



**Liketi v Republic (Criminal Appeal 190 of 2019)
[2023] KEHC 23166 (KLR) (6 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 23166 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CRIMINAL APPEAL 190 OF 2019
JRA WANANDA, J
OCTOBER 6, 2023**

BETWEEN

ZEBEDAYO AMONDO LIKETI APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. This Appeal arises from a Ruling made on 18/10/2019 in Eldoret Chief Magistrate's Court Criminal Case No. 4192 of 2018.
2. The Appellant was charged in the said case with the offence of burglary and stealing contrary to Section 304(2) as read with Section 279(b) of the *Penal Code*. The particulars are that on diverse nights between 26/09/2018 and 28/09/2018 at Moi Teaching & Referral Hospital in Eldoret, East district, within Uasin Gishu County, jointly with others, broke into a playing room for children with intent to steal therein and did steal therein Ramptons microwave, 4G cooker, 13kgs gas cylinder, Sony TV, Sony DVD player, 6kgs gas cylinder, all valued at Kshs 27,939/-, the property of the said hospital.
3. The Appellant was also charged with the alternative offence of handling stolen goods contrary to Section 322(2) of the *Penal Code*. The particulars are that on 28/09/2018 at Tradeno Cash Investment, within Uasin Gishu County, otherwise than in the course of stealing, dishonestly received or retained one Ramtons Microwave and one 4G cooker, valued at Kshs 10,000/- knowing or having reason to believe it to be stolen.
4. On 4/10/2018 a plea of not guilty was entered. On the same date, Counsel for the Appellant, Ms Toroitich, holding brief for Mr. Omwenga, applied that the Appellant be released on bond and that his items which were confiscated by the police be released to him. Counsel submitted that the said items cannot be said to be exhibits since the Appellant's alleged accomplices had not been charged. The



Appellant was then released on bond and on the issue of release of exhibits, the same was adjourned to 5/10/2018 to allow the Prosecutor time to prepare a response.

5. On 5/10/2018, upon the Prosecutor's request, the Court issued Summons to the Investigating Officer to attend Court on 12/10/2018 to respond to the request. On 12/10/2018, the Investigating Officer, one Constable Naftali Mathenge attended Court and testified under oath. In his testimony, he stated that the items were at the police station's exhibit store, what the Appellant was required to do was to go and prove ownership, the only person who can authorize the release of goods is the Officer Commanding the Station (OCS).
6. Ms Toroitich disagreed with the Investigating Officer and submitted that the items were picked from the Appellant's shop along with what was listed in the Charge Sheet, the items were not part of the exhibits and should be released. Upon his request, he was allowed to file a formal Application seeking release of the items. Pursuant thereto, on 23/10/2018, Counsel filed an Application by way of the Notice of Motion of the same date in which the following orders were sought:
 - i. Spent
 - ii. This Honourable Court to be pleased to issue a release order for the accused person's confiscated movable properties namely; One LG TV 49', one LG TV 43', one Sayona woofer, one spoilt microwave, documents, four empty receipt books, one partly used receipt book, one filled up receipt book, two agreement books, original bushes licence, receipt for received goods, one partly used loan book, rent receipts, passport size photos, personal items, cash money of Kshs. 50,000/- which were taken from his shop on 28/09/2018 but have not been listed as exhibits before this Court.
 - iii. That the OCS Naiberi Police Station do appear before this Honourable Court to explain the whereabouts of the accused person/Applicant's goods.
7. The Application was stated to be brought under the provisions of Articles 10, 19, 20, 21, 23, 27, 28, 31, 40, 49 & 50(1)(h) & 165(3)(b) of the Constitution of Kenya and Section 21, 22, 25 of the Criminal Procedure Code Cap. 75 Laws of Kenya.
8. The Application was then premised on the grounds set out on the face of thereof and supported by the Appellant's Affidavit. The Appellant deponed that he is a businessman trading as Tradeno Electronics, he deals with electronic items and shylock business, he has a trading licence for the business together with a Lease Agreement for the premises, on the night of 28/09/2018 he received a phone call from a police officer based at Naiberi Police Station at around 3.00 am in the morning who informed him that the Appellant's shop had been broken into and that they needed the Appellant to immediately go to the premises, the Appellant declined to visit the premises at that time of the night and instead offered to go at dawn which he did, on reaching the premises, he found 3 vehicles parked by the entrance of the building, the police were loading the Appellant's movable properties from the Appellant's shop onto the parked vehicles, he waited until the police officers had left, upon enquiring from the guards on what had happened, he was informed that one of the customers who had come during the day and sold to the Appellant a second-hand microwave and a cooker was the one who had come with police who broke into the Appellant's shop, the guards also informed the Appellant that the items were stolen property and that this is the reason the police had come to the premises and that the customer confessed that the goods were stolen. The Appellant deponed further that the said customer had been brought by one Wilson Kamau Muge who intimated to the Appellant that the goods were genuine, as such the Appellant bought the goods at a price of Kshs 4,000/- and issued a receipt to the customer, the guards informed the Appellant that the police had forced the door open using a certain device which they also used to close the door once they had carried away the goods, once he was inside he discovered that they



had carried away everything and left the room vacant, the police carried away all the electronic items from the shop plus documents and personal items, including cash of Kshs 50,000/-. He then listed the items allegedly carried away.

9. The Applicant deponed further that on 3/10/2018 the police arrested and charged him with the offences stated above, some of his confiscated properties were listed as exhibits to be produced before the Court, however those listed in the Application were not and have also not been released to him, he is apprehensive that the police act of omitting some of the property was deliberate so as to squander his goods, he is a businessman and some of the goods that the police have listed as exhibits and those that have not been listed are his tools of trade and he will be highly prejudiced if the same are not released to him. The Appellant therefore pleaded with the Court to release the goods which are not listed as exhibits.
10. The Prosecution opposed the Application and relied on the Replying Affidavit filed on 15/11/2018 and sworn by one Chief Inspector Johnstone Mwamburi. He deponed that he is the Officer in charge of Naiberi Police Station, on 27/09/2018 a report was received at Moi Teaching and Referral Hospital (MTRH) Police Patrol Base from one Ernest Kirui that as he was reporting on duty in one of the offices within the hospital, he discovered that the doors of the offices were open and the following assets missing; a Microwave, make Ramtons, a 6kg gas cylinder, 4 burner stoves and a DVD player make Sony, on 29th September, 29/09/2018 at about 0100 hours, a suspect, one Edison Kibet was arrested within MTRH, upon interrogation the suspect led the police to a shop, namely, Tradeno Electronics, the police forced the door open after efforts to have the owner of the shop come and open were fruitless, inside the shop the suspect identified the items he said he had brought to that shop after he stole them from MTRH, the police recovered the items which were later identified by the staff of MTRH as theirs, the items were annexed as exhibits, they also recovered other electronics found in the shop so that they could be identified by any other complainants who had previously reported cases of burglary and stealing from their houses, the items taken from the shop were captured in an inventory, later the Appellant presented himself to the police station and identified himself as the owner of the shop, after interrogation, he recorded a statement and was thereafter arrested and jointly charged with the suspects who were already before Court, all the items recovered from the shop are part of exhibits in a case before Court, there was no cash of Kshs 50,000/- found or recovered from the shop as alleged by the Appellant, and that nothing else that was recovered from the shop has not been accounted for.
11. In a rejoinder, the Appellant filed a Supplementary Affidavit on 22/01/2019 in which he deponed that in the Replying Affidavit, there is an admission by the police that they forced the door open and took away his items, he does not understand what urgency precipitated the police officers to unlawfully break his shop yet he had not resisted to open it in the morning, it was not explainable why the police officers could not put the suspect Edison Kibet in the police cells and let him lead them to the shop the following morning, it has also not been explained why the police chose to list some of the items as exhibits and leave some, the facts indicate how manipulative the police are playing to deprive him of his properties, the staff members from MTRH have not been named and they are not witnesses in the case, the police have selectively filled the inventory omitting some items.
12. Subsequently, the said Chief Inspector Mwamburi was summoned for cross-examination. During the examination, he recounted the matters deponed in his Affidavit and stated they were in a convoy of 3 vehicles. He conceded that during the raid at the Appellant's shop, the police did not have a breaking order. He stated further that they reached the premises at 3.00 am, the premises were locked, a suspect had been arrested, the suspect, the said Edison Kibet Ruto was charged in Criminal Case No. 4134/2028 together with one Timothy, he pleaded guilty and was convicted. He admitted that they broke into the shop in the Appellant's absence and stated that the delay to obtain a Court Order



would have defeated the purpose of the search, the Appellant declined to come, they did not call any neighbour to come and witness the break-in, their action did not amount to impunity, they did not carry everything, he does not have any inventory of the items left behind, he has an inventory of the items they took away, the inventory was prepared at the station and not at the scene, they did not lock the shop after picking some items and leaving others in the shop, they did not take inventories according to the vehicles that carried the items, neither he nor the OCS signed the inventory as witnesses, the documents that were not part of the exhibits were released, the inventory items tally with the items in the Occurrence Book (OB), the charge sheet does not list all the items listed, some items were released to the Appellant on 12/03/2019, the rest of the items are detained as exhibits, they intend to produce the detained items as exhibits at the trial, those in the charge sheet. In Re-examination, he stated that there was nothing substantial capable of being stolen at the time or after the raid, they could have taken an inventory at the scene had the Appellant come.

13. The parties then filed Submissions. Thereafter, the trial Court delivering its Ruling dismissing the Application. Aggrieved by the Ruling, the Appellant instituted this Appeal vide the Petition of Appeal filed on 3/12/2020 premised on the following grounds:
- i. That the learned trial Magistrate erred in law and fact in dismissing the Appellant's Application dated 23.10.2018 without any lawful justification.
 - ii. That the learned trial Magistrate erred in law and fact in failing to issue a release Order for the Appellant's confiscated movable properties that were not listed as exhibits by the investigating officer.
 - iii. That the trial Court did not take into account that the goods sought to be released were not listed as exhibits in the criminal matter and that they were merchandise in the shop.
 - iv. That the learned trial Magistrate erred in law and fact in failing to consider the Appellant's evidence in the Supporting Affidavit.
 - v. That the learned trial Magistrate erred in law and fact in overlying on the Respondent's evidence in arriving at her decision.
 - vi. That the learned trial Magistrate erred in law and fact by ignoring Appellant's Submissions and legal authorities that were relevant.
 - vii. That the learned trial Magistrate contravened the provisions of Articles 21(1) and Article 40 of the *Constitution* when she dismissed the Appellant's Application dated 23/10/2018.
 - viii. That the learned trial Magistrate erred in law and fact in over relying on the Respondent's Submissions that were not relevant to the case and/or Application.
 - ix. That the learned trial Magistrate's decision albeit, a discretionary one was plainly wrong.
14. It was then directed that the Appeal be canvassed by way of written Submissions. Pursuant thereto, the Appellant, through Messrs Omwenga & Co. Advocates, filed his Submissions on 1/2/2023 whereas the Respondent, through Senior Prosecution Counsel, Emma Okok, filed its Submissions on 14/06/2023.

Appellant's Submissions

15. Counsel for the Appellant submitted that the evidence of Police Constable (PC) Naftali Mathenge confirms that the items listed in the Application were not going to be used as exhibits in the trial, all that was needed was for the OCS - Naiberi Police Station to authorize their release, Chief Inspector (CI)



Johnstone Mwamburi stated that they were going to use the exhibits listed in the charge sheet only, the CI further confirmed that on 12/3/2019, he had released some items to the Appellant, it is clear from the evidence that the items claimed in the Application were not going to be used in the trial, the OCS confirmed that the items listed in the inventory are not the same as those listed in the OB extract as well as the items listed in the Charge Sheet, the OCS was not able to account for the whereabouts of the missing items as he had no knowledge from the onset as to which particular items were confiscated and which motor vehicle carried which particular items, the trial magistrate erred in law and fact in failing to make a finding that the Appellant's items which were not listed in the Charge Sheet as exhibits be released to him, the Court ought to have ordered for the release of the goods not listed as exhibits, the subordinate Court erred when it failed to intervene when the police officers had acted in bad faith and abused their powers in confiscating the goods and failing to release items that were not to be used as exhibits in the trial. He cited the case of *Samuel Kabuu v Muktar Mahat, Deputy Administration Police Commander (DAPC) Athi River & 3 Others* [2019] eKLR.

Respondent's submissions

16. Counsel for the State submitted that this Court has held that any item that the Prosecution intends to rely on as an exhibit can only be released once the same has been produced in Court. She cited the cases of *Republic v Everlyne Wamuyu Ngumo* [2016] eKLR and *Elijah Nyakebondo Onsongo v Republic* [2017] eKLR and submitted that an exhibit can only be released after the same has been produced in Court and the Court has had a chance to examine the same, the OCS's evidence was clear that they confiscated items from the Appellant's shop and prepared an inventory of the same, they released some items to the Appellant which they did not deem to be exhibits, the items that were not released to the Appellant would be relied on during the trial as exhibits, the Appellant's assertion that some of those items were not listed as part of the stolen items in the Charge Sheet does not hold water as the Prosecution is not mandated to list all the stolen items in the particulars of the charge to prove that indeed theft occurred, the Appellant claims that the recovered items are his properties yet the OCS Naiberi was categorical that those items were suspected to be stolen property and were to be relied on during the trial, there is therefore contention as to the real owner of the recovered items, this can only be determined by the trial Court after hearing both parties.
17. Counsel cited Section 177 of the *Criminal Procedure Code* and also the case of *Republic v Cape Van International Ltd & another* [2004] eKLR on applicability of the said section. Counsel further submitted that the Application by the Appellant to have the exhibits released to him on allegation that the same are his properties was premature, the Appellant should wait for the trial to commence and he can even challenge the evidence by the Prosecution during the trial especially as pertaining the ownership of some of the items that the Prosecution intends to rely on as exhibits, the trial Magistrate would then be in a position to determine the issue of ownership of the items, the trial Magistrate did not err in disallowing the Application as the exhibits had not been produced in Court and were in the safe custody of the investigating officers.

Analysis & Determination

18. I have considered the Memorandum and Record of Appeal, the lower Court file and the Submissions on record. As a first appellate Court, this Court is obligated to revisit and re-evaluate the record afresh, assess the same and make its own conclusions (see *Okeno v Republic* (1972) EA 32)



19. In my view, the issue that arises for determination in this Appeal is the following;

“Whether the trial Court erred in dismissing the Appellant’s Application seeking that the items seized or confiscated from his shop and alleged not to be exhibits at the trial, be released to him before commencement of the trial”

20. I now proceed to analyze and answer the said issue.

21. On the issue of detention of items seized and brought before a Court, Section 121 of the *Criminal Procedure Code* provides as follows;

1. When anything is so seized and brought before a court, it may be detained until the conclusion of the case or the investigation, reasonable care being taken for its preservation.

22. On the issue of release of items seized and brought before a Court as part of a charge against a person arrested, Section 177 of the *Criminal Procedure Code* provided as follows;

“Where, upon the apprehension of a person charged with an offence, any property is taken from him, the court before which he is charged may order –

(a) that the property or a part thereof be restored to the person who appears to the court to be entitled thereto, and, if he be the person charged, that it be restored either to him or to such other person as he may direct; or

23. I also take cognisance of the holding of Hon. Justice L. Kimaru (as he then was) in *Republic v Cape Van International Ltd & another* [2004] eKLR where he expressed himself as follows;

“A Magistrate’s Court can only make an order restituting the property to a proved owner under the provisions of section 177 of the *Criminal Procedure Code* when the said goods have been produced in evidence before court. Before the said goods or property is produced in court as exhibits in evidence, a Magistrate Court cannot make an order in criminal proceedings for the release of such goods.”

24. Similar sentiments were expressed by Hon. Justice Bwonwonga J, in *Republic v Everlyne Wamuyu Ngumo* [2016] eKLR where he stated the following:

“20. The next issue to be considered is whether the order complained of should be revised or not. I find that the trial court was not entitled to direct that the motor vehicle be released to the respondent/accused in order as that court put it “to save it from the wear and tear due to immobilization of the engine.” The reason for this is that the motor vehicle had not been produced as an exhibit in court. It is only when some property including a motor vehicle have been produced as an exhibit in court that that court is then seized with the jurisdiction to order for its disposal.”

25. It is therefore evident that detention and/or release of items presented before Court upon seizure or confiscation from a suspect or any other person for that matter, in respect to a criminal Court case, is a discretion to be exercised by the trial Court. The trial Court may release such items at any time or stage of the trial or decline to do so until conclusion of the trial or even allow continued detaining of the same even after trial, where justifiable grounds exist. Generally, however, the trial Court is not



expected to release or return such items to the owner or claimant before the same have been produced in evidence as exhibits.

26. My understanding of the argument by the Appellant is that he is not challenging the powers of the police to seize and/or confiscate the property found in his shop nor is he challenging the powers of the Court to decline release thereof. His contention is that the items required by the Prosecution have already been identified and isolated and that the remainder are not listed as exhibits to justify their continued detention.
27. As already outlined while I was recounting the proceedings before the trial Court, two police officers addressed the trial Court under oath on the issue of the release of the seized or detained items. The first officer who did so was the Investigating Officer, one Constable Naftali Mathenge. In his testimony, he stated that the items were at the police station's exhibit store, that what the Appellant was required to do was to go and prove ownership and that the only person who could authorize the release of goods is the OCS.
28. Deeming the said testimony as insufficient to assist the Court, the Appellant filed a formal Application seeking release of the seized items. In response, the Prosecution filed a Replying Affidavit sworn by the Officer in charge of Naiberi Police Station, one Chief Inspector (CI) Johnstone Mwamburi. In the Affidavit, the CI deponed that the items seized were annexed as exhibits, that they also recovered other electronics found in the shop so that they could be identified by any other complainants who had previously reported cases of burglary and stealing from their houses and that all the items recovered from the shop are part of exhibits in a case before Court.
29. In his Submissions, the Appellant's Counsel placed much emphasis on the evidence of PC Mathenge for the sole reason that PC Mathenge stated that what the Appellant was required to do was to go and prove ownership of the detained items and that the only person who could authorize the release of goods is the OCS. According to Counsel, this was proof that the items were not part of those to be used as exhibits. Was this a true interpretation of the record? I do not think so.
30. First, PC Mathenge never at any time expressly stated that the items would not be used as exhibits or that they were to be released to the Appellant. My understanding is that all he meant was that it is the OCS, his superior, who had the mandate or authority to answer the question whether or not the items were to be released.
31. Secondly, CI Mwamburi, the officer in charge, stated that they also recovered other electronic items found in the shop and which needed to be identified by any other complainants who had previously reported cases of burglary and stealing from their houses. This statement is relevant since it raises the issue of ownership of the detained items since the Appellant concedes that the same were brought to him by third parties as second-hand goods. While the same may as well be genuinely disposed goods by true owners, there is also strong possibility that some may indeed be stolen items. The Appellant has not presented any explanation on what mechanism, if any, he has been employing to ascertain whether goods brought to him as second-hand items are not in fact stolen goods. He has also not addressed the claims that he may in fact be part of the whole stealing and robbery syndicate. On this ground alone, the police were entitled to detain the items, of course not indefinitely, but within a reasonable period of time as may be specified by the trial Court.
32. Thirdly, CI Mwamburi was categorical that all the items recovered from the shop are part of exhibits in a case before Court. It has not been demonstrated that CI Mwamburi misrepresented facts or misled the Court was dishonest on what he informed the Court. It is therefore not justifiable for Counsel to interpret the testimony of PC Mathenge as overruling that of his boss, CI Mwamburi.



33. There is also merit in the Prosecution Counsel's assertion that in any event, the Prosecution is not mandated to list all the stolen items in the particulars of the charge to prove that indeed theft occurred.
34. My finding is therefore that unless the Prosecution expressly communicates to the trial Court a decision to omit the mentioned items from the list of the intended exhibits, the Appellant should wait until the trial commences and the items in question produced in evidence before seeking release thereof. Accordingly, I find that it was premature for the Appellant to demand release of the items at the stage that he did.
35. The Appellant relied on the decision of Odunga J (as he then was) in the case of *Samuel Kabiu v Muktar Mahat, Deputy Administration Police Commander (DAPC) Athi River & 3 Others* [2019] eKLR. That case is however easily distinguishable since as stated by the Judge therein, the Director of Public Prosecutions (DPP) denied any knowledge of the prosecution and/or detention of the goods in question and on its part, the National Police Service whose officers were the persons accused of detaining the subject goods, never filed any Replying Affidavit to controvert the allegations made by the Applicant.
36. The other issues raised by the Appellant such as the allegations that the forced entry and search into his shop was made without a search warrant or the same was conducted in contravention of the law, are issues that would have been best addressed and canvassed in a Constitutional Petition, not in an Application filed at the Magistrate's Court.
37. As already demonstrated, whether or not to release goods stated to be detained as exhibits to be used in a trial Court was at the discretion of the trial Court. On exercise of discretion, in the case of *Mbogo v Shah & another* (1968) EA 93, the Court of Appeal set out circumstances under which an appellate Court may interfere with a decision of a trial Court to be as follows:
- “I think it is well settled that this court will not interfere with the exercise of discretion by the inferior court unless it is satisfied that the decision is clearly wrong because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into account matters which it should have taken into consideration and account and in doing so arrived at a wrong conclusion.”
38. In view of the above and having considered the decision of the trial Court, it is my view that it has not been demonstrated that the trial Court breached or violated any of the said principles or that it erred in the exercise of its discretion. I therefore find that this Appeal lacks merit.

Conclusion

39. In the premises, I order as follows:
- i. This Appeal is dismissed in its entirety.
 - ii. The lower Court file is to forthwith be returned to that Court for hearing and determination of the criminal case.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 6TH DAY OF OCTOBER 2023

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WANANDA J.R. ANURO

