

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU

Criminal Appeals 3 & 4 of 2006 (Consolidated)

ISAAC KARIUKI NYAGA.....1ST APPELLANT

GEORGE MATHENGE WACHURI....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

ISAAC KARIUKI NYAGA and **GEORGE MATHENGE WACHIURI** (the Appellants) were with two others charged in Nyahururu PMCRC No. 4173 of 2003 with stealing contrary to **Section 273** of the **Penal Code**. The particulars of the charge were that on diverse dates between 1st March 2002 and 29th October 2003 at Endelea Farm in Nyandarua District within Central Province they jointly stole 12 steel water pipes valued at Kshs.24,000/-, the property of Paul Ndirangu Kionyi.

The Appellants with another also faced an alternative charge of handling stolen goods contrary to **Section 322(2)** of the **Penal code**. The particulars of that count were that on 30th October 2003 at Ndaragua Trading Centre in Nyandarua District of Central Province, other than in the course of stealing, they jointly and dishonestly received or retained 4 steel water pipes knowing or having reason to believe them to be stolen or unlawfully obtained goods. They pleaded not guilty to the charge but upon trial before the Principal Magistrate at Nyahururu the first and second Accused persons in that case were convicted on the main count and were each sentenced to 2 years imprisonment while the Appellants were convicted on the alternative charges and were each sentenced to 3 years imprisonment. The Appellants have appealed against both that conviction and sentence.

In his short submission, Mr. Chege, counsel for the Appellants, contended that the charge against the Appellants of handling stolen goods was not proved. He said that the Appellants gave a plausible explanation as to how they came to be in possession of the stolen pipes. In the circumstances, he concluded that the conviction cannot be sustained and urged me to quash it and set aside the sentence.

Mr. Mugambi, the learned state counsel conceded the appeal on two grounds. The first ground was that the prosecution case was conducted by an unqualified prosecutor. While the second ground was that the explanation given by the Appellants was plausible.

I have perused the record. It is correct as stated by Mr. Mugambi that the prosecution was partly conducted by an unqualified prosecutor, Sergeant Migwi. That fouled the provisions of **Section 85(2)** of the **Criminal Procedure Code** as it stood before it was amended by **Act 7 of 2007**. That provision required criminal prosecutions to be conducted by an “advocate of the High Court of Kenya or a person employed in the public service, not being a police officer below the rank of Assistant Inspector of Police,”

The Appellants who were charged with handling stolen goods explained that the pipes were taken to their workshop by the owner of the tractor to which the police found them being welded. The only part the Appellants played in the matter was to weld the stolen pipes to the tractor as requested by the owner

thereof. Welding was their vocation and they were found doing so in their workshop. There was nothing suspicious about that. There was also nothing to suggest that they knew that the pipes were stolen or unlawfully obtained. In the circumstances I agree with both counsel that the charge of handling stolen goods was not proved against the Appellants. Consequently, I allow this appeal on these two grounds, quash the conviction and set aside the sentence. The appellants shall be set free forthwith unless otherwise lawfully held.

DATED and DELIVERED at Nakuru this 3rd day of October, 2008.

D. K. MARAGA

JUDGE