IN THE COURT OF APPEAL

AT NAKURU

(Coram: Madan, Kneller JJA & Chesoni Ag JA)

CRIMINAL APPEAL NO. 82 OF 1983

BETWEEN

EDDIE ODONGO...APPELLANT

AND

REPUBLIC...RESPONDENT

JUDGMENT

The appellant, Eddie Odongo, was convicted of house breaking and stealing contrary to sections 304(1) and 279(b) of the Penal Code (cap 63). He was also convicted, in the alternative, of handling stolen goods by way of dishonestly retaining them contrary to section 322(1). He was sentenced to four years' imprisonment for house breaking, four years with five strokes of the cane for stealing and the minimum statutory seven years' imprisonment for handling. His first appeal against conviction and sentence was dismissed by Mbaya J and he has now appealed to this court.

The prosecution case accepted by the two lower courts was that the house of Sister Wafula, a matron at Mt Elgon Hospital at Kitale, was broken into on November 20, 1981, and six table chairs, two small tables, a fire place board cover, one electric kettle, a bedside lamp, a floor mat and one dining table were stolen therefrom. All these properties belonged to Mt Elgon Hospital and were valued at Kshs 9,250.

The appellant came to Kenya from Uganda in July 1981 and he lived at Machinjoni with his parents and sister called Monicah Awuor (PW 5). His cousin Richard Onen, who was charged with him but was acquitted by the trial magistrate, lived with them too. He had come to Kenya from Uganda in February, 1981 to help the appellant's mother at her shop. Monicah told the court that the appellant started bringing various items of property to their house in September of that year and continued doing so till November 1981. In November, he brought one floor carpet, six table chairs, one table, and an electric kettle. In September and October, he had brought a National radio cassette, a recorder player and another radio cassette whose make Monicah did not specify.

When Monicah asked the appellant about the property he had brought home, he became annoyed and threatened to kill her if she talked about them. On December 23, 1981, the police acting on information raided the house where the appellant lived at Machinjoni and recovered these items and others, which they took to Kitale Police Station. Mt Elgon Hospital staff, particularly Japheth Kidada (PW 1), who was guarding Sister Wafula's house but was not in the house when it was broken into and the theft committed, and William Amutala (PW 3), the Hospital Administrator, went to the police station and identified the six table chairs, two small tables, one carpet, one electric kettle and one fire place cover, all of which had been stolen from Sister Wafula's house. These items had MEH marks written on them. When Sgt Amolo

(PW 6) went to the appellant's house with other police officers on December 23, they found the appellant and Richard sleeping on the hospital's carpet.

The appellant's explanation was that his sister Monicah brought the six table chairs, two tables, one floor carpet and one electric kettle from the farm of Mayor HW Okul. The property had been left at the Mayor's farm by Monicah's uncle Dr Amone. The trial magistrate disbelieved the appellant, but believed Monicah's story and he was entitled to do so for he listened to and saw them. It was Monicah who informed the police about the goods and the appellant had warned her never to talk about them.

The second accused, Richard, had made an unsworn statement in his defence in which he told the court that the appellant told him that he (appellant) brought those properties from Uganda. In his judgment the trial magistrate said this:

"I see no reason to disbelieve the second accused that the first accused had told him that he had brought those goods from Uganda."

The second accused's evidence supported the prosecution's case in a material respect. It undermined the appellant's defence. It was therefore evidence against a co-defendant (*Murdoch v Taylor* AC 574 [1965] 1 All ER 406). The second accused's statement was not a confession nor was it evidence on oath which could be tested by cross-examination. In *Patrisi Ozia v R* [1951] EA 36 the Court of Appeal for East Africa held that an unsworn statement by an accused cannot be used against another coaccused. The same view was expressed in *Ezera Kyabamanamaizi v R* [1962] EA 309. Also in *Usin and Another v Republic* [1973] EA 467 where the appellants were convicted of murder and the judge stated that he took into account the words in which the first appellant pleaded not guilty and he relied upon the unsworn statement of the second appellant as evidence against the first appellant, which statement was entirely exculpatory and was not a confession. The court held that; (i) an unsworn statement is not evidence against a co-accused and (ii) as the statement was not a confession it could not be taken into consideration against a coaccused.

These three cases were referred to and followed in *Chaama Hassan Hasa v The Republic* [1976] KLR 6 in which the High Court criticized the magistrate for using what one accused had told the police against his coaccused when what that accused had told the police was not in the nature of a confession. In fact, even where one accused gives evidence on oath, such evidence must be regarded with extreme caution when it is to be used against a co-accused.

As the second accused's statement was unsworn and was not a confession, it was not evidence against his co-accused, the appellant, and the trial magistrate should not have used it. Nevertheless, the evidence against the appellant was overwhelming and when the second accused's evidence is disregarded, he still was correctly convicted on the evidence of recent possession of recently stolen properties and the independent evidence of Monicah. No miscarriage of justice was occasioned by the trial magistrate using the second accused's statement.

In the alternative charge, the appellant was said to have dishonestly retained three cups and cassette tape, the property of Richard Namasaka, other than in the course of stealing knowingly or having reason to believe them to be stolen goods. In the prosecution case, Monicah did not speak of the appellant bringing home a cassette tape. The cassette bore the name of Richard Namasaka (PW 4) whose Sanyo Record Player in which this particular cassette was stolen on May 13, 1981, that is about two months before the appellant came to Kenya. The cups were stolen on the same night. The appellant said that the cassette belonged to Musundi who stayed at Munubi and he had bought it from another boy. He said the cups were his and he bought them in late July 1981 at Kitale for Kshs 15 each. He said they were four but one cup got broken on the day of his arrest. It will be recalled that on the evidence of Sgt Amolo, there were three cups the saucers were four. Richard's items were stolen in May when the appellant was not in Kenya. His explanation was reasonable and he could have purchased those items from third parties. His explanation might possibly be true. As receiving and retaining are not mutually exclusive, a charge of dishonestly retaining, like one of receiving stolen property, is not established if the explanation given by the accused is reasonable and might possibly be true even if the court is not convinced that it is true –

Kipsaina v Republic [1975] EA 253. The section under which the appellant was charged in the alternative charge reads as follows:

"322(1) A person handles stolen goods if (otherwise than in the course of stealing) knowing or having reason to believe them to be stolen goods he dishonestly receives or retains 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 prosecution had therefore to prove that:

a) the goods ie the cassette and the cups, were stolen;

b) the appellant had knowledge or reason to believe that they were stolen goods;

c) he dishonestly undertook or assisted in their retention, removal, disposal or realization;

d) the retention, removal, disposal or realization was by or for the benefit of another person;

The prosecution, through the evidence of Richard Namasaka, proved that the cassette and cups were stolen goods. It was, however, not proved that the appellant had knowledge or reason to believe that those goods were stolen. It was also not established that the appellant dishonestly undertook or assisted in their retention by or for the benefit of another.

In *Mumbi v Republic* [1970] EA 345, the appellant had been convicted of dishonestly retaining a bedsheet knowing or having reason to believe it was stolen. She had given an explanation that she had bought it from a named individual known to the police and who was not called to give evidence. On appeal the court held that (iii) in the offence of retaining stolen goods, the knowledge or reason to believe must relate to the time of the retention, removal, disposal or realization for the benefit of another person and (iv) there is no longer an offence of retaining stolen property for oneself.

The first appellate court did not address its mind to these matters, but as it is a point of law whether the charge laid against an accused person has been proved, we have had to consider it. The alternative charge of handling stolen goods by retaining the cassette and three cups was not proved.

For these reasons given, we dismiss the appeal against the conviction on the main count of housebreaking and stealing, but the appeal against the alternative charge of handling stolen goods contrary to section 322(1) of the Penal Code is allowed; the conviction on that count is quashed and the sentence of seven years' imprisonment is set aside. The appellant shall remain in jail to serve the sentence on the main count.

Dated and Delivered at Nakuru this 7th day of October 1983.

C.B.MADAN

....

JUDGE OF APPEAL

A.A.KNELLER

....

JUDGE OF APPEAL

Z.R.CHESONI

..

AG. JUDGE OF APPEAL

I certify that this is a true copy

of the original.

DEPUTY REGISTRAR