REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL APPEAL NO. 115 OF 2014

EMMANUEL MUTEGI.....APPELLANT

V E R S U S

REPUBLIC.....PROSECUTOR

JUDGMENT

Emmanuel Mutegi, Cecilia Nicholas, Kelvin Lemaiyan Lenteror and Dennis Lacami Lentoror (Accused 1– 4) were jointly charged with the offence of Breaking into a building and committing a felony contrary to Section 306 (a) of the Penal Code (P.C.). Accused 2 and 4 were charged with alternative charges of handling stolen property contrary to Section 322 (1) (2) P.C. They were alleged to have handled mobile phones stolen from IEBC office Laisamis.

The Appellant, Emmanuel Mutegi, (Accused 1) was convicted of the offence of handling stolen property contrary to section 322 (1) (2) of the Penal Code CAP 63 of the Laws of Kenya and sentenced to 5 years imprisonment without the option of a fine.

The Appellant was aggrieved by the conviction and sentence and filed this appeal. In his petition of Appeal, the Appellant raised the following issues:

> *a.* ***THAT the Trial Magistrate erred in law and fact in convicting the Appellant in a charge which was not preferred against him;***
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> *b.* ***THAT the Trial Magistrate formulated a charge and went on to convict the appellant without basis;***
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> *c.* ***THAT the Trial Magistrate convicted the Appellant for an offence of handling stolen property when the ingredients thereof were not proven beyond reasonable doubt;***
>
> *d.* ***THAT the sentence was harsh and without the option of a fine.***

The appellant therefore prays that the court do quash the conviction, and set aside the sentence.

When the appeal came up for hearing on 5th March 2015, Mr. Kariuki, Learned State Counsel for the State conceded the appeal on the grounds that the appellant was convicted of an offence he was not charged with.

The appellant was represented by Mr. Mwanzia who submitted that the appellant was never charged with the offence of handling stolen property and that the ingredients of the said charge were not proved. That the appellant explained where he got the phone, that is with Cecilia Nicholas and that the Investigating Officer did confirm having found the phone with the said Cecilia. It was Counsel's submission that for the offence to have been committed, the appellant should have been found in possession of the stolen property and must have known it to have been stolen. Counsel also urged that the court on the evidence of the witnesses to have been unbelievable and there was doubt that the offence was committed. Counsel relied on the decision of **Nelson Maingi V Republic** Criminal Appeal 52 of 2013 where the court considered what the court should consider in a charge of handling stolen property contrary to Section 322 P.C. See also **Tembere V Republic (1990) KLR 353**. Counsel also argued that the sentence was excessive and discriminatory in that though Accused 3 was convicted of the same offence he was handed one year probation while the appellant was handed 5 years imprisonment.

This is the first appellate court and as such I have subjected the evidence adduced before the trial court to a fresh evaluation and analysis and draw my own conclusions. I am alive to the fact that I neither saw nor heard any of the witnesses and so cannot comment on their demeanor. I am guided the Court of Appeal decision of ***KIILU AND ANOTHER V R (2005) 1 KLR 174*** on the duties of a first appellate court, where the Court of Appeal held thus:

> ***"an appellant in a 1st appeal is entitled to expect the whole evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court's own decision in the evidence. The 1st appellate court must itself weigh conflicting evidence and draw its own conclusions.."***
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> ***It is not the function of a 1st appellate court to merely scrutinize the evidence to see if there was some evidence to support the lower courts findings and conclusions; only then can it decide whether the magistrates finding should be supported. In doing so it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses.."***

The evidence before the trial court was that; Festus Mureithi Mucheke (PW1) the Constituency Elections Coordinator with IEBC in charge of Laisamis Constituency recalled that on 24/2/2014, he was travelling from Nairobi to Nkubu when an office clerk in the office called and informed him that some phones had been stolen from the office. He proceeded to the office and found 26 phones stolen.

PW2 Wilson Lekidenye told the court that he went to the office on 24/2/2014 at 8.00 a.m., found the security officer, Joseph Maro, found that one padlock on the external door broken. He had the keys, opened and found the larch of the door tampered with. On checking, he found some phones missing and he informed PW1. She said she had locked the offices on Friday 21/2/2014 and left security officers on duty.

PW4 Samson Nicholas Sausen is the brother to Accused 2 Cecilia. He informed the court that Cecilia's telephone line 0728-415 592 had been registered in his name in 2010 when she was still in college in Meru. He confirmed that Accused 2 had got the phone from their cousin, Accused 1.

PW5 APC Lopoyok Benedict was the officer guarding IEBC offices on 23/2/2014 till the morning of 24/2/2014 and handed over to one Maro. When he reported again in the evening, he learnt that one of the IEBC offices had been found broken into after he left though he had left all of them locked.

PW 3 Mary Mutegi who is the appellant's sister testified that on 25th March 2014 she was at the police station having been called by the OCS who told her that there was data from safaricom in which her name had been traced. She was then shown some numbers among them 0711732864, which she identified as her brothers, which had been registered using her Identity Card No. 29908373.

PW 6 Chief Inspector John Boino testified that on 25/2/2014, he received a report from Mr. Mucheke of IEBC office Laisamis that their office had been broken into. He proceeded to the scene and instructed Mr. Mucheke to go to his office and give him a full inventory of the things missing from his office. PW1 gave him on inventory of the stolen phones and sim cards. He then commenced investigations with a view to

tracking the phones and by 7th March 2014, he got a report from the CID Headquarters on the location and whoever was in possession of the phones. According to the report, the print for IMEI No. 35269304689040 for Nokia 1680C using mobile No. 0711732864 was registered under Mary Mutegi (PW 3) of identity card number 29908373. He further testified that he knew Mary Mutegi (PW 3), the appellant's sister. He called for her and her identity card which corresponded with the one on the print out for phone number 0711732864 which was being used by the appellant. He further testified that PW3's mobile number did not correspond with the one in the print out whereupon PW 3 told him that the number in the print out was for her brother (the appellant). He then instructed her to bring her brother (appellant) who admitted that the phone was in his possession and that he had given it to one Cecilia Nicholas (Accused 2).

In his unsworn evidence, the appellant told the court that he was given the subject phone by Accused 4 (Dennis Lecami Lentoror) as a friend as he proceeded to school. He then gave it to Accused 2 after buying another phone. He was later called by the Officer Commanding Station (OCS) and was questioned over the phone he had given to Accused 2.

I have considered the submissions; the authorities relied upon by both the Appellant and the State Counsel, and the grounds of appeal. In addition, I have reevaluated the evidence on record.

The IEBC offices were found to have been broken into between 23/2/2014 and 24/2/2014. The charge however read that the offence was committed between December 2013 and 24/2/2014. Nobody witnessed the breakage. PW6 received the report on the offence on 25/2/2014 and he commenced investigations. He received a report from CID on 7/3/2014 on the whereabouts of the phones that were amongst the stolen phones. In respect to the phone that was found with Cecilia, Accused 2, that which the appellant was charged with, it was found with PW2 on 25/3/2014. I find that there was no direct or circumstantial evidence connecting the appellant with the breaking into and theft of phones from offices of IEBC, Laisamis. It was not even known when the theft took place. From the data from Safaricom, the court deduced that the phones had been in use even before the alleged breakage.

From 24/2/2014 when the theft was discovered, the recovery was not made till about 25/3/2015, over a month later. In my view, the appellant could not have been said to be in recent possession of the phone. The doctrine of recent possession was discussed in the case of ***MAHINGI V REPUBLIC (1989) KLR 225,*** stated as follows:

> ***"By the application of the doctrine the burden shifts from the prosecution to the accused to explain his possession of the item complained about. He can only be asked to explain his possession after the prosecution has proved certain basic facts. Firstly, that the item he has in his possession has been stolen; it has been stolen a short period prior to their possession; that the lapse of time from the time of its loss to the time the accused was found with it was, from the nature of the item and the circumstances of the case, recent; that there are no co- existing circumstances which point to any other person as having been in possession of the items. The doctrine being a rebuttable presumption of facts is a rebuttable presumption. That is why the accused is called upon to offer an explanation in rebuttal, which if he fails to do an inference is drawn, that he either stole or was a guilty receiver".***

As earlier mentioned, it is not clear when the subject phone was stolen from IEBC offices. What is clear is that the phone was recovered over a month since the breakage and the appellant could not have been in recent possession of the same.

I must point out that an item like a phone can easily change hands and it may have changed many hands from the day it was received from IEBC up to 25/3/2014.

The appellant was acquitted of the principle charge and instead convicted of the offence of handling stolen property contrary to Section 322 (1) (2) P.C. It is a fact that the appellant had not been charged with that offence but was convicted of it. Under Section 179 (1) of the Criminal Procedure Code, the court has discretion to convict an accused for another offence disclosed by the facts. The Section

provides:

> ***Section 179 (1) of Criminal Procedure Codes "When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and the combination is proved but the remaining particulars are not proved, he may be convicted of the minor offence although he was not charged with it.***
>
> ***(2) When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it."***

However, the question is whether the evidence on record proved the said offence of handling stolen property. In the case of **Tembere V Republic (1990) KLR 393**, the court held as follows:

> ***"The charge of handling stolen property is a highly technical offence and the plea recorded must show that the accused has answered all the elements of the charge.***
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> ***2. One of the important elements of the charge of handling stolen property is that the accused must know or have reason to believe that the goods were stolen. Another vital element is that the accused must dishonestly receive or retain the goods".***

In the instant case the appellant admitted to have given the phone to Accused 2. As observed by the trial court, the appellant was in constructive possession but he went further to explain that it is Accused 4 who gave the phone to him. The court believed Accused 2 that the phone was given to her. However, the court did not explain why it did not believe the appellant's explanation that it is Accused 4 who gave him the phone. There is no evidence, direct or otherwise to demonstrate that the appellant knew or had reason to believe that the said phone was stolen. The appellant is a prime suspect, having been found with the phone. However, the prosecution did not prove beyond any doubt that the offence under Section 322 (1) and (2) P.C. was proved.

The court then went ahead to imprison the appellant for 5 years while Accused 3 who was also found guilty of the same offence has sentenced to one year on probation. Both accused had been found to be first offenders. There is no reason why the court did not consider the appellant for a lesser sentence or non-custodial sentence. In the circumstances, the sentence was harsh and obviously discriminatory.

After careful consideration of the grounds of appeal, the submissions, and a review of the evidence on record, I am satisfied that the prosecution failed to prove the charges beyond any doubt and the conviction was unsafe.

In the end, I allow the appeal, quash the conviction and set aside the sentence. The appellant is set at liberty forthwith unless otherwise lawfully held.

DATED SIGNED AND DELIVERED AT MERU THIS 13th DAY OF MAY, 2015.

R. V. P. WENDOH

JUDGE

In the presence of;

Mr. Musyoka for State

Mr. Mwanzia for appellent

Faith, Court Assistant

Accused.