



**IN THE COURT OF APPEAL**

**AT NAKURU**

**(CORAM: LAW, MILLER & POTTER JJ A)**

**CRIMINAL APPEAL NO 48 OF 1979**

**BETWEEN**

**WASIEMBO..... APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

*(Appeal from a Judgment of the High Court at Nakuru (Nyarangi J) in Criminal Appeal No 404 of 1978 dated 13th March 1979)*

March 21, 1980, the following Judgment of the Court was delivered.

This is a second appeal. The appellant was convicted in the Resident Magistrate's court at Nakuru on a charge of dishonestly handling, contrary to section 322 (2) of the Penal Code, a record player and a record said to be worth KShs 660/-, and was sentenced to 7 years imprisonment, to be followed by 5 years police supervision. His appeal to the High Court was summarily dismissed. He now appeals to this Court.

His advocate, Mr S M Otieno, has raised a number of points of law on his behalf. The first is that the appeal to the High Court should not have been summarily dismissed. The grounds of appeal in that Court, where the appellant was not represented, were confined to questions of fact, and we consider that the judge who dismissed the appeal summarily acted within the provisions of section 352 subsections (1) and (2) of the Criminal Procedure Code, as the appeal before him was in effect based on the ground that the conviction was against the weight of evidence. Mr Otieno then submitted, correctly in our view, that the charge of handling was defective and incomplete. The particulars were stated as follows –

“Antony Olale Wasiembo: On the 18th day of June, 1978, at Ronda Estate Nakuru in Nakuru District of the Rift Valley Province, handled stolen property in that otherwise than in the cause (sic) of stealing, dishonestly handled one Sanyo record player and one record all valued at Kshs 660/- knowingly or having reason to believe them to have been stolen or unlawfully obtained.”

This charge was defective in that it did not specify the manner of the alleged handling, as required by section 322 (1) of the Penal Code, in other words whether the allegation was that the appellant dishonestly received or retained the goods, or dishonestly undertook or assisted in their retention, removal, disposal or realization by or for the benefit of another person, or if he arranged to do so.

Learned Senior State Attorney, Mr Shilenje, conceded that the charge as framed was defective. He submitted however that the objection to it should have been taken earlier, particularly as the appellant was represented by an advocate when his plea was taken, and that no failure of justice was occasioned by the defect, as the evidence adduced by the prosecution made it clear that what was alleged against the appellant was that he dishonestly received the goods, so that he was not prejudiced by the defect in the charge, and he referred us to section 382 of the Criminal Procedure Code. We find ourselves in agreement with Mr Shilenje's submissions on this point, and we are satisfied that the defect in the charge did not in fact occasion a failure of justice.

Mr Otieno's final ground was that the trial magistrate erred in law in finding that the evidence pointed to dishonesty on the part of the appellant in his handling of the goods. The evidence on this point was that the appellant met certain persons in the house of a neighbour, by prearrangement; that he lent his bicycle to one of these persons who used it to bring the record player to the house, and that after a discussion with these persons outside the house (one of whom was subsequently convicted on his own plea of having stolen the goods) the appellant bought the record player for KShs 300/-. Mr Shilenge submitted that these circumstances justified a finding of dishonesty against the appellant. He pointed out that the appellant had paid a low price for the record player, and that it was not accompanied by a certificate or licence. On this latter point, a record player is not a wireless receiving set, and so far as we are aware a record player does not need to be licensed. As regards the price paid by the appellant, we know that the record player had cost KShs 650/ - when bought on hire-purchase, a price which must have included a substantial element by way of interest. There is no evidence on record as to when it was originally bought, or what its condition or value were at the time the appellant paid Shs 300/- for it. For all we know, KShs 300/- may have been a reasonable price for that particular record player at the time the appellant acquired it.

We have a doubt, in all these circumstances, whether the appellant was proved to have acted dishonestly when he received the record player, and also whether he must have known or had reason to believe it to have been stolen. In law, the appellant is entitled to the benefit of that doubt. We accordingly allow this appeal, set aside the conviction, and quash the sentence of 7 years imprisonment and the police supervision order, and we so order. The appellant is to be released forthwith unless otherwise lawfully detained.

**March 21, 1980**

**LAW, MILLER & POTTER JJ A**