



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(Coram: Law, Miller & Potter JJA )**

**CRIMINAL APPEALS NOS 63 & 105 OF 1981 (CONSOLIDATED)**

**BETWEEN**

**KARINGO.....1ST APPELLANT**

**TIARA.....2ND APPELLANT**

**WANGOMBE .....3RD APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

The three appellants in these consolidated appeals (to whom we will refer as Karingo, Tiara and Wangombe respectively) were charged in the court of the Resident Magistrate at Machakos as follows:

1. Jointly in count 1 with stealing in-transit goods to a value exceeding Kshs 72,000, contrary to Section 279(c) of the Penal Code;
2. Separately, and in the alternative to count 1, with handling by way of dishonestly receiving, contrary to Section 322(2) of the Penal Code, cameras forming part of the goods referred to in the first count. Karingo was charged in count 2 with receiving two Yashica cameras, valued at Kshs 6,950; Tiara was charged in count 3 with receiving three Olympus cameras, valued at Kshs 10,500 and Wangombe was charged in count 4 with receiving two Olympus cameras valued at Kshs 7,000;
3. In addition, Tiara was charged in count 5 with forging a cash sale receipt purporting to be a genuine receipt for a Yashica camera and in count 6 Karingo was charged with uttering that receipt to Inspector of Police Mwangi, contrary to Sections 349 and 353 of the Penal Code respectively.

Karingo is a businessman who has a shop and runs *matatus* at Makindu, in Machakos District. Tiara is a clerk employed by a co-operative at Kerugoya, in Kirinyaga District, where he lives. He is a nephew of Karingo's and Karingo's *matatus* operated at the material time between Makindu and, amongst other places, Kerugoya. Wangombe is the owner of a photographer's business at Kerugoya, known as Hollywood Silent Studio.

On June 14, 1979, a lorry belonging to the Akamba Bus Company of Nairobi and driven by Nzyuko (PW 5) left Nairobi at about 7.30 pm for Mombasa. The lorry was laden with packages of assorted goods consigned to various merchants in Mombasa. The goods were covered by a tarpaulin, well tied down on

all sides.

The lorry arrived at Mtito Andei at about half an hour after midnight and the driver stopped at a petrol station there to check the water in the radiator and the tyre pressure. It was then discovered that the tarpaulin had been cut over a length of four feet and that a number of packages were missing. According to Nzyuko, thefts of this nature often take place on a steep hill called Kiima Kiu, between Nairobi and Mtito Andei, where lorries proceed at a very slow pace owing to the steep incline. That this is so, was confirmed by Inspector Mwangi (PW 13) who deposed that many reports of similar thefts were made to the police stations at Kibwezi and Sultan Hamud, between Nairobi and Mtito Andei.

Nzyuko drove on to Mombasa where the goods were checked against the documents. Several packages were found to be missing, containing goods specified in count 1. Two of the missing packages were cartons containing fourteen Olympus and Yashica cameras, including seven cameras particularized in counts 2, 3 and 4. The serial and lens numbers relating to all 14 cameras were specified in the respective consignment notes which were produced in evidence. When the stolen property was ascertained, the matter was reported to the police in Mombasa and to the police at Sultan Hamud by Nzyuko on his return to Nairobi.

On January 4, 1980 Inspector Mwangi (PW 13), acting on information received, visited Karingo's house behind his shop at Makindu, which is between Nairobi and Mtito Andei. He told Karingo that he was a police officer and that he was looking for cameras and other goods which had been stolen in transit. On a table, Inspector Mwangi found a Yashica camera and he found another Yashica camera in a suit case. Both these cameras are shown by their serial and lens numbers to have been among the cameras which disappeared from the lorry driven by Nzyuko on the night of June 14, 1979. Karingo's explanation for his possession of these cameras was that they had been bought by his brother who was studying abroad. He was unable to produce any receipts.

On the following day, Inspector Mwangi went to Nairobi where he made further inquiries at the offices of Akamba Bus Company. Later that day he returned to Makindu. This time Karingo produced a cash sale receipt, No 8175, dated June 22, 1978, bearing the impression of a rubber stamp in the name of Hollywood Silent Studio, purporting to show that somebody on that day had bought a Yashica camera for 300 US dollars. Karingo was taken to Machakos and arrested.

On February 19, 1980 Inspector Mwangi visited Kerugoya in Kirinyaga District. He there located a photographer's studio called Hollywood Silent Studio which belongs to the appellant Wangombe. Wangombe was not present and Inspector Mwangi spoke to an assistant working in the studio, Kiruki (PW 11). In the studio, Inspector Mwangi found two small cartons which had contained Olympus camera lenses. Kiruki produced a cash sales receipt book. Receipt No 8175 was missing and the duplicate in the book was blank. Inspector Mwangi also took possession of a rubber stamp bearing the words "Hollywood Silent Studio." Inspector Mwangi then went to a nearby farm where he saw a man called Ndungu (PW 10) who is the appellant Wangombe's brother. Ndungu was taking photographs with an Olympus camera shown by its serial and lens numbers to be one of the cameras taken from Nzyuko's lorry on June 14, 1979. He deposed that the camera had been borrowed by him from the appellant Wangombe, who told him it belonged to Tiara. Ndungu took Inspector Mwangi to Tiara's house and the Inspector, posing as a buyer, said he wanted to buy a camera. Tiara agreed to sell him one for Kshs 500. Inspector Mwangi then told Tiara that he was a police officer. Tiara took him into the house where three Olympus cameras were found, all positively identified as cameras taken from Nzyuko's lorry on June 14, 1979. Tiara was then arrested and cautioned. He then took Inspector Mwangi to Wangombe's house. After first denying that he had any cameras, Wangombe then produced an Olympus camera, which was proved by its serial and lens numbers to have been one of the cameras taken from Nzyuko's lorry on June 14, 1979. Wangombe was then also arrested, and he and Tiara and the exhibits were taken to Machakos.

The above is a summary of the relevant prosecution evidence adduced at the trial of the three appellants, before a Senior Resident Magistrate at Machakos. The appellants were legally represented. All three gave evidence on oath and their explanations for their possession of the cameras was as follows.

The appellant Karingo deposed that on June 15, 1979, he found a considerable quantity of lost property in one of his *matatus*, including an unspecified number of cameras. He took all this property to Kibwezi Police Station on July 27 and was told to take the cameras away, which he did. He later sent them to his nephew, the second appellant at Kerugoya some 179 miles away asking him to try and trace the owners “who might be in that area”. He did not give Inspector Maina the receipt No 8175. He did not steal the cameras, or know that they were stolen. In cross-examination he was shown the relevant entry in the Kibwezi Police “lost and found” register, and he admitted that although the register shows that he handed in a number of articles, which are listed, there is no mention of any cameras having been handed in.

The second appellant Tiara deposed that in August or September, 1979, he received a package containing cameras in boxes, “between 5 and 9”, a figure which he later amended to 7, which had been brought in his uncle’s *matatu* “to look for their owners”. He sent these cameras to the third appellant Wangombe who runs a photographic studio in Kerugoya so that “the owners could see them.” He did not ask Wangombe to sell the cameras, only to look for the owners. He did not know the cameras were stolen until he was told of this by Inspector Mwangi on February 19, 1980. He said he brought two cameras back to his house, and sent two back to his uncle the first appellant in Makindu. He admitted that he had written the receipt No 8175, but said he did so at Machakos police station at the dictation of Inspector Mwangi.

The third appellant Wangombe said he had been given the cameras “produced in evidence in this case” to try and trace the owners. He put one on display in a display case, so that the owner could claim it, and kept the others in a carton in their boxes. He did not sell any, and did not suspect that they were stolen.

In his judgment, the learned Resident Magistrate reviewed the evidence as a whole in detail and then made clear and definite findings of fact. In particular he held that the cameras had been stolen in transit on the night of June 14/15, 1979 having been loaded in Nairobi onto the lorry driven by Nzyuko; that the seven cameras produced in evidence were part of the stolen cameras; that two of these cameras were recovered from Karingo, and had come into his possession on June 15, 1979; that three of these cameras were recovered from Tiara on February 9, 1980 and had come into his possession in August or September, 1979; that one camera was recovered from Wangombe on February 19, 1980 and one from Ndungu, who had got it from Wangombe, on the same day; and that both these cameras had come into Wangombe’s possession in August or September, 1979, having been sent to him by Tiara. He did not believe that the cameras had been left by unknown persons in Karingo’s *matatu*, or that Karingo had taken them to Kibwezi police station as lost property, or that the receipt had been written by Tiara at Machakos police station at Inspector Mwangi’s dictation, a suggestion which he described as “outrageous”. On the contrary, he found as a fact that the receipt was forged at Kerugoya, by Tiara, on a form supplied by Wangombe, to support Karingo’s story that the two cameras found in his possession had been bought by a brother who was studying overseas, and that this forged receipt was uttered by Karingo to Inspector Mwangi. He rejected as incredible the story of all three appellants that the cameras had been sent to Kerugoya in the hope that the owners would be traced.

With all these circumstances and findings in mind, he acquitted all three appellants on the charge of stealing goods in transit as charged in count 1, but convicted them of the charges of handling by way of dishonestly receiving two, three and two cameras respectively as charged in counts 2, 3 and 4 and he convicted Tiara of forging receipt No 8175 with intent to deceive, and Karingo of uttering it with a fraudulent intent, as charged in counts 5 and 6. He sentenced each of the three appellants to the mandatory term of seven years imprisonment on the handling charges; and he sentenced Tiara to six months imprisonment, concurrent, on the forgery charge and Karingo to six months imprisonment, which he ordered to run consecutively “as he was the ring-leader”, on the uttering charge.

The appellants appealed to the High Court (Nyarangi J). Their appeals were dismissed in all respects, except that the sentence of 6 months imprisonment passed on Karingo on the uttering charge was ordered to run concurrently with his sentence on the handling charge. In the course of his judgment, the learned first appellate judge made concurrent findings of fact, based on his own evaluation of the evidence, that the cameras, the subject of the charges, had been loaded on to and stolen from Nzyuko’s lorry and that the receipt No 8175 had been forged by Tiara and uttered by Karingo and that in the case of the uttering it had been done fraudulently within the meaning of Section 353 of the Penal Code.

The three appellants have now brought second appeals to this Court. A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of fact arrived at in the two courts below unless based on no evidence. The test to be applied on second appeal is whether there was any evidence on which the trial court could find as it did (*Reuben Karari s/o Karanja v Republic* (1950) 17 EACA 146).

Mr Otieno for the first appellant, Karingo, began by submitting that there was no evidence that the two parcels containing the cameras were even loaded onto Nzyuko's lorry at all. We do not agree. The Manager of Akamba Bus Co (PW 4) deposed that the two cartons consigned by Mohindra & Co to Photo Shop Mombasa were sent on their lorry driven by Nzyuko on June 14, 1979 and we know from the evidence of Mohindra's Sales Manager (PW 3) that these cartons contained cameras including the cameras which admittedly came into Karingo's possession at Makindu on June 15. There was thus ample evidence to justify the finding that the cameras were loaded on to Nzyuko's lorry and no point of law arises in this respect. Mr Otieno also submitted that there was no evidence that the parcels, if on the lorry, had been stolen. The tarpaulin, he submitted, might have been cut by wind action and the missing parcels fallen off. This theory was not put forward at the trial and was rightly rejected by the first appellate judge, who held on his own evaluation of the evidence that the tarpaulin could not have been cut by wind. This is clear from Nzyuko's evidence that a hole four feet wide had been cut in the tarpaulin "by someone." No point of law arises out of these grounds of appeal.

Mr Otieno's main ground of appeal was that guilty knowledge on the part of a handler of stolen goods must be proved to have existed at the time of receiving, which both courts below accepted in the case of Karingo as having been June 15, 1979. That is undoubtedly so. As Sir William Duffus said in *Ratilal v R* [1971] EA 575 at page 578:

"The necessary *mens rea* must exist at the time of the receipt of the stolen goods so that it must be established that the accused person knew at the time of the receipt that the goods were stolen or that he had reason to believe."

What a person's *mens rea* was at any particular time can only be established by a consideration of all the circumstances attending his continued possession of goods. What are the circumstances here? Karingo's explanation, which was intended to show that his possession was innocent, includes the following matters:

1. That he took the cameras, together with other "lost" property, to the police at Kibwezi. This was shown to be untrue by the police "Lost and Found" Register, according to which no cameras were included in the property taken;
2. That he sent the cameras to his nephew at Kerugoya, 170 miles away, so that the owners could be traced. Both courts below found this explanation "incredible." We certainly do not think it reasonably probable.

In addition, there is his denial that on January 5, 1980, he produced the forged receipt No 8175 in an effort to convince Inspector Mwangi that one at least of the cameras had been bought abroad for 300 dollars. Both courts below preferred Inspector Mwangi's evidence on this point, as they were entitled to do. All these matters satisfy us, as they did both courts below, that the appellant Karingo's possession of the cameras was dishonest, and that when he received them he knew, or had reason to believe, that they had been stolen. We see no merit in Karingo's appeal against his conviction on the handling charge.

Mr Otieno lastly submitted that Karingo should not have been convicted of uttering the receipt No 8175. The charge, which followed the wording of Section 353 of the Penal Code, charged Karingo with uttering a forged cash sale receipt No 8175 to Inspector Mwangi "knowingly and fraudulently ... purporting it to be a genuine receipt." Mr Otieno submitted that even if the receipt was forged and uttered, both of which contentions he disputed, it had not been shown that it was uttered fraudulently, as it had not been shown that when Karingo produced it to Inspector Mwangi he did so with intent to defraud Inspector Mwangi of anything. As to the disputed facts, that the receipt was forged and that Karingo uttered it to Inspector Mwangi, we are bound by the concurrent findings in the courts below (with which incidentally we agree) that the receipt was a forged document and that Karingo uttered it to Inspector Mwangi on January 5,

1980. As regards the point of law that no fraudulent intent was proved, Mr Chunga for the Republic referred us to *Samuels v Republic* [1968] EA 1. In that case, applying *Welham v DPP* [1961] AC 103, it was held that where a person utters a false document intending to deceive a public officer, and by that deceit to cause the public officer to take action which he would not otherwise have taken or to refrain from action which he would otherwise have taken, that intent was fraudulent. That is precisely the position in this case. By uttering the forged receipt to Inspector Mwangi, Karingo intended to deceive the Inspector into believing that the cameras found in his possession had been lawfully acquired abroad, so that Inspector Mwangi would refrain from taking action against Karingo which he would otherwise have taken. In so doing, Karingo acted fraudulently. We accordingly dismiss Karingo's appeal on both counts on which he was convicted.

We now turn to the appeal of the second appellant Tiara. He was admittedly found in possession of three stolen cameras, which came into his possession in August or September, 1979. His explanation for this possession was that these cameras, and some others, were sent to him by his uncle the first appellant for him to try to trace the owners. Both courts below held that this explanation was unbelievable, and made concurrent findings of fact that Tiara had offered to sell one of these cameras to Inspector Mwangi, before discovering that the inspector was a policeman and not a civilian as he appeared to be. Furthermore, it was Tiara who, on the concurrent findings of fact of the two courts below, had forged the receipt No 8175 with the obvious intention of deceiving the police into believing that one at least of the cameras in his uncle Karingo's possession had a legitimate origin. A consideration of all these circumstances leaves us with no reasonable doubt that the second appellant, Tiara, knew or had reason to believe that the cameras sent to him by his uncle Karingo were stolen property, and that he was properly convicted of dishonestly handling them. As regards the charge of forging receipt No 8175, Tiara admitted writing it. The courts below rejected his explanation that he had written it after his arrest at Inspector Mwangi's dictation. They preferred the Inspector's evidence on this point, in our view rightly. No point of law fit for consideration by this court was put forward by Tiara, and we dismiss his appeals on both counts on which he stands convicted.

As regards the appellant Wangombe, he admitted being in possession of some of the cameras received by Tiara in August or September 1979, but claimed that his possession was innocent as he had been asked by Tiara to display them in his shop so that they could be claimed by their owners. In fact he only displayed one, the Olympus camera found in Ndungu's possession on February 19, 1980. When questioned by Inspector Mwangi, he at first denied having any cameras in his possession, but finally produced from his room one Olympus camera, which was proved from its serial and lens numbers to have been one of the cameras stolen from Nzyuko's lorry on June 14, 1979. Furthermore, the forged receipt was proved to have come out of Wangombe's cash sale receipt book, and the impressed stamp on that receipt was Wangombe's. The irresistible inference is, in our view, that Wangombe supplied the blank receipt and the impressed stamp which enabled Tiara to forge the receipt. All these circumstances justify the findings in both courts below that Wangombe's explanation for his possession of the two cameras was not a reasonably possibly true explanation, and that he knew or had reason to believe that the cameras were stolen property.

For these reasons, we consider that the appeals of all three appellants fail and we order that they be dismissed. The learned Resident Magistrate, in sentencing Karingo, described him as the ringleader. We agree; a consideration of all the evidence leaves us with no reasonable doubt in our minds that Karingo received these valuable cameras from the thieves, soon after the theft, knowing them to have been stolen and that he used Tiara and Wangombe to dispose of them on his behalf.

**Dated and delivered at Nairobi this 15th day of March , 1982.**

**E.J.E LAW**

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**JUDGE OF APPEAL**

**C.H.E MILLER**

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**JUDGE OF APPEAL K.D POTTER**

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**JUDGE OF APPEAL**

**I certify that this is a true copy of the original**

**DEPUTY REGISTRAR**