REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL APPEAL NO 210 &211 OF 1992

(CONSOLIDATED)

MUMO MUSEMBI…….....……..APPELLANT

VERSUS

REPUBLIC…….....……..RESPONDENT

JUDGMENT

These two appeals are consolidated. The two appellants were jointly charged with two counts of Robbery with violence contrary to section 296 (2) of the Penal Code. In the alternative both faced the offence of Handling Stolen Goods contrary to section 322 (2) of the Penal Code. After a full trial both appellants were convicted of the offences of Robbery with violence and each sentenced to the mandatory sentence of death. These are appeals against both the said conviction and sentence.

At the hearing of the appeals, the learned counsel for the republic did not support the convictions under section 296 (2) aforesaid but submitted that the alternative charge of handling had been proved against both appellants.

On our part, as the first appellate court we have the duty to evaluate the evidence on record afresh and arrive at independent conclusions. This is what we have done.

There was evidence that both P.W. 1 and P.W. 2 were robbed of motor vehicle Reg. No. KYE 998 and personal effects as shown in the particulars of the Charge Sheet in respect of both counts. Both witnesses did not identify the robbers. They have said as much in their respective testimonies. In convicting the appellants, the learned trial magistrate observed-:

> "It is to be noted that the robbery occurred on 19/6/91 and the stolen motor vehicle was recovered and the two accused persons arrested only two days later i.e. on the 21/6/91. In the absence of an acceptable defence by the accused persons I have to conclude that they together with others who were not arrested were the ones who robbed Mr. Mohamed and his wife..."

It is clear that the learned principal magistrate relied on the principle of recent possession. It is quite possible however for a subject matter like a car to change hands in two days. It is therefore not unreasonable to conclude that the appellants were more of handlers than the robbers. We are therefore in agreement with the learned counsel for the Republic that a conviction under section 296 (2) cannot be sustained. We have now to examine the evidence to see if the offence of handling was proved beyond any reasonable doubt.

P.W. 3 and P.W. 5, both police officers were going to Dandora Police Post from Buru Buru Police

Station in company of other police officers. At some place along Mutarakwa Road they both saw a Datsun 1200 pick up crash into an electric post after hitting the support wires. One person fell off the pick up onto the road. The police officers rushed to the scene and found the two appellants herein. The second appellant herein Stephen Kilonzo Lulungu who was the original first accused is the one who fell off the pick up. Both appeared to be drunk

The crash took place some 50 metres or so from where the police officers were and when they reached the scene the first appellant herein was still in the motor vehicle. The two were however not injured. The motor vehicle had Reg. No. KYT 403 which tallied with the insurance sticker but the road license read KYE 998. An officer from the registrar of Motor Vehicles Registry confirmed that motor vehicle Reg. No. KYE 998 was registered in the name of P.W.1's company and had no relation whatsoever with motor vehicle Reg. No. KYE 403.

Suspecting the motor vehicle to have been stolen the police radioed 999 controller who in return confirmed that the said motor vehicle had been reported stolen within Langata Area. An officer from Langata Police Station was called and went to the scene. The two appellants were then arrested and charged with these offences.

Both appellants denied the charge and stated that they were arrested on their way to their respective homes. Both police officers P.W. 3 and P.W. 5 were very consistent about the crash and the discovery of the discrepancies relating to the motor vehicle. There were streetlights and the two witnesses never lost sight of the pick up after it had crashed into the electric post. I believe they saw appellant 2 fall off the motor vehicle after the crash and that the first appellant was still in the motor vehicle. Weighed against the foregoing evidence, the appellant’s respective defences are rendered hollow and bear no truth whatsoever.

The discrepancies on the particulars of the said motor vehicle robbed from the first complainant would cause/raise some concern to anyone handling the same. It was confirmed to have been stolen. The two appellants must have handled the same knowing it to have been stolen. We find that the offence of handling stolen goods under Section 322 (2) of the Penal Code was proved beyond any reasonable doubt. We therefore allow the appeal against both conviction and sentence on counts one and two but convict each appellant of the offence of handling stolen goods under Section 322 (2) of the Penal Code.

The offence which the two appellants now stand convicted carries a sentence of fourteen years with corporal punishment. The first appellant had two previous convictions one of them relevant to the charge while the second appellant had one previous conviction relevant to the charge. The motor vehicle was recovered but in damaged condition.

We order that each appellant shall serve two (2) years imprisonment and to suffer two (2) strokes of the cane. The sentences of imprisonment shall run from the date of original convictions.

Orders Accordingly

Dated and delivered at Nairobi this 4th day of November, 1995

A.M. MSAGHA **S.O. OGUK**

JUDGE **JUDGE**