



REPUBLIC OF KENYA

IN THE HIGHCOURT OF KENYA AT NAIROBI

CRIMINAL APPEAL NO. 1007 OF 1983

PETER MUEMA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from the Resident Magistrate's Court at Kitui, ADO Andati Esq)

JUDGMENT

The appellant Peter Muema was charged with 2 others with the offence of Robbery contrary to section 296(1) of the Penal Code in the alternative he was charged with one of his co-accused Fredrick Mutunga with handling stolen property contrary to section 322(2) of the Penal Code, in that they on July 3, 1983 at Ngiini Village in Kitui district otherwise than in the course of stealing jointly and dishonestly handled 10 women's inner wears, 5 petticoats, 4 children's clothes, 1 dress and 4 children's inner wear all valued at Kshs 900 the property of Peter Jackson Nzioki knowing or having reason to believe them to have been stolen or unlawfully obtained. It was stated in the particulars to the substantive charge or robbery that the robbery of the several items including those mentioned in the alternative charge of handling stolen property occurred on July 1, 1983 at Kalundu bus stop in the Kitui District.

The appellant when charged on the first count pleaded not guilty, but when charged on the alternative count he said:-

"It is true that I unlawfully handled the 10 women's innerwear, 5 petticoats, 4 children clothes, 1 dress, 4 children's innerwear and I knew they were stolen property and were the property of Peter Jackson Nzioki."

Then the prosecutor related the following facts:-

"On 1.7.83 the complainant was waiting for a vehicle at Kalundu bus stage. He was approached by 3 people who asked him where he was heading to. Before he could answer they grabbed him at the neck and they grabbed his property. They took from him the items listed in charge sheet. The men ran away. On 3rd July, 1983 he identified one of the accused – 1st accused (appellant) as one of the people who had robbed him when people went to home of 1st accused and they got the items listed in the alternative charge of handling stolen property is when 1st accused was arrested. He then pointed out the 2 other accused persons to have been with him. The 1st accused said he had kept the property knowing it was stolen property. He was arrested with the goods in his house. He knew the property to be stolen."

To which the appellant said:-

"I knew it was stolen property. I admit the facts."

Then the trial magistrate recorded:-

“1st accused is guilty on his own plea and convicted on the alternative charge of handling stolen property.”

Then the prosecutor said:-

“We have not received his previous record but the offence is serious. He has another case pending. It is case No 326/82. It involves robbery of a motor vehicle. The offence (is very common in the area).

(I do not think the prosecutor should have informed the trial magistrate that there was another case pending against the appellant since the result was then not known).”

To where the appellant replied:-

“I help my parents at home. I have another case pending. I ask for mercy.” (And I do not think the appellant would have mentioned the other case pending.)

The court then pronounced sentence:-

“The accused is a first offender although he has another case pending before this court. Handling stolen goods is dangerous as it is people who help keep for thieves property stolen that encourages the thieves to steal more.”

SENTENCE:

Accused is sentenced to 7 years imprisonment.

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The alternative charge as drawn is defective because it is not stated in the particulars of the charge as it should be so stated how the accused or the appellant dishonestly handled the stolen goods whether by receiving them or retaining them, as added by Act 4 of 1973, or dishonestly undertook, or assisted in, their retention, removal, disposal or realization by or for the benefit of another person, or if he arranged to do so as set out in the section. In this regard refer the learned trial magistrate to the case of *Antony Olala Wasiembo v Republic Kenya Court of Appeal Criminal Appeal No 48 of 1979* unreported in which it is recorded:-

“The particulars were stated as follows:-

‘Antony Olala Wasiembo: On the 18th day of June, 1978, at Randa Estate Nakuru in Nakuru District of the Rift Valley Province handled stolen property in that otherwise than in the cause (sic) of stealing, dishonestly handled one Sanyo record player and one record all valued at Kshs 660/= knowing or having reason to believe them to have been stolen or unlawfully obtained.’

This charge was defective in that it did not specify the manner of the alleged handling, as required by Section 322(1) of the Penal Code, in other words whether the allegation was that the appellant dishonestly received or retained the goods, or dishonestly undertook or assisted in their retention, removal, disposal or realization by or for the benefit of another person, or if he arranged so to do. I also refer the learned trial magistrate to what was said by Sir William Duffus P in the case of *Ratila & Another v Republic* [1971] EA 575 at pages 577, 578, 579, 580, 581 and 582. However such a defect may not in fact occasion a failure of justice to an accused person if it is quite clear what he has to meet but it is safer to have the charge properly drawn. In the appeal now before me the appellant admits that he unlawfully handled the goods, but because it does not mention how he came to handle them in the charge he makes no mention of this fact in his plea. He then admits what the prosecutor told the court which includes that he robbed. He cannot rob or steal and receive or retain at the same time. I think and find in the circumstances that the

proceedings before the trial magistrate ought and should be declared a nullity and I so declare this a nullity trial and the appellant to be released from custody unless otherwise lawfully held. The prosecution is free to proceed again against the appellant upon properly framed charges and if the trial magistrate is disposed to find the appellant guilty of one or either of the two charges then I refer him to what was said by Law Acting P in the case of *Kipsaina v Republic* [1975] EA 253 at page 254 at letters D, E & F which I quote:-

“The evidence in this case does not point to the blanket having been dishonestly received rather than stolen, and the appellant’s conviction on the alternative charge of handling was prejudicial to him, as it involved the consequence of receiving a sentence quite disproportionate to the offence of breaking and stealing which he is just as likely to have committed. In our view, the magistrate in the circumstances erred in law in convicting of the alternative charge of handling. We quash that conviction, and substitute a conviction for the substantive offence of breaking, entering and stealing, the articles specified in the charge. We set aside the sentence of nine years imprisonment with hard labour and substitute a sentence of three years imprisonment on the first limb of the charge, with a concurrent sentence of one year’s imprisonment on the second limb, together with three strokes of the cane.....”

Dated and Delivered at Nairobi this 27th day of January 1984.

J.H.S.TODD

JUDGE