REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

crim app 768 of 82

WILSON MURIGI……APPELLANT

AND

REPUBLIC……...RESPONDENT

CORAM: POTTER AG J

(Appellant absent, unrepresented,

M B Mbai (State Counsel)

JUDGMENT

The appellant was charged with conveying suspected stolen property contrary to section 323 of the Penal Code before the District Magistrate of the 1st class in Nairobi.

He pleaded guilty to the offence and was convicted and sentenced to two years imprisonment and now appeals against the conviction and sentence on the ground in respect of conviction and the one ground in respect of sentence, set out in his ground of appeal.

This was a charge which arose out of the events of the 1st of August, 1982. When the accused came before the court the record shows that the substance of the charge and every element of it was stated by the court to the accused person who being asked whether he admits or denies the truth of every element of the charge replied:-

“I admit the offence.”

On hearing that the District Magistrate convicted him under his own plea of guilt.

The section under which the appellant has been charged is section 323 of the Penal Code and I set the section out below for convenience.

“Section 323: Any person who has been detailed as a result of the exercise of the powers conferred by section 26 of the Criminal Procedure Code and is charged with having in his possession or conveying in any manner anything which may be reasonably suspected of having been stolen or unlawfully obtained and who does not give an account to the satisfaction of the court of how he came by same is guilty of a misdemeanor.”

The matter of sentence is governed by section 36 of the Penal Code which contains the general punishment for a misdemeanor being imprisonment for a term not exceeding two years or fine or both.

Section 323 of the Penal Code refers to section 26 the Criminal Procedure Code. The relevant part of that section as follows:

“Section 26 (1). Any police officer or other persons authorized in writing on their behalf of the commissioner of police may stop, search and detain (c) any person who may reasonably suspected having in his possession or conveying in any manner anything stolen or unlawfully obtained.”

It can be seen that under section 323 of the Penal code the accused commits no offence until he has been charged with having in his possession or conveying in any manner anything which may be reasonably obtained and upon that charge fails to give an account to the satisfaction of the court of how he came by the suspected goods.

In the case of Koech v R (1963) E A at page 109 was held (1) that the charge under section 323 of the Penal Penal Code cannot set out all the facts which constitute offence as an accused is not guilt until the court has rejected his explanation of possession. (2) an accused who admits all the matters of fact in regard to his possession must then be asked for a satisfactory explanation and upon failing to give one may be convicted. (3) if an accused admits all the assertions of facts but prefers an explanation the accused’s statement should be treated as plea of not guilty and the prosecution required to lead all their evidence.

In this case as in the Koech case the charge set out (1) that the accused had been detained by police officers under the powers conferred to them under section 26 of the Penal Code (2) that he was found conveying three pairs of trouser and (3) that the police officers suspected those long trousers to have been stolen or unlawfully obtained. There is a slight difference between this case and the Koech case in that the charge does not allege that the suspicion the police officers was reasonable. As in the Koech case the appellant was asked to plead to this charge as he would have been asked for example to plead to a charge of theft. It is quite clear from the procedure outlined in the Koech case that this was an error procedure.

The accused replied when the charge was read out to him. “I admit the offence.”

It is clear from the passage letter “I” on page 110 of the report of the Koech case he thereby admitted possession of the three pairs of trousers and I must assume though with reluctance that police not only suspected that they were stolen but had to do so despite .. the fact that the charge does not … that the suspicion was reasonable.

But having made that admission the appellant had confessed to no offence at all and it was quite wrong to convict him as was done and to sentence him. The accused having made that admission should have been asked for an explanation of his possession.

It is clear from his grounds of appeal that he had at least something to say about the reason that he was conveying these goods. It was not for the learned District Magistrate nor for me to come to the conclusion that his explanation could not be true. Had he been asked to account for possession of the goods his explanation could have been tested and the evidence heard on oath and the whole issue of whether his account was to th satisfaction of the court as to how he came by the suspected goods could and should have been resolved.

Clearly the conviction cannot stand. It is quashed and the sentence set aside. For similar reasons as advanced in the Koech case I think it proper not to order a retrial.

Learned state counsel has asked me to consider whether the matter can be cured under section 382 CPC. I think the point in this case is that the accused has yet committed the offence, and will not until he is asked to account for possession. Section 382 therefore does not assist.

D C POTTER

AG JUDGE

28th January, 1983