



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL APPEAL NO. 808 OF 1982

WYCLIFFE KARISA CHARO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant pleaded guilty to the offence of being in possession of suspected stolen property, to wit, a colour television set of Sanyo Model contrary to Section 323 of the Penal Code (Cap 63). He was then convicted on his own plea and was sentenced to one year and six months' imprisonment.

He appealed to this court against his sentence pleading in mitigation that his mother was very sick and that his wife not being in employment, his children would be thrown out of school. He therefore pleaded that his custodial sentence be quashed and a sentence of a fine be substituted therefor.

In the supplementary memorandum of appeal, Mr Mulwa, who appeared for the appellant, challenged the magistrate's finding stating that he did not correctly state the substance, ingredients and elements of the offence and that the plea was in effect equivocal. He further stated that the facts did not support the offence of being in possession of stolen property. In his submission to this court, Mr Mulwa, while conceding that the charge was not defective, submitted that the facts as stated did not support it and that the appellant was not given a chance to give an explanation as to how he came to be in possession of the colour television as required under Section 323 of the Penal Code.

Section 323 of the Penal Code provides as follows:

“Any person who has been detained 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 the same, is guilty of a misdemeanour.”

There are the following ingredients to be satisfied for an offence to be committed under the above section:

- a) A person must have been detained pursuant to Section 26 of the Criminal Procedure Code (Cap 75);
- b) The person must be charged with having in his possession or conveying in any manner anything reasonably suspected of having been stolen or unlawfully obtained, and
- c) The person does not give an account to the satisfaction of the court of how he came by the same.

Section 26(1) of the Criminal Procedure Code (Cap 75) empowers any police officer or other person authorised on that behalf by the Commissioner of Police to stop, search and detain:

“... (c) any person who may be reasonably suspected of having in his possession or conveying in any manner anything stolen or unlawfully obtained.”

The facts of this case as stated by the prosecution were that the appellant was a watchman at Kahawa House, Nairobi. “On August 31, 1982, police acting on information visited the appellant’s flat on 13th floor on Kahawa House. The accused was charged. Police searched the house and found the TV in question. The TV is here. He had no permit or receipt. He was arrested and charged.”

With respect, nowhere in these facts is it shown that the police acted under powers conferred by Section 26 of the Criminal Procedure Code.

All that is stated was that police went to the appellant’s flat acting on information. There is nothing in the facts to show that they stopped, searched or detained the appellant. The result was that the first ingredient of the charge was not satisfied.

The learned Chief Magistrate does not appear to have explained to the appellant all the ingredients of the charge. He does not appear to have asked the appellant to give any explanation as to how he came to be in possession of the television. All that was stated was that the appellant did not have a permit or receipt. This was not enough. The facts of the offence did not support the charge against the appellant.

Mr Mulwa rightly attacked the Chief Magistrate’s finding that the appellant pleaded guilty to the charge when in fact all the elements and ingredients of the charge had not been fully explained. The learned state counsel properly conceded this appeal. For these reasons the appellant’s appeal was allowed, conviction quashed and the sentence imposed on the appellant set aside.

The appellant was to be set at liberty forthwith unless otherwise held on another lawful warrant.

Dated and delivered at Nairobi this 29th day of October, 1982.

M.G. MULI

JUDGE