



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CRIMINAL DIVISION
CRIMINAL APPEAL NO.32 OF 2020

**(An Appeal arising out of the conviction and sentence of Hon. H.M.Nyaga (CM) delivered on 24th January 2020 in Makadara
Criminal Case No.6311 of 2012)**

ELIZABETH WAMBUI WANJIRU.....1ST APPELLANT
SIMON MACHARIA GACHIE2ND APPELLANT
VERSUS
REPUBLIC.....RESPONDENT
JUDGMENT

The Appellants, Elizabeth Wambui Wanjiru and Simon Macharia Gachie were convicted of the **alternative charge of handling stolen goods** contrary to **Section 322(1) and (2)** of the **Penal Code**. The trial court held that the prosecution had established to the required standard of proof that the Appellants, were on 5th December 2012, respectively at Lima Hardware and Equator Hardware in Gikomba in Nairobi County, jointly with others not before court, otherwise than in the course of stealing, dishonestly retained 1,700 pieces of 7” cutting discs, 375 pieces of 9” cutting discs, 200 pieces of 7” grinding discs, 30 pieces of bird locks double and 50 pairs of brass hinges valued at Kshs.240,000/- knowing or having reason to believe them to be stolen goods. The Appellants were each sentenced to serve 18 months imprisonment. In addition, the trial court ordered the recovered items to be restituted to the complainant. The Appellants were aggrieved by their respective conviction and sentence. They filed appeal to this court challenging the said conviction and sentence.

In their petition of appeal, the Appellants raised several grounds of appeal challenging their conviction and sentence. They were aggrieved that they had been convicted on the basis of a defective charge. They faulted the trial magistrate for failing to properly evaluate the evidence, analyse it and reach the correct conclusion that the prosecution had failed to prove its case to the required standard of proof. The Appellants accused the trial court of selective analysis of the evidence and unbalanced evaluation of the same which prejudiced the Appellants’ case. The Appellants were of the view that the finding reached by the trial magistrate was based on speculation and did not take into account all the material facts and circumstances of the case. The Appellants faulted the trial magistrate for relying on evidence that had obvious discrepancies, contradictions and inconsistencies to convict them. They were aggrieved that their respective defences were not taken into account before the trial court reached the impugned decision convicting him. In the premises therefore, the Appellants urged the court to allow the appeal, quash their conviction and set aside the sentence that was imposed upon them.

During the hearing of the appeal, this court heard oral submission made by Mr. Ngatia for the Appellants. Ms. Njuguna for the State conceded to the appeal on the ground that the ownership of the items allegedly stolen were not established to the required standard of proof. This court shall revert to the main issues raised in this appeal after briefly setting out the facts of the case according to the prosecution witnesses.

PW1 James Mwangi Kagure (the complainant) is a businessman. At the material time, he owned a business known as Kags Trading Company Limited. The business dealt mainly with hardware. It was apparent from his evidence that the business was a wholesale supplier of hardware materials. PW1 testified that he was also an importer of several hardware materials. His business is based at Industrial Area in Nairobi County. On 30th September 2012 at about 7.00 p.m., he received information that his business premises had been broken into. Several hardware materials had been stolen. He recalled that on the day prior thereto, he had just unloaded a container that he had imported. When he did an inventory, he discovered that several items had been stolen including 7” and 9” cutting discs. Also stolen were 7” grinding discs and bird branded deadlocks. PW1 told the court that the stolen items had a distinct trademark “KT”. The other cutting discs were labelled “ABRA”. It was the complainant’s testimony that the said items had the said trademark because he had instructed his supplier in China to mark them with the unique trademark and also with the unique number. In the case of the 9” Abra cutting discs, the Code No. was

100233, for the 7” grinding discs, the Code No. was 120152 while for the 7” cutting discs the Code No. was 100313.

The complainant told the court that after he reported the theft to the police, there was no development until on 5th December 2012 when he was informed by one of his employee, PW2 Peninah Wambui Kamau that she had seen some of the stolen items being sold at a hardware in Gikomba owned by the 1st Appellant. The business operated as Equator Hardware. PW2 also met the 2nd Appellant. PW2 pretended to be a buyer. She ordered for the 9” and 7” cutting discs. She was supplied with the same from the 1st Appellant’s shop. She could not get the entire consignment that she had requested. The 1st Appellant told her that she could get the same from a nearby shop known as Lima Hardware. After purchasing a sample, she took them to PW1 who confirmed that indeed the said cutting discs were from the batch that were stolen from his hardware at Industrial Area.

The complainant made a report to the police. PW7 Cpl. Jacob Mangare, then attached to DCI Makadara with other investigators visited the two hardware shops at Gikomba. They recovered the items which PW1 claimed were stolen from his hardware. It was instructive that the basis of the recovery of the items was the identifying mark “KT”, “ABRA” and codes No.100313 and 10031. The locks which were recovered had the label “KT Bird”. The pairs of hinges which were recovered did not have any identifying mark. According to PW7,

“The grinding discs bears the label KT discs. The complainant had been allowed to use it as a trademark by Kenya Industrial Property Institute (KIPI) (MFI 16). In the same shop, we found cartons labelled KT for Kags Trading. We prepared an inventory that accused 1 signed.”

The investigation by the police revealed that some of the cutting and grinding discs had been sold to a hardware in Nakuru. The hardware was operated by PW3 Susan Njeri. The hardware was called DM Hardware. PW3 confirmed that indeed she had purchased the cutting discs from the 1st Appellant in a hardware at Lima Limited. The investigations by the police at Nakuru was conducted by PW4 CIP John Njoroge of the Flying Squad Nairobi and PW6 Cpl. Rinos Murungu then based at Nakuru DCI office. The items recovered from PW3 were photographed and produced into evidence by the prosecution. Photographs of the allegedly stolen items were taken by PW5 PC Gaudencia Olweny. These photographs were produced into evidence.

When the Appellants were put to their defence, they denied that they were party to the theft of the items from the complainant’s hardware. Indeed, they insisted that they had obtained the said items from another supplier. The 1st Appellant attributed the charge brought against her to sour grapes by the complainant when she changed suppliers. She denied that the Appellants had any unique trademarks that could be identifiable and therefore unique from other suppliers. On his part, the 2nd Appellant stated that he had the requisite permits to operate a hardware. His wife by the name Jane Wanjiku is the one who operated the hardware on a day to day basis.

This being a first appeal, it is the duty of this court to re-evaluate and reconsider the evidence adduced before the trial court before reaching its own independent determination, whether or not to uphold the decision of the said court. In doing so, this court is required to bear in mind that it neither saw nor heard the witnesses as they testified and can therefore not make comment regarding the demeanour of the witnesses (See **Okeno vs Republic [1972] EA 32**). In the present appeal, the issue for determination by this court is whether the prosecution proved its case on the charges brought against the Appellants to the required standard of proof beyond any reasonable doubt.

This court has carefully re-evaluated the evidence adduced before the trial court. It has also considered the submission made by counsel for the parties to this appeal. It has also considered the grounds of appeal put forward by the Appellants. This appeal will turn on only one issue. Whether the prosecution proved that the items recovered from the Appellants’ business premises were the items that were in a batch stolen from the complainant’s hardware on 30th September 2012. It was the prosecution’s case that the items recovered from the Appellants’ business premises contained the trademark “KT”, “ABRA”, and Code Nos.100233, 120152 and 100313. The prosecution produced a letter from KIPI dated 19th January 2016 which indicated that the complainant had reserved the trademark “KT” under Class 2, 6 and 9 in the name of Kags Trading Company Limited.

It should be noted that this letter by KIPI was produced into evidence. It relates to a reservation of the trademark and not an actual registration. The reservation was made four years after the theft from the complainant’s hardware at Industrial Area. The assertion by the prosecution that the complainant had registered the name “KT” as a trademark as of the year 2012 cannot therefore be the correct position. Further, the prosecution did not produce any documentary evidence to prove that indeed the complainant had instructed the manufacturers in China to label the said grinding and cutting discs using the mark “KT” or the Code numbers indicated in evidence. No evidence was adduced to support the prosecution’s contention that the name “ABRA” in the cutting or grinding discs was registered to the complainant. There was no evidence that was adduced by the prosecution to support the thrust of the prosecution’s case that the complainant had the exclusive distribution rights of the grinding and cutting discs with the marks “ABRA” or “KT”. According to the 1st Appellant, the said cutting or

grinding discs could be secured from other suppliers. No evidence was adduced by the prosecution to controvert this assertion by the 1st Appellant.

This court's re-evaluation of the evidence adduced by the prosecution in relation to the ownership of the items recovered in the Appellants' possession allegedly having been stolen from the complainant leads it to the irrefutable conclusion that the complainant was not able to establish that the said items were exclusively in his possession at the time, for the prosecution to charge the Appellants for allegedly being found in possession of stolen goods. The prosecution failed to establish that the cutting and grinding discs with the mark "KT" and "ABRA" exclusively originated from the complainant's hardware. Further, the prosecution failed to prove that the brass hinges (which incidentally had no mark) found in the Appellants' possession were from the consignment that was stolen from the complainant's hardware.

The prosecution did not also prove that the locks with the mark "KT Bird" found in the Appellants' possession was part of the consignment that was stolen from the complainant. In this court's assessment, the hardware items found with the Appellants were generic hardware merchandise which could be purchased from any hardware wholesaler for resale by retail hardwares as the ones owned by the Appellants. For the above reasons, it is clear that the prosecution failed to prove, to the required standard of proof beyond any reasonable doubt, that the items found with the Appellants were part of the consignment that were stolen from the complainant's business premises in Industrial Area. The prosecution, correctly in the view of the court, conceded to the appeal.

In the premises therefore, the Appellants' appeal against conviction is allowed. The conviction is quashed. They are acquitted of the charges that were brought against them. The custodial sentences imposed on them is set aside. The Appellants are ordered set at liberty forthwith unless otherwise lawfully held. The sums that the Appellants deposited in court to secure their release on bail pending the determination of this appeal shall be refunded to them. It is so ordered.

DATED AT NAIROBI THIS 6TH DAY OF MAY 2020

L. KIMARU

JUDGE