IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: PLATT, GACHUHI & APALOO JJA)

CRIMINAL APPEAL NO. 217 OF 1986

BETWEEN

HAMISI BAKARI …….....…….1ST APPELLANT

RUKIA DZERI …….....…….2ND APPELLANT

AND

REPUBLIC……...……RESPONDENT

JUDGMENT OF THE COURT

The appellants, Hamisi Bakari and Rukia Dzeri were charged with burglary and theft contrary to sections 304(2) and 279(b) of the Penal Code. It was shown that on the night of September 15, 1985, Peter Omori Arosi's house had been broken into and a considerable quantity of his personal goods had been stolen. The evidence clearly showed that these appellants had nothing to do with this burglary and theft, which had been carried out by one Hakimu Wagise. The latter has been punished. He happens, however, to have been acquainted with the appellant Hamisi Bakari; and he was the lover to Rukia Dzeri. The trial court quickly disposed of the charge of burglary and theft and turned its attention to the alternative charge of handling contrary to section 322(2) of the Penal Code, eventually convicting both appellants of this offence, and sentencing them to the minimum sentence of seven years and hard labour. The appellants appealed to the High Court where Mr Sadiq Ghalia strove hard to have their convictions quashed, or at least, as this offence carried an onerous minimum sentence, their sentences reduced to probation. The High Court, however, confirmed both conviction and sentence. The appellants appealed again to this court. They were unrepresented and their appeals have been consolidated. Their appeals are poorly put forward and we have considered that they have repeated Mr Ghalia's submissions.

The trial court found as follows :-

> "From these facts the two accused persons dishonestly undertook or assisted in the retention of the stolen items despite the knowledge that they had been unlawfully obtained. The alias Hakimu was to collect the items later. By accepting to hide the suitcase for the alias Hakimu, the accused persons ensured that the same were not recovered immediately. This would be for the benefit of this alias Hakimu, for in one way it could prevent his detection as the one who had burgled and stolen from the house of the complainant."

This offence would not appear to be the one charged. The particulars are as follows:-

> "On the 3rd day of November 1985 at Mgombeni Village, Likoni in Mombasa District… otherwise than in the course of stealing, dishonestly received five long trousers, one Kaunda Shirt (etc) the property of Peter Omori Arosi knowingly or having reason to believe them to have been stolen or unlawfully obtained.

The question then arises whether a charge of receiving is the same as retaining. It is clear that it is not. Section 322(1) of the Penal Code provides:-

> "322(1) A person handles stolen goods if otherwise than in the course of stealing or knowing or having reason to believe them to be stolen goods he dishonestly receives the goods, or dishonestly undertakes, or assists in, their retention, removal, disposal or realization by or for the benefit of another person, or if he arranges to do so."

The trial court has blithely by-passed the alternative charges of receiving which is the first limb of section 322, and has proceeded to find guilt on the second limb. The passage quoted from the judgment shows that the learned magistrate had every aspect of the second limb to mind.

Section 322(1) is taken from the English law for this offence, and it will be seen that it is in identical terms to section 22(1) of the Theft Act 1968. (See *Archbold* 39th Edition page 883). The first specimen indictment is for the dishonest receiving of goods with knowledge or belief that they are stolen goods. The commentary then continues:-

> "The above count will suffice where there is clear evidence of possession by the defendant of the goods alleged to have been stolen. Where, however, the prosecution desires to include the other limbs of the offence of handling, the following further count should be added."

The precedent that follows covers the second limb of the section, namely:-

> "dishonestly undertakes, assists in their retention, removal, disposal or realization by or for the benefit of another person (etc)."

At page 887 *Archbold* continues:-

> "1578. The handling: Having proved that the goods are stolen goods, it is necessary to prove that the defendant handled them: that is, that he either (i) received them or (ii) had undertaken or assisted in their retention, removal, disposal or realization by or for the benefit of another person or had arranged so to do."

The importance of the distinction between receiving and handling is this, that the accused must know or have reason to believe at the time that he received the goods, that they were stolen; or that he had such knowledge at the time he retained them. The second important distinction is that the accused must have possession when he received them, while possession is not necessary in the present charge of retaining. That is because he is undertaking or assisting in retaining the goods. He may, of course, have possession as well. In *R v Pitchley* (1973) 57, Criminal Application No 30,

> "P was held to have assisted in the retention of stolen money, where some forty-eight hours after innocently accepting it from his son for safe keeping and banking it, he discovered it was stolen, and took no steps to have it returned to the owner before being visited by the police four days later."

P's control of the money in the bank was sufficient to constitute retention in accordance with the usual dictionary meaning of "retain."

That clearly illustrates the difference between receiving and retaining with possession. Otherwise there is no need to prove possession or control (*R vs Shears*[1969] Cr LR 319 *Archbold ibid* page 888 and 889). Hence by converting the reasoning from receiving into a case of retaining, the learned magistrate killed

two birds with one stone, so to speak. He avoided the difficult task of proving possession of the stolen box in the appellant Rukia Dzeri, (the remaining shirt would be negligible), and in the case of the appellant Hamisi Bakari, the court would leave the decision as to his knowledge to the last minute before the police arrived, showing that by then, he had knowledge or reason to believe the goods had been stolen; even if that were not clear at the time he received the goods. By leaving the relevant time until just before their arrest, the learned magistrate apparently felt able to conclude that the two appellants had accepted to hide the suitcase for Hakimu, thus aiding him to escape detention, and allowing him to collect the goods later on.

Having thus decided the case on the basis of retaining, the trial court disarmingly ended its judgment by finding the appellants guilty on the alternate charge of handling, which concerned receiving. Quite what process of reasoning this entailed, if any, is unclear. Possibly the learned magistrate thought that he would rely on the wide provisions of section 188 of the Criminal Procedure Code, where, on a charge of theft, an alternative verdict of any offence under section 322 of the Penal Code is open to the court, though the accused is not charged with it. Perhaps the learned magistrate thought better of relying on an alternative verdict different from the alternative chosen by the prosecution. Certainly if he chose that path, he would need to bring the ingredients of retaining to the notice of the appellants. Perhaps he simply did not realize that retaining does not lie on a charge of receiving. Possibly he thought it all the same thing.

When the matter came before the High Court, the difference between receiving and retaining was put clearly by a reference to *R vs Nicklin* (1977) Cr App Rep 205. The argument was that the magistrate had convicted the appellants of an offence not charged. That was true. On another occasion we will examine the situation, where although several alternative verdicts are open, and one is actually chosen by the prosecution in the form of a specified alternative charge, what is the fate of the other unspecified alternatives; and to what degree the accused should be warned of this lurking danger. But in the event, the learned judge attempted to put matters right. He remarked that the trial court had analysed the evidence and had come to the conclusion that both appellants had received the suitcase and one shirt each, when he and she respectively had reason to believe that those articles were stolen property, and had agreed to retain the same for the benefit of the thief Hakimu. He held that *Nicklin* did not apply because at the time they received the stolen property, the appellants in this case, knew or had reason to believe the property stolen. In this way, it appears, the High Court supported the actual statement of the offence of handling in the form of receiving. It is therefore on this basis that we will deal with the appeal, otherwise the issues might be hopelessly confusing to the appellants, and indeed we wonder if the High Court's judgment was clear enough to non-lawyers, to indicate what was afoot. It would have been more robust if the High Court had dealt with the appeal to it on the basis of the learned magistrate's conclusions of retaining, and considered whether the alternative verdict of retaining was open to the trial court under section 188 of the Criminal Procedure Code. Still, the

High Court could deal with the matter as one of receiving, in effect abandoning the conclusions of retaining under section 354 of the Criminal Procedure Code; and the conviction confirmed was for handling by way of receiving.

As we take the High Court to have based its decision on the specified alternate count of handling by receiving, we will note now what other views the High Court formed. It held that "suspicion" and "reason to believe" were saying the same thing in different words. That is not so at all, and has never been the law. Of course, suspicion is an inchoate state of mind inclining to, or entertaining the impression, that a certain conclusion may yet be reached. Knowledge is the mature stage of that process when the conclusion has been reached. "Reason to believe" is an objective evaluation of the facts upon which a mature conclusion should be reached, but which the individual has failed to reach, because he has shut his eyes to the facts before him. The learned judge must have observed the operation of section 323 of the Penal Code. When the police officer stops a person, reasonably suspecting the person of having or conveying stolen property (*inter alia*), the police officer, neither knows nor has reason to believe that the person's property has been stolen or unlawfully obtained. The police officer has not reached the mature stage of knowledge. That follows section 26 of the Criminal Procedure Code, which empowers a police officer to stop, search or detain, any aircraft vessel, or vehicle, when there is reason to suspect that anything stolen or unlawfully obtained may be found. Similarly a person may be stopped who is

reasonably suspected of conveying anything stolen or unlawfully obtained. On the High Court's views, the law of arrest would become unsettled.

There is lastly the question of whether the appellants were in recent possession. Six weeks is a long time. Articles of clothing move more quickly on the market or at home than that. But the real point is that the learned judge should have answered Mr Ghalia by saying that this particular case did not depend on recent possession. It is a case where, from first to last, the property was admitted by the appellants to have been given to them by Hakimu. It is not a case where due to recent possession, the inference is either one of theft or handling. This is a direct case of handling emanating from the explanation given by the prosecution witnesses and the appellants to the police officers on first arrest, and the conviction of Hakimu as the thief.

We come to the issue whether there was evidence to support the handling charge, having in mind that there is a divergence of views upon the evidence held by the lower courts.

The first concern is to ascertain upon what ingredients the charge was based. It has been set out above. They are:-

1) The two appellants together;

2) on 3rd November, 1985 at Migombeni;

3) otherwise than in the course of stealing;

4) dishonestly received the clothing – five Long trousers, one Kaunda shirt, seven pairs of socks, two neck ties and two shirts; and

5) knowing or having reason to believe them to have been stolen or unlawfully obtained.

It is a joint charge. The appellants did not receive the goods on November 3. That was either October 30, or November 1. They did not receive the property jointly. The box was first dealt with by Rukia and then taken to Hamisi Bakari. The latter had the box on November 3 when the police investigated. The police heard the complainant's story. The charge could not have been laid on November 3, because the police witness Peter Njau Ngungu PW 1 bought one stolen shirt from Hamisi on October 30, 1985. On November 2, 1985 Peter was arrested wearing it. (Of course, retaining would fit with the November 3). The appellants were not jointly in possession. They each had a shirt brought separately to them by Hakimu. That was not joint possession. The box had been refused by Rukia, because she would be out when it was to be collected, and it was passed on Hakimu's behalf to Hamisi. Hakimu is said to have asked Hamisi to keep it for him. The trial court held in the quotation set out above that the "Alias Hakimu" was to collect the items later. It was his property, and not Rukia's. Rukia had no interest in, nor control over the box; and while it might have turned out that if Hamisi had become tired of holding the box and given it back to Rukia, she might have had control then, he did not do so. There is no evidence on the record by which a charge of joint receiving of the box of clothes by these appellants could be sustained. For this reason alone Rukia's conviction cannot stand. The shirt in Rukia's possession was just another piece of clothing which had been left there by Hakimu on the occasions that Hakimu stayed with Rukia. Several pieces of men's clothing were taken from Rukia's house. Nothing turns on that one shirt. That was part of domestic life.

In fact possibly the best case against Rukia was one of assisting to retain the box of clothes. But as far as receiving is concerned, there is no evidence why Rukia should have known that the box contained stolen clothing. She did not know what the box contained. It had a broken lock or end (it is not clear which). But it was her lover bringing it to her, and as she could not usefully keep it, it was left with Hamisi. In the normal course of relations between a man and a woman of this type, the bringing of the box could hardly have been strange. Hakimu had already left things with her. Rukia was criticized for being shifty. But it is noticeable that the alleged discrepancies in her evidence are minuscule, and understandable. Judged from the right approach to the law, no court could possibly have found that she had knowledge or reason to

believe, the box, brought to her around November 1, contained stolen property, and that is no doubt the learned magistrate did not base his final conclusions on receiving. It is difficult to see on what dicta or findings of the trial court the judge could resurrect a case of receiving. Hamisi and Agnes brought the box, Rukia declined it was given to Hamisi, Hakimu asking Hamisi to keep it.

That is the top and bottom of this case. Although Hamisi gave a sworn defence, he was not present when Rukia was first presented with the box. He could only testify to what happened later. If Hamisi's evidence was to be taken against Rukia, then it would have been desirable for the lower courts to warn themselves with regard to the danger of acting on the uncorroborated evidence of Hamisi, similar to the warning given in the case of accomplices, because of the danger of a co-accused seeking to serve some purpose of his own. (*R v Prater*, (1960) 44 Cr App R 83; *R vs Russell*, (1968) 52 Cr App R 417; *Archbold ibid* page 302). It was very desirable in this case because Hamisi had possession of the property. No warning was resorted to.

Turning to Hamisi's case, he was a friend of Rukia, since he sometimes had his meals with her. She was a tenant in the house of Hamisi's mother. Tenants commonly get other persons the house or look after their things. Hamisi had known Hakimu for the two months that Rukia had known him. At the time when the box came into his possession closed, did Hamisi know it contained stolen property? As he did not know its contents, did he have reason to believe that it contained stolen property? He asked Rukia about it. She said Hakimu was going on safari. She did not know its contents. Hakimu had the key. The trial court held that he was suspicious and he made comments to that effect. At the time of the receipt of these articles, did he know, or have reason to believe that they were stolen? Some part of the box was broken. But that did not reveal its contents it seems. Hakimu himself asked Hamisi to keep the box. Suspicious or not he kept the box. Were there any facts upon which Hamisi ought to have formed the opinion that the contents of the box were stolen property? The trial court preferred to judge this matter finally from the sale of the shirt and the lack of any one calling for the box. In this case, that was hind sight and ended in a conclusion of retaining. The High Court thought that suspicion and reason to believe were synonymous. In view of these nondirections and misdirections, we cannot be sure that if the lower courts had asked themselves clearly whether at the time of receipt, Hamisi had knowledge or reason to believe the goods to be stolen, that they would certainly have come to that conclusion. For our part we think it doubtful that they would have done so, especially the trial court, which steered away from that decision towards the easier case of retaining. Consequently we allow the appeals of each appellant quash their convictions and set aside their sentences and they are ordered to be set free unless held for any other lawful cause. We would note that where a heavy minimum sentence is involved, the lower courts should be particular to see that each ingredient in the charge is reflected in the particulars of the offence, and is properly proved. Seven years is a long time to serve in a case where the issues are not clear. Perhaps amendment to provide for one concept of handling would be useful.

Dated and delivered at Mombasa this 21st day of July, 1987.

H.G PLATT

JUDGE OF APPEAL

JM GACHUHI

JUDGE OF APPEAL

F.K APALOO

JUDGE OF APPEAL

I certify that this is a

true copy of the Original.

DEPUTY REGISTRAR