



IN THE COURT OF APPEAL

AT MOMBASA

(Coram: Kwach, Omolo & Akiwumi JJ A)

CRIMINAL APPEAL NO. 67 OF 1993

PATRICK SIANA APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Mombasa

(Mr Justice Wambilyanga) dated 9th July, 1993,

in HC CR A No 202 of 1993)

JUDGMENT

Patrick Siana (the appellant) was convicted by the Resident Magistrate, Kwale, on his own plea of guilty of the alternative charge of conveying property suspected to have been stolen contrary to section 323 of the Penal Code and sentenced to 12 months imprisonment. His appeal to the superior court against both conviction and sentence was dismissed by Wambilyanga, J on 9th June, 1993, and he now appeals to this Court.

At dawn, on the material day, the police acting on information received, tried to stop a vehicle in which the appellant and another person were travelling at Vinuni in Kwale. The driver refused to stop and the police gave chase. At Matuga, the vehicle stopped and the occupants jumped out and started running. In the process they dropped the luggage which they were carrying which on inspection were found to be a television set and a radio which had already been reported stolen (underlining ours).

When the prosecutor had outlined the facts, the appellant admitted that they were true and conviction followed. It is now being contended on behalf of the appellant first, that the plea was not unequivocal and, secondly, that the conviction on the alternate charge was unlawful.

As regards the plea, we are satisfied that the appellant fully understood the charge and the facts which he admitted and that both the plea and conviction were taken and entered in accordance with the guidelines set down in the case of *Adan v Republic* [1973] EA 445. There is no substance in this ground of appeal.

On the second ground of appeal, it was Mr Magolo's submission that the conviction under section 323 of the Penal Code was unlawful because, at the time the appellant was stopped on 7th May, 1993, and also when his plea was taken on 12th May, 1993, the police already knew that the two items had been stolen

and the real owner Sidan Water Project, was known. In the circumstances, he submitted, the question of the of the items being reasonably suspected of being stolen could not arise and the appellant should have been charged either with theft or handling stolen property. We think there is considerable merit in this submission. In the case of *Mohammed v Republic* [1971] EA 42, the appellant was charged with stock theft and in the alternative with possession of stock which may be reasonably suspected of having been stolen. At the time of the charge it was known who the stock belonged to and that it had been stolen. The appellant was convicted on the alternative count and appealed. It was held by the Court of Appeal for East Africa, allowing the appeal, *inter alia*, that the charge of possession of property reasonably suspected of having ben stolen should never be made where a charge of stealing or receiving could be made. At page 45 – A, the Court said:

“It seems to us that the provision which relate to reasonable suspicion should never be invoked where a charge of stealing or receiving could be laid. The general rule in criminal matters is that the onus of proof is on the prosecution. In certain limited classes of cases the Legislature has, for good reason, placed the onus of proof on the accused, but such provisions should not be used outside the circumstances for which they were intended. We think that where evidence is available to prove ownership and the theft of any property it is clearly wrong to rely on them.”

We respectfully endorse and adopt this statement of principles. As the goods were known to have been stolen and the police knew who the owner was, it was not open to them to lay a charge under section 323 of the Penal Code. The appellant should have been charged with either theft or handling stolen property. Consequently, we allow this appeal, quash the conviction and set aside the sentence. In the interests of justice we order that the appellant be arrested and charged with the charge disclosed by the facts.

Dated and Delivered at Mombasa this 28th day of July, 1993

R.O. KWACH

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JUDGE OF APPEAL

R.S.C OMOLO

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JUDGE OF APPEAL

A.K. AKIWUMI

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JUDGE OF APPEAL