REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT NAIROBI
Criminal Appeal 12 of 2003

MWANGI MUNGAI ……..…….……..……. APPELLANT

AND

REPUBLIC ……..…….…….. RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Nairobi (Patel & Tuiyot, JJ.) dated 22nd January, 2002

in

H.C.CR.C. NO. 815 OF 1997)

****

JUDGMENT OF THE COURT

Mwangi Mungai, the appellant herein, was tried before the then Principal Magistrate of Kibera (Mrs. Ondieki) on a charge of robbery with violence contrary to ***section 296(2)*** of the Penal Code and the particulars contained in that charge were that on the night of *28th/29th November, 1995* along, Waiyaki Way within Nairobi Area, the appellant, jointly with others not before the court, robbed ***Philip Omutoka*** of cash *K.Shs.150,000/=*, one fax machine, six boxes containing padlocks, all valued at K.Shs.526,000/=, the property of ***Tribhoyan Bhubahai Soni*** and that during the robbery they used personal violence on ***Philip Omutoka***. At the conclusion of his trial during which a total nine witnesses testified on behalf of the Republic and the appellant made an unsworn statement, the learned trial magistrate found the appellant guilty as charged, convicted him and sentenced him to suffer death. The appellant appealed for the first time to the High Court but by its judgment dated and delivered on *22nd January, 2002*, the High Court ***(Patel and Tuiyot, JJ.)*** dismissed the appellant's appeal against the conviction and confirmed the sentence of death. The appellant now comes to this Court by way of a second appeal, and that being so, only matters of law can be considered by the Court.

Tribhoyan Bhubahai Soni who was said to be the owner of the goods alleged to have been stolen from Philip Omutoka was the managing director of a company called Rajdip Housing Development Ltd and the late Philip Omutoka was employed as a watchman in the company's premises. It was proved by the prosecution beyond any reasonable doubt that during the night of *28th/29th November, 1995*, the late Philip Omutoka was brutally attacked and killed within the premises of the company. The goods listed in the charge sheet were stolen from the offices of the company. Except for the money, i.e. the Shs.150,000/=, the items stolen from the premises were recovered in the morning of *29th November, 1995* and it is abundantly clear from the recorded evidence that the goods were so recovered with the assistance of the appellant after the appellant had been arrested. For some unknown reason(s) the police officer who arrested the appellant and who actually recovered the stolen goods was not brought to court to testify as to

the actual place where the goods were recovered and who the owner of that place was.

Johnson Fundi Mwai (P.W.7) owned motor vehicle Reg.No. KRF 072, Datsun Pick-up. On *28th November, 1995*, Johnson had employed the appellant to use the vehicle for hire and at the end of the day, the appellant would pay him (Johnson) 10% of whatever income had been derived from the hiring-out of the vehicle. To ensure that he was made aware of all the income that had been derived from the hiring-out of the vehicle, Johnson put his brother ***Isaac Kariuki Mwai (P.W.8.)*** to work with the appellant and the evidence accepted by the two courts below was that on *28th November, 1995* at around 10 p.m. the appellant was approached by two people who told the appellant that they would need the services of the vehicle at around 4 a.m. the next morning and that the two people were to pay Shs.1,500/= as hiring-charges. Isaac was unhappy with the hour when the work was to be done and told the appellant so. He also asked the appellant if he knew the two people who were to hire their vehicle. The appellant told Johnson not to treat him as a child and let him (appellant) do his work. The two men left but at about 4 a.m. one of them returned and after some trouble with the vehicle failing to start, the appellant, Isaac and the hirer left for Westlands where they got into a compound with two gates. One of the gates was a steel one while the other was made of iron-sheets. It is clear from the recorded evidence that this compound was the premises of ***Rajdip Development Company Ltd.*** where Philip Omutoka was found murdered in the morning of *29th November, 1995*. In between the two gates were three men who had a lot of luggage. The luggage was loaded into the vehicle and one of the men sat with Isaac and the appellant infront of the vehicle. The vehicle was driven to Mathare North and according to Isaac, nobody was giving the appellant instructions as to where the vehicle was going to. They drove to a house which, according to Isaac, the appellant told him it was his (appellant's). Isaac asked why the goods were taken to the appellant's house but the appellant ignored the question and instead asked Isaac to help in off-loading the goods. Isaac refused and the appellant and his party started off-loading the goods. In the course of the off-loading, Isaac felt he wanted to relieve himself and he asked some one to show him the place to do so. He was shown a toilet and while inside the toilet, he heard shouts of "thieves, thieves" and people running away. He stayed in the toilet until all was quiet and when he came out, he found everybody had run away, including the appellant and the vehicle was also not there. Isaac who claimed he was new to Nairobi, found his way to Juja Road and eventually to his brother's house.

The appellant's version in his unsworn statement was that, on the way, Isaac alighted from the vehicle at Mathare North, but the appellant continued on his way and at Huruma Estate, he was shown a house and those who had hired him started to off-load the items from the vehicle. In the process of off-loading, police on patrol arrived at the scene and the appellant's customers ran and disappeared. The police arrested him and he took the police to the house where the goods had been taken to.

According to Isaac, the appellant had said that was his house while the appellant was saying it was not his house. As we have already pointed out, the prosecution did not bring the officer or officers who had arrested the appellant and recovered the goods. The two courts below and even this Court was left in the dark as to why the prosecution chose to do this but the consequence of that omission is that it is not possible to say for certain that the house actually belonged to the appellant. This, we think, is a proper case in which we can draw the adverse inference that the police chose not to bring the officer or officers who arrested the appellant and who recovered the goods because had they been brought, the officer or officers would probably have testified that the house did not belong to the appellant. Surely, if the house had belonged to the appellant and the police officers had recovered goods from there, they would have easily established that fact instead of leaving it to Isaac and Johnson. Johnson casually said in cross-examination by the appellant that he knew the appellant's house because he had taken the appellant's wife to the house. But Johnson was not there when the stolen items were recovered so he could not say that it was the same house to which he had taken the appellant's wife from which the items were recovered.

On the state of this evidence, the learned trial magistrate found as follows:-

"…***……The accused in his defence told the court that he was only hired to transport the goods. Why then did he take them to his house? If accused had just ferried the goods to his house and knowing them to be stolen, then I would have found him guilty of the offence of Handling Stolen Property contrary to section 322 of the Penal Code. However, in this particular case, it is clear that accused***

was aware prior to the robbery that his services of transporting the goods would be needed at 4 a.m. Indeed the nature of the goods i.e type-writer, fax machine, locks etc being moved at 4 a.m. would have set the most trusting of souls wondering as did P.W.9 [actually PW8]. I take into account that accused did not also ask the directions to the scene of the robbery. He must have known about the robbery and even the scene prior to the robbery. He also took the stolen goods to his house. His movements before and after the robbery indicate a prior knowledge. Indeed, he was very antagonistic to PW9 when he persisted in his questions. ……. It is clear from the evidence that although accused never participated in the robbery, he aided and abetted it. He had prior knowledge it would take place and also knew what role he would play, i.e. transporting the goods to his house ……. I find that accused aided and abetted in the robbery and was legally one of those robbers where the watchman one Omutoka was killed in a most viscious manner. ……..… ".

It is of course true that the appellant knew from 10 p.m. that he would be required to transport goods at 4 a.m. It is also true that he drove to the scene of the robbery but the evidence of Isaac was that one of the two men who had come at 10 pm returned to the appellant at 4 a.m. and the three of them then drove to the scene of the robbery. If the appellant knew before hand that a robbery would be committed and the particular place where it would be committed, why would the other man come to collect them and take them to the place he (*appellant)* already knew? We think the learned trial magistrate was making too large a jump from the fact that the appellant was told at 10 p.m. that his services would be required at 4 a.m., he (*the appellant*) must have or ought to have known that a robbery was to be committed and that he approved of the plan to commit a robbery. The circumstances surrounding the hiring were of course suspicious; the time of the hiring, the place where the goods were collected from, the nature of the goods and so on were such that a reasonable person involved in the business of transporting goods must know or ought to have known that the goods had either been stolen or unlawfully obtained. But such knowledge could not transform the appellant into a perpetrator of the crime by which the goods were obtained in the first place. Had the prosecution established beyond a reasonable doubt that the goods were in fact recovered in the house of the appellant, different considerations would have applied.

The first appellate court, while confirming the decision of the trial magistrate, did not consider these issues. We are certain that had the superior court done so, they would have come to the conclusion that the first hunch by the magistrate that a charge under ***section 322*** of the Penal Code was feasible, was in fact the correct position.

Section 322 *(1)* of the Penal Code provides:

" ***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 appellant either knew or as a reasonable person he ought to have known that the goods he was being asked to transport must have either been stolen or unlawfully obtained and it is no answer for him to say that he was merely hired, and paid for his services. In transporting the goods from the place where the robbery had occurred to the house where the goods were eventually recovered, he was clearly assisting the robbers in the removal and eventual disposal of the goods, and it is no defence to him to say that he was paid to do so. The motive for committing a criminal offence is normally irrelevant – see ***section 9(3)*** of the Penal Code.

The appellant was not charged in the alternative, as is usually the practice, with handling stolen property contrary to ***section 322(2)*** of the Penal Code. But the offence provided for under that section is clearly minor and cognate to the offence of robbery with violence under ***section 296(2)*** of the Penal Code. Under the provisions of ***section 179*** of the Criminal Procedure Code, when a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it – see ***section 179(2)*** of the Code. But the offence to be substituted under ***section 179(2)*** of the Criminal Procedure Code must not only be minor but must also be cognate to the offence actually charged - see for example ***OUMA VS. REPUBLIC*** **[1969] EA 398.**

The offence of robbery with violence under ***section 296(2)*** carries with it, upon conviction, a mandatory sentence of death. The offence under ***section 322(2)*** of the Penal Code carries with it, upon conviction, a maximum of 14 years imprisonment with hard labour. That being so, the offence under ***section 322(1)*** and ***322(2)*** is clearly minor in relation to the one under ***section 296(2)*** of the Penal Code. Robbery is theft by use of force or threat to use force while handling stolen property involves dealing with the property after it has been stolen. Once again the offence of handling stolen property, apart from being minor, is also of a cognate nature to the one of robbery with violence under ***section 296(2)*** of the Penal Code. That being the position, we allow the appellant's appeal to the extent that we set aside the conviction for robbery with violence under ***section 296(2)*** of the Penal Code and in place thereof, substitute it with a conviction for handling stolen property under ***section 322(2)*** of the Penal Code. We also set aside the sentence of death imposed upon the appellant and substitute therefor a sentence of ***fourteen (14)*** years imprisonment with hard labour to run from the *11th July, 1997* when the appellant was convicted and sentenced by the magistrate. Those shall be our orders in the appeal.

Dated and delivered at Nairobi this 17th day of November, 2006.

R.S.C OMOLO

……

JUDGE OF APPEAL

P.K. TUNOI

…….

JUDGE OF APPEAL

E.M. GITHINJI

……..

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR.