



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

CRIMINAL APPEAL NO. 3 OF 2019

JONATHAN OTOTI AGUNDA.....APPELLANT

VS.

REPUBLIC.....RESPONDENT

EAST AFRICAN FOUNDRY WORKS LTD.....INTERESTED PARTY

(An appeal against a Ruling in the Chief Magistrate's Court at Kiambu, J. Kituku, PM, dated 25th January, 2019 and arising from a judgment delivered on 20th July, 2018 in Criminal Case No. 468 of 2013)

JUDGMENT

1. The background of this appeal is that **JANATHAN ATOTI AGUNDA**, (appellant) was charged before Kiambu Chief Magistrate's Court with the offence of stealing contrary to **Section 281** of the Penal Code and an alternative charge on handling stolen goods contrary to **Section 322(2)** of the Penal Code. Those two counts related to various items of property listed and attached to the charge sheet.
2. The appellant, prior to him being charged, was an employee of **EAST AFRICAN FOUNDRY LIMITED** (the company). In October, 2012, that company found that some of its goods had unprocedural been taken out of its premises.
3. The trial court, after receiving both the prosecution's and defence evidence and by its judgment dated 20th July, 2018, acquitted the appellant on both charges under **Section 215** of the Criminal Procedure Code (CPC).
4. Following that judgment, the company prayed for the release of the exhibited items to it. The trial court received submissions of the appellant and the company and by the Ruling dated 25th January, 2019, which is the subject of this appeal, the trial court ordered all the exhibits which had the company's logo be released to the company and all others be released to the appellant.
5. The appellant was aggrieved by that Ruling and filed this appeal which is based on the following grounds:-
 1. *The learned magistrate erred in fact and in law by failing to put into consideration the provisions of the Criminal Procedure Code, Section 178 on restitution and making consequential orders as to restitution without express provision of the law.*
 2. *The learned magistrate erred both in law and in fact by proceeding to hear and application for restitution of goods long after he had rendered his judgment on the matter and thereby rendering the court to be functus officio.*
 3. *The learned magistrate erred in fact and in law by making a ruling which was not based on any precedent and is contradictory on the face of it from the Court's own judgment delivered on 20th July, 2018.*
 4. *The learned magistrate erred in fact and in law by restituting the goods to the complainant when in his own judgment he had found that the explanation by the accused was satisfactory to the effect that the accused had acquired good title to the goods.*
 5. *The learned magistrate erred in fact and in law by not evaluating the evidence before him and proceeding to give a ruling without reasons and or basis.*
 6. *The learned magistrate erred both in fact and in law by releasing some of the items to the complainant as he did.*
6. The appellant, in his submissions collapsed the six grounds of appeal to two – that is:-

(a) Whether the trial court erred in releasing the exhibits bearing logos to the company.

(b) Whether the trial court had become *functus officio* by the time the Ruling was delivered.

7. Appellant submitted that the prosecution needed to prove ownership of the items released by the trial court to the company. Appellant faulted the trial court for having ordered the release of the items to the company after that court made a finding that the appellant was a customer of the company. Appellant submitted that the order to release the items to the company amounted to the trial court re-writing its judgment. Appellant also sought a finding by this Court that the order to release the items to the company was deprivation of its rights of ownership of the property.

8. Appellant submitted that the trial court on delivering its judgment on 20th July, 2018, it became *functus officio* and in making the ruling releasing the items of property to the company, it was in breach of that principle of *functus officio*.

9. The company submitted that the appellant erred to argue that the trial court should have applied the provisions of **Section 178** of CPC. It is the position of the Company that Section 178 applied to the case where the accused was convicted. The company relied on the provisions of **Section 177** of CPC which it argued empowered the trial court to order release of the exhibited items.

10. In response to the appellant's submissions, the company submitted that appellant erred to argue the trial court was *functus officio* when it delivered its Ruling. The company submitted that an order for release or restitution of items exhibited has no time limit that it can be made any time.

ANALYSIS

11. As stated before, the appellant was an employee of the company. The company, according to the evidence, tendered at trial, by its director, **Josphat Singh Sago** was manufacturer of spare parts and manholes. The charge of stealing, and in the alternative the charge of handling stolen goods that the appellant faced before the trial court related to those items manufactured by the company. The trial court acquitted the appellant of the main and the alternative charge.

12. The company and the appellant lay claim to those items, the subject of the charges following that acquittal. The trial court made a Ruling on 25th January, 2019 to the effect that the items which bore the logo of the company be released to the company and the remaining items be released to the appellant.

13. It needs to be stated that on the appellant being arrested for the afore-stated offence police raided his business premises and recovered items of goods, some of which had the company's logo and others that did not have the company's logo. All those items of property were exhibited at the appellant's trial and they are the same ones that the company and the appellant lay claim over.

14. Appellant has argued that the trial court did not consider the provisions of **Section 178** of CPC before making the order of the release of goods with the logo to the company. **Section 178(1)** of the Criminal Procedure Code provides:-

“If a person guilty of an offence mentioned in chapter XXVI to XXXI, both inclusive of the Penal Code (Cap. 63), in stealing, taking, obtaining, extorting, converting or disposing of, or in knowingly receiving any property, is prosecuted to conviction by or on behalf of the owner of the property, the property shall be restored to the owner or his representative.”

15. Appellant did not expound on how the provisions of that section related to his claim over the goods that were released to the company.

16. Appellant failed, in my view, to appreciate that at the trial the court was deliberating on the charges that the appellant faced. The trial court was required to determine whether the charge of stealing or handling stolen property was proved beyond reasonable doubt.

17. The trial court made a finding that the company had an impeccable system to monitor the movement of its goods within its premises and also those goods that were supplied to its customers. The trial court faulted the prosecution during appellant's criminal trial for failing to produce the company's genuine cash receipt which was allegedly forged and was used to have the stolen property removed from the factory. The trial court also faulted the prosecution for failing to call vital witnesses who could have testified on how the stolen items were moved out of the company's premises. The trial court generally blamed the prosecution for prosecuting a case that had loose-ends. It was on that basis the appellant was acquitted.

18. The appellant was mistaken in submitting that in acquitting him, the trial court made a finding that all the items recovered from his place of business, in Umoja area, were his property. That was misapprehension of the trial court's judgment.

19. The appellant was also in error to argue that the trial court was *functus officio* when it made the order of release of the items exhibited at his trial after having delivered its judgment. That submission is not supported by the jurisprudence in respect to **Section 177** of CPC. That Section provides:-

“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

b) That the property or a part thereof be applied to the payment of any fine or any costs or compensation directed to be paid by the person charged.”

20. **Section 177** of the CPC only requires that a court be satisfied on a balance of probability on who the owner of the property is. This is the implication of **Section 177 (a)** where it stated that the property be restored to the person who appears to the court be entitled thereto. The trial court in ordering the release of some of the exhibited items to the company stated thus:-

“In this case, the complainant (the company) proved some of the items bore its logo and there is no record they sold them.”

21. In the case of **KIRPAL SINGH & ANOTHER VS. REPUBLIC (2006) eKLR** where the provisions of **Section 177(a)** of the CPC provides thus:-

“...by Section 177(a) of the Criminal Procedure Code which grants jurisdiction to a court which heard a criminal case to make an order of restitution of the property which was the subject matter of the criminal case to a person whom it appears to the court to be entitled to the said property. Such a person may not necessarily be an accused person or the State. It could be the complainant or a witness in the criminal case or a different person altogether.

22. The trial court cannot be faulted on its Ruling. The appellant did not prove ownership to the trial court of the exhibited items, bearing the company’s logo and which, the trial court seemed satisfied, had been stolen from the company. It was on that basis the trial court released the same to the company.

23. The company submitted before this Court and it was not controverted by the appellant that once the trial court ordered release of those exhibited items, it obtained possession of them from **Kasarani police station**, and that they were therefore not now available to be returned to the appellant as sought through this appeal. It is on the basis of that submission that the appellant amended its grounds of appeal and sought it be paid the value of those items.

24. My response is as follows: firstly, the value the appellant placed on those items Kshs.6,022,844.00 is not supported by documentary evidence and cannot therefore be entertained by this court; and secondly, the CPC makes no provisions of power to the court to award compensation as sought by the appellant. Such an award can only be made through civil action where there can be proof of the monetary value of those exhibited items.

25. The appeal, for exhibited properties, to be released to the appellant further fails because the exhibited items are not under the control of the law enforcers and cannot be traced. This is made clear in the case **DICKSON TASIO MUKUBA VS. REPUBLIC (2017) eKLR** thus:-

“Further I agree with the prosecution counsel that Section 177 of the CPC envisages a situation where the property is still available and is in the hands of law enforcers. Clearly the alleged property is not in the hands of law enforcers nor is there evidence that the property is still available.”

26. It is also made clear in the case **KAGIRI REPUBLIC (1989) eKLR** as follows:-

“Provisions for orders of restitution are made in sections 177 and 178 of the Criminal Procedure Code where:

(a) any property is taken from an accused upon his apprehension; (section 177) or

(b) a person is convicted of any of the offences relating to property in Chapters XXVI to XXXI of the Penal Code (section 178)...

These provisions suggest that an order of restitution should be made where the very property stolen or the proceeds of its disposition are traceable and can be easily restored to the complainant.”

DISPOSITION

27. The appeal before court is without merit and it is therefore dismissed.

JUDGMENT DATED AND DELIVERED AT KIAMBU THIS 3RD DAY OF JUNE, 2021.

MARY KASANGO

JUDGE

Coram:

Court Assistant: Ndege

Appellant: Mr. Achach

DPP for Respondent: Mr. Kasyoka

Interested party : No appearance

COURT

Judgment delivered virtually.

MARY KASANGO

JUDGE