REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NANYUKI

CRIMINAL APPEALS NOs 57, 58 & 60 OF 2018

(CONSOLIDATED)

1. CHRISTOPHER MAINA MBOGO (5TH ACCUSED BEFORE TRIAL COURT)

2. ROBERT WANJAU NJOKI (4TH ACCUSED)

3. PETER MUGURO KARANJA (1ST ACCUSED).....APPELLANTS

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from original Convictions and Sentences in Nanyuki CM

Criminal Case No 544 of 2011 – L K Mutai, CM)

J U D G M E N T

1. The Appellants herein, **CHRISTOPHER MAINA MBOGO** (5th accused before trial court), **ROBERT WANJAU NJOKI** (4th Accused), and **PETER MUGURO KARANJA** (1st Accused) were each acquitted after trial of the main charge of robbery with violence contrary to section 296(2) of the ***Penal Code***. However, they were each convicted of a separate alternative charge of ***handling stolen property*** contrary to **section 322(1) & (2)** of the Penal Code. It was alleged against the 1st Appellant (Christopher Maina Mbogo) that on 11/05/2011 at Sweetwaters, Matanya in Laikipia County, otherwise than in the course of stealing, he dishonestly retained KShs 2,666,000/00 knowing or having reason to believe the money to be stolen or unlawfully obtained.

2. For the 2nd Appellant (Robert Wanjau Njoki) it was alleged that on 04/05/2011 at Site Estate in Nyahururu Township within Nyandarua County, otherwise than in the course of stealing, he dishonestly retained KShs 1,988,500/00 and various named household and other items, knowing or having reason to believe them to be stolen or unlawfully obtained. Regarding the 3rd Appellant (Peter Muguro Karanja), it was alleged that on 26/04/2011 at Murichu Village of Nyandarua County, otherwise than in the course of stealing, he dishonestly retained KShs 10,250,000/00, 4396 US Dollars, 45 £ Sterling, 110 Swiss Francs, 3,000 Canadian Dollars and 650 Euros, knowing or having reason to believe them to be stolen or unlawfully obtained.

3. On 24/09/2018 each appellant was sentenced to serve eight (8) years imprisonment. They have appealed against both conviction and sentence, each of them raising between 14 and 16 grounds in their respective petitions of appeal. The grounds are similar. The Appellants' three co-accused (2nd, 3rd and 6th accused) were all acquitted of the charges.

4. Learned counsel for the Respondent has supported the conviction of each appellant.

5. I have read through the record of the trial court in order to evaluate the evidence tendered and arrive at my own conclusions regarding the same. This is my duty as the first trial court. I have borne in mind that I neither heard nor saw the witnesses testify, and I have given due allowance for this fact. I have also considered the very able submissions of the learned counsels appearing and the various authorities relied upon.

6. The trial was presided over by four (4) different learned magistrates; **section 200** of the ***Criminal Procedure Code, Cap 75*** was however fully complied with. We shall nevertheless revert to this aspect of the trial later.

7. Seven (7) prosecution witnesses testified. The three Appellants gave sworn evidence in their own defence. The 1st and 2nd Appellants each called a witness in their defence. The 3rd Appellant did not call a witness.

8. One of the prosecution witnesses, SSP SHADRACK JUMA (PW3), partially testified in-chief. He was stood down to enable the prosecution to supply to the defence some documents the witness was to testify upon. His partial testimony-in-chief was quite considerable, running into some six (6) typed pages. As it happened, PW3 was never recalled to the stand to complete his testimony-in-chief and to be offered to the defence for cross-examination. This was despite the court granting several adjournments for him to be called. Ultimately, no reason was given for his failure to attend court to complete his testimony.

9. One of the main grounds of appeal argued by the Appellants is that the failure to avail PW3 for cross-examination by the Appellants breached their constitutional right to challenge evidence enshrined in **Article 50(2) (k)** of the ***Constitution of Kenya, 2010***. This right to challenge evidence is amplified by **section 208** of the Criminal Procedure Code which provides for cross-examination of prosecution witnesses by the accused or his counsel.

10. The Appellants have pointed out that the partial testimony-in-chief of PW3 was not a formality and was substantial, and was relied upon quite heavily by the trial court in convicting the Appellants. A perusal of the judgment of the trial court clearly brings this out. See page 29 of the typed judgment where the court stated –

> ***"The evidence that the 1st accused (3rd Appellant) led the investigators to where he had hidden the money was also given by PW3 and PW7…."***

See also page 30 of the judgment –

> ***"The 4th accused (2nd Appellant) faces a second count of handling stolen property….PW3 and PW5 as well as PW7 testified that they, in the course of their investigations, arrested the 4th accused…and that he led them to a two-roomed house in Core-site Estate. They testified that the accused opened the door to the house and that they got a briefcase in the inner room wherein they found a sum of KShs 1,988,000/00 in Kenyan currency…."***

> ***"…I found the evidence of PW3, PW5 and PW7 credible. They were forthright witnesses. They did not know the 4th accused from before. Their evidence was not poked holes (sic) by the defence and as such I had no reason to doubt them. I find that the prosecution ably proved the offence of handling stolen property against the 4th accused and I hereby find him guilty and I convict him…."***

> ***"The 5th accused (1st Appellant) faces an alternative count of handling stolen property contrary to section 322(1) & (2) of the Penal Code. PW3, 5 & 7 testified that they arrested the 5th accused from Segera Ranch in the course of their investigations and that he led them to his father's homestead. His father pointed out to them the 5th accused's house and that they dug a hole under his bed and recovered some money in a Barclay's Bank bag from under the bed…."***

Again at the bottom of page 30 of the judgment and continuing to page 31 it is stated –

> ***"I have considered the prosecution evidence as well as the 5th accused's defence vis-à-vis the doctrine of recent possession, and find the prosecution ably proved the offence of handling stolen property against the 5th accused. The evidence of PW3, 5 and 7 was clear and firm on cross-examination…I…declare him guilty…and I convict him."***

11. The learned Chief Magistrate not only heavily relied upon the testimony of PW3 in convicting the three Appellants; she was also under the mistaken belief that the witness had been cross-examined by the Appellants! Part of the problem with this trial was, as already seen, that four different learned magistrates presided over it. Initially there was ***J N Nyagah, CM*** who took the testimonies of PW1 and PW2 and partial testimony-in-chief of PW3. Then there was ***T Cherere, CM*** who also took further partial-testimony-in-chief of PW3 and also the testimonies of PW4 and PW5. ***T Matheka, CM*** was the third presiding magistrate. She took the testimony of PW6. Finally there was ***L K Mutai, CM*** who took the testimony of PW7. She also took the testimonies of the Appellants and their witnesses and wrote and delivered the judgment.

12. This was a complicated case involving some six (6) accused persons (and multiple counts), all represented by a number of counsels. To be tried by four different learned magistrates was bound to create problems, such as the one we have just seen of the last presiding magistrate thinking, mistakenly, that PW3 had been cross-examined whereas he had not been availed for cross-examination.

13. There were other problems too, like the final presiding magistrate stating that monies recovered had been produced in evidence whereas the monies had in fact not been produced in evidence.

14. Section 200(4) of the Criminal Procedure Code was not enacted in vain. It provides –

> ***"Where an accused person is convicted upon evidence that was not wholly recorded by the convicting magistrate, the High Court may, if it is of the opinion that the accused person was materially prejudiced thereby, set aside the conviction and may order a new trial."***

More on that later.

15. One of the cherished rights of an accused person is to challenge by cross-examination any witnesses brought against him. It is a constitutional right. PW3 was not availed for cross-examination by the Appellants. PW3's partial testimony-in-chief was substantial and was not a mere formality. His testimony, along with the testimonies of PW5 and PW7, was about recovery of the various monies and other items from the Appellants. PW5 and PW7 were cross-examined at length by the Appellants. There is no reason to think that PW3 would not also have been similarly cross-examined. We cannot speculate what such cross-examination may have come up with. The important thing is that the Appellants were denied their constitutional right to challenge the evidence of PW3. That occasioned a grave failure of justice to the Appellants. It was not a mere error, omission or irregularity that can be cured under **section 382** of the ***Criminal Procedure Code*** as argued by learned counsel for the Respondent. It was an omission and irregularity that resulted in a mistrial.

16. I am also of the opinion that the trial of the Appellants by four different learned magistrates materially prejudiced them. The convicting magistrate recorded only the testimonies of the last prosecution witness and of the Appellants and the defence witnesses. The evidence of the other six prosecution witnesses was recorded by three other different magistrates!

17. Upon the two issues dealt with at length above, I hold that the conviction of all 3 Appellants cannot stand and must be vacated. The convictions and sentence are hereby set aside.

18. I have agonized if I should order a retrial of the Appellants, given the gravity of the offences they faced. I have decided not to on account of the fact that they have now served nearly three (3) years of their sentences.

19. In the result the three appeals are allowed in their entirety. The convictions and sentences have been set aside. The Appellants shall be set at liberty forthwith unless otherwise lawfully held. It is so ordered.

DATED AND SIGNED AT NANYUKI THIS 7TH DAY OF JULY 2021

H P G WAWERU

JUDGE

DELIVERED AT NANYUKI THIS 8TH DAY OF JULY 2021