REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL APPEAL NO 830, 964 & 965 OF 1977

REPUBLIC ....APPELLANT

VERSUS

JOHN MBITHI MUINDI.......................1ST RESPONDENT

ELIJAH MAYOKI CHARO ....2ND RESPONDENT

JACKSON KITAWE ....3RD RESPONDENT

JUDGMENT

All the three respondents in these consolidated appeals had been jointly charged before the Resident Magistrate, Nairobi, with handling stolen property, contrary to section 322(2) of the Penal Code, and, in the alternative, with having possession of suspected stolen property, contrary to section 323 of the Penal Code.

The first respondent, John Mbithi Muindi, was represented by counsel who, at the close of the prosecution case, made a submission of no case to answer, which was upheld by the magistrate in respect of all the respondents for both counts of the charge, and all of them were acquitted.

The Republic appealed against all the acquittals, but at the hearing of the appeals, the senior State counsel for the Republic informed us that he was appealing against the acquittal of the first respondent only. Accordingly, we treat the appeals against the second and the third respondents as abandoned, and dismiss them.

Briefly, the prosecution case was that, in the early hours of the morning of 4th July 1977, a warehouse belonging to Etco (Kenya) Ltd, where coffee was stored, was broken into, and 119 bags of coffee stolen. Each of those bags contained 60 kilogrammes of coffee, and all the bags bore markings of Etco (Kenya) Ltd. On 5th July 1977, at about 5.00 am, acting on information received, police officers arrived at a house in Kimathi Estate, Nairobi. They knocked at the door, and it was opened by a young man.

While they were going into the sitting room, a woman walked in there, and the police officers asked her where her husband was. She was the wife of the first respondent. She replied that he was in Machakos. The police officers entered the room from which she had come, and they found the first respondent standing inside that room. He was also called to the sitting room. One of the other bedrooms leading from the sitting room was locked. The police officers asked the first respondent for its keys. He replied that it had been lost. The police officers threatened to break down the door whereupon the first respondent went into his bedroom, and returned with a key with which he opened the locked bedroom. Inside that room,

the police officers found eighty and a half bags containing coffee, each weighing about 90 kilogrammes, stacked up to the ceiling of the room. That coffee was subsequently weighed by the police and the net weight found to be 7184 kilogrammes, which was almost exactly the weight of 119 bags of coffee stolen from the godown of Etco (K) Ltd on the previous night at about 1.00 a.m. The first respondent claimed that the coffee had been brought to him on the previous night at about 3.00 am. In another bedroom, described as the children's bedroom, the police found 241 empty sacks, a ball of string and three needles used for sewing sacks. The first respondent told the police officers that the coffee had been brought to him by a man called Kimeu. However, the police looked for that person without success.

In a cautionary statement, the first respondent stated that on 30th June, and 2nd and 3rd July 1977, he had been negotiating to buy coffee from Kimeu and the other two accused persons, and that on 4th July 1977, at about 2.00 am, five persons (including those three) brought a lorry to his home and started off-loading coffee from it which was marked "Kenya".

Since he had expected to get coffee from Busia, he asked them if that was the coffee they had promised to deliver. They told him that they knew their job, and asked him to give coffee bags to them. He had bought some bags to take to Busia to buy coffee, and he gave them those bags. During the night those men poured the coffee which they had brought from the bags in which it was contained on to the floor, and in the morning they loaded it into his bags, and took away the bags in which they had brought the coffee. He gave them Shs 2500 as transport charges of the lorry which had brought the coffee and he agreed to give them Shs 500 for each of the 140 bags which they told him they had brought.

The magistrate based his ruling of no case to answer on four grounds, two minor and two major, and we will now deal with each of them separately.

(i)According to the particulars in the charge sheet, the value of the coffee stolen from the godown of Etco (Kenya) Ltd was 420,000. According to the manager of Etco (Kenya) Ltd, auctioneers had valued it at Shs 266,700. In his ruling the magistrate refers to the value in the charge sheet as Shs 20,000. That was clearly wrong. However, while the prosecution should have applied to amend the charge sheet to read the correct value, it did not matter to the outcome of the trial whether it was Shs 420,000 or Shs 266,700. The coffee was clearly a thing of value and capable of being stolen.

(ii)The charge sheet named Etco Ltd as the owners of the stolen coffee. The coffee was stolen from a godown belonging to Etco (Kenya) Ltd. However, there was evidence that a company named "Notco" had access to that godown, and could remove coffee from it at its will at any time. Be that as it may, when stolen, the coffee was in possession of Etco Ltd and any technical error in describing the ownership of stolen articles does not vitiate a charge. This the magistrate appreciated.

(iii)The first major consideration in the magistrate's mind was that it had not been proved that the coffee recovered from the first respondents' home was in fact the coffee stolen from the godown of Etco (Kenya) Ltd. He was of the view that the circumstances were suspicious but that he could not act on suspicion alone. With respect to him, this was a case of much more than suspicion. It is true that the prosecution could not establish by a positive mark that the coffee recovered was stolen coffee, but it was clearly more than a coincidence that the quantity of coffee recovered was about the same as the amount stolen, that it had been removed from its original packings and repacked into other bags, and that the original packings had disappeared without a trace. As this Court observed in *Patel v The Republic* (unreported):

> It is not necessary, in order to establish identity of goods, found with goods stolen, that any particular article found in possession of the accused should be positively identified with an article stolen by means of a name or mark in some other way (*R v Sbarra* (1918) 13 Cr App Rep 118; *R v Fuschillo* (1940) 27 Cr App Rep 193).
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> Where evidence of positive identification by name or mark or confident recognition exists, the case is strengthened; but absence of positive identification is not necessarily fatal. Property found in the possession of an accused person may be held to be stolen property for the purpose of

> applying the doctrine of recent possession, where, though positive identification is impossible, the possession of the property cannot, without violence to every reasonable hypothesis, but be considered of a guilty character. (*Wills on Circumstantial Evidence* (7th Edn), page 107 and *R v M'Kechnite* there cited). We conceive that the rule to be applied is the general and fundamental rule applicable to circumstantial evidence that, in order to justify a conclusion adverse to the accused, it is necessary for the jury (or the magistrate) to be satisfied not only that it was a rational conclusion, but that it was the only conclusion which the circumstances would enable them to draw *(R v Hodge* (1838) 2 Lew CC 227) or, as Lord Hewart CJ put it, in summing up to the jury in *R v Podmore* (cited in Wills at page 45), 'Circumstantial evidence consists of this, that when you look at all the surrounding circumstances you find such a series of undesigned, unexpected coincidences that, as reasonable persons, you find your judgment is compelled to one conclusion'. Notwithstanding that there may be no positive identification of any one article found in possession of the accused with any article stolen, the similarities between the articles found and those stolen may be shown to be so numerous and striking as, in their totality, to compel the judgment of any reasonable person to a conclusion that they are identical. There may come a stage beyond coincidence, where the only rational explanation is identity.
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> Moreover, as was held by Darling J in *R v Sbarra (supra)*, 'The circumstances in which a defendant receives goods may of themselves prove that the goods were stolen'.

Here, the coffee is stolen at about 1.00 a.m. At about 2.00 on the same night almost exactly the same amount of coffee is offloaded a the first respondent's home. The coffee is then removed from its original packings (which disappear) and is packed into different gunny bags, all within a matter of about twenty-four hours. A ball of thread and sewing needles for sacks are found in a different room. When first questioned, the first respondent's wife alleges that he is at Machakos although he is found standing in the adjoining room. He falsely tells the police that the key to the locked room is lost, but when faced with the threat of the door being broken down, he produces the key and opens the door. It was held in *Idi s/ o Waziri v R* [1961] EA 146 that the circumstances of possession may be sufficient to prove that the property was stolen and that the possessor knew that the property was stolen and knew it when he received it.

(iv)The magistrate considered the first respondent's statement reasonable in his estimation; but was it really so? Questions which should immediately arise for consideration are: is the first respondent a coffeedealer?

Is it proper for him to use a bedroom to stack bags of coffee up to the ceiling? Does he keep accounts of his business? Has he got a bank account? How was he going to pay Shs 500 per bag for the 140 bags, which he claimed were brought to him (totalling Shs 70,000) in addition to the transport charges? Was that, in any event, a reasonable price to pay for coffee which has been valued at Shs 267,000 by an authorised coffee auctioneer? If it was a proper transaction, what was the necessity of transporting the coffee at 3.00 at night, and then repacking it into other bags? In our view the magistrate clearly erred in accepting the sketchy explanation of the first respondent, as it stood, to be true.

We accept the Republic's contention that the magistrate erred in law in so far as the first respondent is concerned by failing to direct his mind sufficiently to the evidence adduced by the prosecution, and also erred in law by ruling that the prosecution had failed to disclose a *prima facie* case against the first respondent.

Accordingly, we set aside the acquittal of the first respondent, and rule that he has a case to answer. We were informed that he was not present at the hearing of this appeal, as he should have been, and we issued a summons for his appearance today. Since he is present today, his original bail will be extended to 9.00 am on 14th March 1978, to appear before the Chief Magistrate, Nairobi, for a date to be fixed for the continuation of his trial before the trial magistrate. We also set aside the order for the return of the coffee and other exhibits recovered by the police to the first respondent, and direct that the same be held in the usual manner until the final determination of the case.

Appeal allowed.

Dated nad delivered at Nairobi this 13th day of March 1978.

A.H SIMPSON **S.K SACHDEVA**

JUDGE **JUDGE**