REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
Criminal Appeal 317 of 2008

PATEL MUKESH BHAI AMBALAL...……………………….APPELLANT

VERSUS

REPUBLIC………..…………………………………………RESPONDENT

JUDGMENT

The appellant, Patel Mukesh Bhai Ambalal, was charged with the offence of stealing railway property contrary to section 279(d) of the Penal Code. The particulars of offence state that on the 4th day of July 2008, at Nakuru Township in Nakuru District within Rift Valley Province, stole 43 cut pieces of rail telecom poles valued at Kshs 160,000/=, 2 rail clips valued at Kshs 1,500/=, 6 rail nuts valued at Kshs 2,000/=, 6 rail bolts valued at Kshs 2,000/=, 4 rail, 1 fish plates valued at Kshs 3,000/=, 1 rail brake block valued at Kshs 1,500/= all total (sic) valued at Kshs 170,000/= the property of Kenya Railways Corporation. The appellant faced an alternative charge of handling stolen goods contrary to section 322(2) of the Penal code. The particulars of the alternative charge state that on the 4th day of July 2008 at Nakuru Township in Nakuru District within Rift Valley Province, otherwise than in the course of stealing dishonestly received or retained 43 cut pieces of railway Telecoms poles, 2 rail clips, 6 rail nuts, 6 rail bolts, 4 rail fish plates, 1 rail block all valued at Kshs 170,000/= the property of Kenya Railway Corporation knowing or having reason to believe them to be stolen goods.

After a full trial before the Resident Magistrate the appellant was acquitted on the main charge of theft and convicted on the alternative charge of handling for which he was sentenced to a fine of Kshs 50,000/= or in default 6 months imprisonment. Aggrieved by both the conviction and sentence he filed this petition of appeal on the grounds, mainly that there was no complainant at the trial, that the prosecution did not prove the offence of stealing or theft against anyone, meaning that the offence with which the appellant was charged was not proved to the required standard. He also complains that he had a sound defence which was not considered on merits and that the learned trial magistrate misdirected herself by shifting the burden of proof to the appellant, leading the trial court to arrive at wrong conclusions.

The State has conceded the appeal on the ground that the appellant did give a reasonable account as to how he came into possession of the alleged stolen goods and his defence was plausible. The said defence, therefore, outweighed the prosecution's evidence rendering the same insufficient to support the conviction.

Submitting in support of the appeal learned counsel Mr. Kanyi told the court that the prosecution witnesses PW1, PW2 and PW3 were only informed of the theft of railway materials. They proceeded to the Nakuru scrap metal lines to check. There had been no complaints made by the railways company of any of its goods having been stolen. All that was done by PW1 and PW3, who were police officers, was to call PW2 an employee of Kenya Railways to check and confirm if railway materials found at the appellant's scrap metal yard belonged to the railway company. Counsel submitted that the lower court, having acquitted the appellant on the main charge of theft, on the ground that no evidence had been adduced to prove that count, clearly meant that the alternative charge of handling could not stand. He cited the case of Mwadzuma Mwambwanga vs. R. Cri Appeal No. 1 of 2001 to support the argument that there can be no prove of a handling charge under section 322 of the Penal code where no theft had been proved. Basing reliance on the authority of Peter Nduati Wangeci vs. R. Criminal Appeal 202, 203 & 204 of 2001 counsel submitted further that the charge of handling was not proved to the required standard

since the appellant's guilt was not established. His possession and detention of the materials forming the subject matter of the charge was not proved to have been done whilst the appellant knew or had reason to believe that the same were stolen. The appellant's defence was that he had bought the goods, which clearly negated any imputation of dishonesty on his part. According to counsel, the fact that the appellant was a bonafide scrap metal dealer who publicly displayed the materials found with him for sale, clearly supported his claim of innocence. Counsel further submitted that in finding that the appellant ought to have made inquiries as to the origin of the materials that he said he had bought from Roll Fasts Africa Ltd to establish where the said company had acquired the said materials, the trial court clearly shifted the burden of proof to the appellant. He further submitted that having believed that the appellant had bought the goods that he was offering for sale, the learned trial magistrate's inference of a guilty mind on the appellant's part was erroneous. According to counsel it was incumbent upon the prosecution to prove by evidence the existence of a guilty mind on the part of the appellant for the charge of handling stolen property to stand. He relied on the cited the authority of Peter Nduati Wangeci vs. R where it was held that:

"*In order to prove a charge under section 322 of the penal there must be proof that the accused had possession of the goods said to have been stolen dishonestly and knowing or believing that the same were stolen.*"

After evaluating the evidence adduced at the trial the learned trial magistrate found the appellant innocent of the charge of theft. She found as a fact that the appellant had bought the materials found with him from Roll Fast Africa Limited knowing that the same were railway materials. On that basis alone the learned trial magistrate proceeded to find that "*the appellant was reasonably expected to be aware that the materials were stolen from Kenya Railways prior to their (sic) sale to him.*"

According to the learned trial magistrate the appellant ought to have made enquires from the vendors as to where they had acquired the railway materials that they sold to him. That having not been established the learned trial magistrate then concluded that the accused person had reason to believe that the materials exhibited before court as exhibit 6 were stolen from the Kenya Railways. She found that his defence did not cast any doubt on the prosecution's case.

Upon my own analysis and re-evaluation of the evidence tendered at the trial, I find that the learned trial magistrate findings on the alternative charge are not supported by the evidence adduced before her. As rightly submitted by the appellant's counsel there was no proof that the material found with the appellant were stolen. PW1 CPL William Matutu (PW7) testified that he was informed by the OCPD Nakuru that the latter had received many reports of theft of railway materials from the railway line and at the yard at the Nakuru railway station. He did not disclose whether the said information was given to him by way of a report or complaint or by who. PW1 proceeded to the scrap metal workshops in Nakuru where he found the appellant at his workshop and informed him of his mission. He proceeded to conduct an inspection. He found the railway materials stated in the charge and called PW2 Joel Kibusi Mwena to identify the same and also to confirm if they belong to Kenya Railways. In his testimony PW2 stated that when he got to the yard he observed that the yard was full of metal scraps. PW1 showed him pieces of metal '*which resembled the ones used by the railways for communication*'. He also saw other metals which he said belonged to the railway. He did not say whether Kenya Railways had lost the said material but gave a valuation of the same stating a figure of Kshs 170,000/=. It was the evidence (under cross-examination) of PW3 PC Sammy Kinyua, one of the police officers who conducted a search at the appellant's yard, that he did not know exactly where the materials found thereat were stolen although he stated that he did know that they were stolen along the railway line.

In his defence the appellant testified that he was a transporter and a scrap metal dealer. He carries on business under the name Raj metals situated at Nyando road. On 4th July 2008 police officers came to his premises and told him that they wanted to search the yard for items belonging to the railway. They conducted a search from 10.30 a.m. to 1.00 p.m., during which time the appellant kept leaving the premises and coming back. Certain exhibits were carried away (PExh 1-6) by the police officers, who also took away other scrap metal that was not produced in evidence. The appellant stated that he tried to explain to the police officers that the other material comprising of 5,200kgs belonged to Deuki Steel

Mills and that he had earlier bought railway scrap metal from Roll Fasts Limited. He testified that every month his company bought 800 tonnes of scrap metal locally and also from Uganda. He testified that the scrap metal exhibited in court had been bought from Uganda on 16th May 2008 and was valued at Kshs 4,800/=. The rest of the scrap metal which he admitted was in his possession had also been bought by his company as assorted metal.

After analysing and re-evaluating the evidence adduced at the trial I find that the learned trial magistrate's finding of guilt on the alternative charge was erroneous. Whereas it was incumbent upon the appellant to give an account as to how he came to be in possession of the materials said to have been stolen, it is clear from the provisions of section 111 (2) of the Evidence Act (Cap 80 of the Laws of Kenya) that the prosecution is still bound to establish by way of evidence the commission of the offence charged. There was no evidence whatsoever to dislodge the appellant's defence that he had bought the materials found with him from a third party for resale. The only witness from the would be complainant (Kenya Railways) did not prove by his testimony that the said materials were stolen. Neither did he lay a claim on them on behalf of his employer. While identifying some of them he even said that they *"only resembled"* his employers goods, thereby creating doubt. The charge against the appellant was based on mere suspicion, the basis of which was not even laid by the prosecution. From the evidence tendered by the prosecution herein, there were no facts whatsoever upon which the knowledge of the appellant as to the theft can be imputed.

I accept the submissions by the appellant's counsel that without the guilt of the appellant being established and the learned trial magistrate's conclusion that the charge under section 322(1) of the penal had been proved to the required standards was clearly erroneous. The authorities cited by the appellant in arguing his appeal support the same on all grounds and the State is right in conceding the appeal. Therefore, appeal hereby allowed with the result that the conviction is hereby and quashed and the sentence set aside. I order and direct that the fine of Kshs 50,000/= paid by the appellant be reinstituted to him with immediate effect.

Dated signed and delivered at Nakuru this 1st day of October 2009

M. G. MUGO

<u>JUDGE</u>