



IN THE COURT OF APPEAL OF KENYA

AT NYERI

CRIMINAL APPEAL 59 OF 2007

BETWEEN

JOHN NYAMU WAWERUAPPELLANT

AND

REPUBLICRESPONDENT

(An appeal from a judgment of the High Court of Kenya at Nyeri (Khamoni & Okwengu, JJ.) dated 14th November, 2009

in

H.C.C.R.A. NO. 158 OF 2003)

JUDGMENT OF THE COURT

John Nyamu Waweru, the appellant herein, comes to the Court by way of a second and final appeal, his first appeal to the superior court having been dismissed on 4th November, 2006. The appellant had been tried and convicted by a Senior Resident Magistrate at Muranga on a charge of robbery with violence contrary to **section 296 (2)** of the Penal Code. The particulars of the robbery charge were that on the 21st day of December, 2002 at Mary's Village within Muranga District of the Central Province, the appellant, jointly with others not before the court, robbed **James Karanja Kariuki** of Shs.3000/= cash, a cheque leaf, one mobile phone, make Erickson, one sim card, a pouch, a diary and a wallet all valued at Kshs.13,300/= and that during the time of the robbery, they used actual violence to James Karanja Kariuki. There was also an alternative charge of handling stolen property under **section 322 (1)** of the Penal Code wherein it was alleged that he dishonestly "*handled*" one sim card and an Erickson pouch while he had reason to believe that the two items had been stolen. The charge of handling stolen property was clearly defective because the particulars contained a blanket averment that the appellant, otherwise than in the course of stealing "*dishonestly handled*" certain stolen items. There are two alternative ways of committing the offence of handling stolen property. These two ways are:

- (i) receiving the goods knowing or having reason to believe that the goods were stolen; or
- (ii) dishonestly undertaking or assisting in the retention, removal, disposal or realisation for the benefit of another person or if he arranges to do so.

A charge which merely asserts, as the one here did, that an accused person "*dishonestly handled*" is incurably defective as

charging two separate and distinct offences in one count and we would draw the attention of trial courts and prosecuting authorities to the decisions such as **RATILAL AND ANOTHER vs. REPUBLIC, [1971] EA 575 SAIDERE vs. REPUBLIC [1975] EA 98** and **MUMBI vs. REPUBLIC [1970] EA, 345**, to list but a few. Miss. Mwai, learned counsel for the appellant, with the support of Mr. Kaigai, the Principal State Counsel, asked us to find the appellant guilty of the alternative charge of handling stolen property, apparently without appreciating that that charge was duplex due to the particulars stated therein. If we accede to that request, we would be obliged to acquit the appellant.

What was the evidence on which the appellant was convicted on the main charge of robbery with violence?

First there was the evidence of the complainant himself, **James Karanja Kariuki** (P.W.1). On the night of 21st December, 2002 James left Metumi Bar, Muranga town, at 3 a.m. The appellant was a taxi operator in that town and it was common ground that James hired the appellant's taxi for the sum of Shs.100/=. The appellant was with another person in the vehicle and the three left for James' house. Near to the house, the appellant's vehicle, either due to a bad road or some other reason, could not proceed any further and James alighted in order to walk the remaining distance. It was the evidence of James that he did not hear the appellant reverse his vehicle to drive away. After he had walked a short distance from the vehicle, James was suddenly held by two people. We quote James:

“One held me by the neck while the other man searched my pockets and removed everything I had with me. He removed the following items: -

- (1) **An Erickson mobile phone AN 185, serial number 570082 - 61-188015 - 3.**
- (2) **Kshs. 3000/= in cash.**
- (3) **My documents like ID Card, ATM card, Civil Servants ID Card and other documents those (sic) were in the wallet.**
- (4) **A cheque of Kshs. 80,000/= that belongs to a.....supplies of my institution.**

The robbers also damaged my glasses and Seiko 5 watch. I was not able to identify the assailants. However soon after the incident, I heard the taxi vehicle starts (sic) and drove off. I went to my house and spent the night. On the following day I went to the police station and reported the incident. From there I went to town to carry out my own inquiry. I reported to mobile.....reporters (repairers?) and gave him details on my mobile for them to look out.....”

The next evidence was that of **Patrick Mwaura Muturi** (P.W.2) and **Simoni Muiruri Kimemia** (P.W.4). Patrick described himself as a “mobile phone operator” in Muranga town while Simoni said he was a barber in the same town. Simoni said on 22nd December, 2002 at about 3 p.m. he was in the shop of Patrick. The evidence of the two witnesses was that at around 3.30 p.m., the appellant came to the shop and handed to Patrick a mobile phone which Patrick was to charge and at the same time look for a person to buy at Shs.2000/=. Patrick said he had received the report of James and he informed James about the phone brought by the appellant. James duly informed the police and **Police Constable Charles Marura** (P.W.5) visited the shop of Patrick on 23rd December, 2002. The appellant was called and constable Marura posed as a buyer. The appellant offered to sell the phone to the officer. He was then arrested and charged with the robbery upon James and in the alternative with handling stolen goods. For some unknown reason, the mobile phone was not among the items the appellant was charged with handling. What was the appellant's answer to all these allegations? In an unsworn statement the appellant agreed that James had hired him on the night of the theft and that he took James somewhere near his home. James was drunk and he did not seem to know his home. He dropped him and drove back to town and the following day while he was washing his car he saw the mobile phone beneath the seat. He took it to the mobile phone shop so that it could be kept there for him. His intention was that he would be sending any person who had an interest in the phone to the shop. Later police came and arrested him over the phone.

So there was the evidence of James that he was attacked and robbed soon after he had come out of the appellant's vehicle and had

walked for some thirty metres. He said he only heard the vehicle of the appellant drive away after he had been robbed. It was never suggested to James that he was not robbed as he stated in his evidence. Then there was the evidence of Patrick and Simoni that the appellant went to the shop to sell the phone, not to keep it there as the appellant alleged in his unsworn statement. We again quote constable Marura:

“The accused later also came to meet the prospective purchasers. He introduced himself as the person who was selling the phone. I arrested him. At the police station he revealed that he had the pouch of the sim card and the phone. He led me and another officer to his house and I recovered the phone’s sim card and a pouch for the phone. These items were put inside a carton that was beneath a table in the house.....”

The evidence of James, Patrick, Simoni and constable Marura was accepted by the two courts below. The magistrate concluded:-

“In my view, there is overwhelming evidence that the accused was arrested when attempting to sell this phone. His statement that he was looking for its owner is not true at all and I proceed to dismiss the same.....”

For its part, the superior court held: -

“.....Later the appellant (sic) arrested when looking for a buyer of a mobile phone identified to be the one robbed from the complainant. The removed sim card and pouch belonging to the mobile phone recovered from the appellant’s house. In these circumstances, we hold that the defence of the Appellant was properly rejected by the learned trial magistrate. There was sufficient evidence to sustain the conviction and he was properly convicted.”

On this second appeal, we can only say that there was more than sufficient evidence upon which the two courts below could and did quite properly come to the conclusions cited above. There is no basis upon which we can interfere with their conclusions and hold, as we were asked to do, that the explanation given by the appellant regarding his possession of the stolen phone was a plausible one. That contention was, rightly in our view, rejected by the courts below and as we have said, there is no good reason at all why we should interfere. Like the two courts below, we are satisfied the appellant was convicted on sound evidence and that being our view of the matter, the appeal against the conviction fails and is hereby dismissed. The sentence imposed was also lawful and the appeal as to sentence must also fail. Those shall be the Court’s orders on the appeal.

Dated and delivered at Nyeri this 14th day of May, 2010.

R.S.C. OMOLO

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JUDGE OF APPEAL

P.N. WAKI

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JUDGE OF APPEAL

D.K.S. AGANYANYA

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JUDGE OF APPEAL