handling certain goods allegedly stolen on a certain day. After full hearing, all the appellants were found guilty of the alternative counts they each faced either individually or jointly and they were each sentenced to serve prison terms of 7 years with hard labour. Each of them appealed against conviction and sentence but during the hearing of their appeals the Appellant Samson Mwanganga abandoned the appeal against conviction and proceeded with the appeal against sentence only. In considering their appeals, I do first feel that I need to make it clear as to who is the Appellant in each appeal and what was his position in the court below. I believe this will help in the understanding of the judgment. Secondly as the appellants are many and the circumstances of each case was to an extent different, I will consider each Appeal on its own.

First Appellant in this Appeal is Samson Mwanganga. He is the Appellant in H.C.Cr.A. No.117 of 2002. He was Accused No.4 in the court below.

2nd Appellant is Joseph Kichawere who is the Appellant in H.C.Cr.A. No.118 of 2002. He was Accused No.7 in the Subordinate Court.

3rd Appellant is Joseph Mukae Mahola, who was the First Accused in the Court below and is the Appellant in Cr.Appeal No.119 of 2002.

4th Appellant is the Appellant in Criminal Appeal No.120 of 2002 and was the third accused in the court below. He is Michael Mutunga.

5th Appellant is Pascal Charo who was accused No.6 in the subordinate court. He is the Appellant in H.C.Cr.A. No.121 of 2002.

The last Appellant is Bernard Okwaro who is the Appellant in H.C.Cr. Appeal No.122 of 2002 and was the fifth Accused in the subordinate court. As I have said the 2nd accused in the Court below Yasin Mahora also appealed and filed Criminal Appeal No.409 of 2001 but as his appeal was against Sentence only, his case was heard separately and his Judgment is also separate.

PROSECUTION'S CASE AS APPPLIES TO ALL APPELLANTS According to the records available, Pw.1 Ahmed Darow is a businessman in Taveta town. He sells knitting threads and Maasai lessos. He has a store in Taveta near Chachewa Village. On 18.10.2001 he locked the store at about 4.00 p.m. and having made sure the store was securely locked he went home. At 4.00 a.m. or thereabout, his bother PW.2 (Mohamed Ishmael Osman) woke him up and told him his store was broken into. The two went to the store and found all goods stolen. They reported to the police. They never saw who committed the same theft and who broker the store. The police then started investigations and through certain information, visited various places and various houses and recovered several items which were part of the allegedly stolen goods. According to the Prosecution, these were recovered from various Appellants houses at various times and on various dates. The Appellants were each arrested and charged with the main charge of Breaking into a Building and Committing a felony therein contrary to Section 322(a) of the Penal Code, but as none saw the Appellants or any of them breaking into the building each was charged with the offence of handling stolen property some severally and some jointly. As I have stated above they were each found guilty of the offence of handling stolen property. I will now consider each Appellant's case in respect of Appeals against conviction.

FIRST APPELLANT SAMSON MWANGANGA

This appellant abandoned the Appeal against conviction and stated in his submission as follows on conviction: "My correct name is Samson Mwaganga. I work as a mason. I am a first offender. I am remorseful. I will not commit such offence. I was found with stolen property. I will not handle any stolen property ---- I ask for forgiveness. I ask the court to take into consideration my mitigation. I do abandon the appeal against conviction."

The Appeal against conviction in respect of this appellant is abandoned and is dismissed. I propose to deal with the Appeal against sentence together after dealing with all the appeals against conviction. 2ND APPELLANT: JOSEPH KICHWAWERE H.C.CR.A. NO.118 OF 2002 The Prosecution evidence against this Appellant is only from PW.6 No.67211 P.C. Johnstone Muriuki. He relied mainly on information from an informer who was not called as a witness. His evidence was that they followed foot prints of some suspects who had stolen from PW.1's store. At Lessessia they got information from an informer that the informer had seen a person near Tanzania border in the bush busy packing some lessos in a bag. PW.6 and other proceeded to where that person was but before they could reach him the person ran away into Tanzania having dropped two lessos which PW.6 and his team took. His footsteps resembled the ones the team had followed from the store. PW.6 says the informer told them the man had gone to Hino. The Kenya team went to Hino in Tanzania and arrested the Appellant. At the time of the arrest the Appellant did not have a bag but the informer knew him even by name. Sole of his shoes resembled the prints that were seen at the scene of theft.

There are a number of worrying aspect of this evidence. The first is that the court was not told how far PW.6 and his team were when the Appellant is alleged to have escaped into Tanzania. Secondly, the witness PW.6 does not state that he actually saw the Appellant with the two lessos he is alleged to have left behind in his alleged flight to Tanzania. The third is that the informer who is alleged to have led the police to this Appellant was never called and never gave evidence identifying the Appellant with theft. In any case whatever he is alleged to have said is no more than hearsay evidence and should not have been admitted. I may make it clear here that the practice of police witnesses giving evidence of what they were told by an informer who is not to be called as witness should stop as it goes directly against hearsay evidence rule. All the police need to say www.kenyalawreports.or.ke 4 in evidence is that as a result of certain information they proceeded to such and such a place or they took such and such an action without revealing the information. They can only reveal the information if they are prepared to call the informer as a witness to be subjected to cross examination as to the alleged information. The fourth difficulty is that much as the same PW.6 says that they arrested the Appellant in Tanzania, in his evidence in chief,

when he was cross examined on that he states as follows:

“We are not allowed to eff ect arrests in a foreign country. Normally it is the other police officers who do the arrest and then hand them over. I was there when you were arrested by police officers in Tanzania”

The last problem is who pointed him out to Tanzanian Police. I do not think I am satisfied that the Prosecution did discharge the burden of proving the identity of this Appellant in view of the above. He may very well have been one of the thieves or a handler but the Prosecution had the duty to prove that and his identity beyond reasonable doubt. The learned Magistrate in finding that the case against this Appellant was proved beyond reasonable doubt relied heavily on allegations attributed to the informer who never gave evidence and whose information should not have been divulged to the court as it was hearsay evidence. He (Magistrate) also stated in convicting this Appellant that PW.6 “clearly saw the accused person when he started running away.” I have perused PW.6’s evidence but with due respect that is not what PW.6 said in evidence. He said:

“At Lessessia we got information from an informer that he had seen a person near the Tanzania border in the bush, busy packing some lessos in a bag. We proceeded to where he was. Before we reached him, he noticed us and he ran away into Tanzania.”

PW.6 does not say whether he saw this man clearly. The man was in the bush and no distance is given of how far the PW.6’s team was before the man ran into Tanzania. Conviction of this Appellant was not safe. I do allow his appeal, quash conviction and set him free forthwith unless otherwise legally held.

THIRD APPELLANT JOSEPH MUKAE H.C.CR.A. 119/2002 This Appellant was charged together with his brother with jointly handling stolen goods contrary to Section 322(2) of the Penal Code. His brother Yasin Mahora had pleaded guilty to the charge. The Prosecution however allege that one bundle of Maasai lessos was found in his house. He said that it was his brother who knew about all the stolen items recovered in their plot and he called his brother as his witness. His brother gave evidence and accepted that he was responsible for what was found in their plot but stated in cross-examination that he did not know when Mukae’s house was searched and what was recovered from there. In my mind, if anything was separately recovered from this Appellant’s house however separately, then the police would not have preferred a joint charge for him and his brother. I do agree with the learned State Counsel that the conviction against this Appellant even on the face of his evidence and his brother’s evidence could not be safe. If his brother who pleaded guilty is the one who took all that was recovered from the plot there then one cannot say that this Appellant, even if he handled the properties, knew they were stolen properties or had reason to believe they were stolen property. I would give him the benefit of doubt. His appeal is allowed, conviction quashed and sentence set aside. He is released forthwith unless otherwise legally held. 4TH APPELLANT MICHAEL MUTUNGA H.C.CR.A. 120 OF 2002

Prosecution’s case against this Appellant was that the police were taken to the Appellant by Bernard Okwaro, the sixth Appellant herein who was in the court below the fifth Accused. This Appellant was allegedly sharing a house with First Appellant. When police opened the door through assistance of a lady. They recovered six pieces of Maasai lessos from the house. However during the investigations, PW.3 who was with Accused 5 Bernard Okwaro went towards Russia Village and on their way to station, Bernard Okwaro spotted 3rd Accused who is the 4th Appellant herein at Taveta Market. He was arrested by PW.3. The Appellant admitted having 8 pieces of lessos in his house. The same PW.3 Senior Sergeant Jackson went with this Appellant to the Appellant’s house and recovered six pieces of lessos from the Appellant’s house. The Appellant then said the rest had been taken by the First Appellant. He was aware that some other lessos had been recovered from his house by police earlier on. Although, I do not subscribe to the uncanvassed inferences made by the learned Magistrate and to his relying on neighbour’s allegations while the same neighbours were not called as witnesses, I do feel nonetheless that even after excluding all those aspects which are not in law admissible the conviction of the Fourth Appellant Michael Mutunga was safe and I have no reasons whatsoever to disturb it. He had stolen lessos in his possession knowing that they were stolen and had no explanation as to his handling the same. His appeal is dismissed.

FIFTH APPELLANT PASCAL CHARO H.C.CR.A. NO.121 OF 2002. Bernard Okwaro, the 6th Appellant who was accused No.5 in the court below showed the police where this Appellant Pascal Charo stays. Appellant Charo was however not there at that time but a certain Mzee opened the door. On opening the same house, the police recovered two pieces of lessors from the house. The Mzee denied knowledge of the same lessos and offered to show the police his son. They started off in search of Mzee's son but Bernard who was with them sported this Appellant and told the police to stop the vehicle. Sixth Accused, who is now the Appellant No.5 was then arrested. I will ignore the evidence given by the alleged Mzee and the evidence allegedly given by his son as the two were not called as witness and those allegations attributable to them are all hearsay. However even after ignoring the same and in concentrating only on admissible evidence before the court it is clear that the Appellant was found handling the stolen property and he knew they were stolen. PW.3 says as follows as concerns this Appellant: "Pascal then said that they had split the items between 4 people. He said none were in his house and he was ready to go and show us the others which were in his house at Burandogo. He opened the house and we found six pieces of lessors."

This piece of evidence is clearly admissible under Section 31 of the Evidence Act as it is a confession which leads to discovery and is therefore an exception under the rules governing confessions. His grounds of appeal in his written grounds raise no points at all for consideration. The court below did not believe his defence and rightly too. I also do not see any merit in it. His appeal is dismissed.

6TH APPELLANT BERNARD OKWARO H.C.CR.A.NO.122 OF 2002 The evidence against this Appellant is overwhelming. He claims that he could not have opened the container where the stolen goods were found in a bag of cement simply because is tribal culture forbids the same as they were alleged to be in his mother's bedroom. He forgets that there are now many people who as a result of Western civilization or as a result of religious beliefs had long discarded such beliefs. In any case, he was with Police and one could not rule out the effect of fear on such outmoded cultures. In the entire evidence, it is clear that not only was he found in possession of stolen goods but he was also the person who pointed out most of the Appellants and this he did with excellent results as all he pointed out were found with same stolen goods meaning that he was one of the core leaders in the commission of this crime. He admitted being in possession of stolen property and their colour does not matter as they were identified as indeed part of the stolen loot. His appeal cannot stand. It is dismissed.

ON SENTENCES Appeals by 2nd and 3rd Appellants have been allowed. Appeals by 1st, 4th, 5th and 6th Appellants have been dismissed. These were only against convictions. They also appealed against sentences in each case. Each accused was sentenced to serve 7 years imprisonment with hard labour. The maximum sentence allowed under the Section is 14 years. Most of the goods stolen were recovered. The learned Magistrate does not seem to have considered this and instead maintained that the value of property stolen is big and that the complainant must have suffered irreparable loss and that it will not be an easy task to revert to his former position businesswise. There was no such evidence before him. If anything what the complainant said after identifying was allegedly stolen was as follows:

"All these was my property which I was told was recovered from Chachewa village. The value of the stolen items is Kshs.46 4,000/ -. The item/goods were recovered from various places."

The learned Magistrate, basing his sentence as he did on the feeling that the complainant had suffered irreparable loss misdirected himself with respect and arrived at wrong sentence. The Appellants were each first offender. They had been in custody throughout. The learned State Counsel conceded appeal on sentence and felt that the sentences were on the higher side. I do agree with him. Doing the best in the circumstances, I do substitute the sentences of 7 years imprisonment with hard labour with that of 2½ years imprisonment with hard labour in respect of the First, Fourth, Fifth and Sixth Appellant. Save for that the Appeals in each case are dismissed.

Dated at Mombasa this 30th Day of August, 2002.

J.W. ONYANGO OTIENO

JUDGE