REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

APPELLATE SIDE

CRIMINAL APPEAL NO. 156 OF 2003

ELIZABETH MBAIKA MUTISYA :::::::::::::::: APPELLANT

VERSUS

REPUBLIC :: RESPONDENT

CONSOLIDATED WITHCRIMINAL APPEAL NO. 175 OF 2003

DANIEL MULANDI KATIMU ::::::::::::::::::::: APPELLANT

VERSUS

REPUBLIC :: RESPONDENT

CONSOLIDATED WITHCRIMINAL APPEAL NO. 173 OF 2003

MARY MUENI NJAGI ::::::::::::::::::::::::::::: APPELLANT

VERSUS

REPUBLIC :: RESPONDENT

CONSOLIDATED WITHCRIMINAL APPEAL NO. 174 OF 2003

ELIZABETH KITUKU ::::::::::::::::::::::::::::: APPELLANT

VERSUS

REPUBLIC :: RESPONDENT

CONSOLIDATED WITHCRIMINAL APPEAL NO. 157 OF 2003

FAITH NDUNGE JOSHUA ::::::::::::::::::::::::: APPELLANT

VERSUS

REPUBLIC :: RESPONDENT

J U D G E M E N T

The five appellants were charged in Criminal Case 999/2002 at Makindu Court. In the first count they were jointly charged with offence of Stealing goods in transit C/Section 279 (c) of the Penal Code of which charge they were all acquitted. Each was however charged with alternative charges of handling stolen property C/Sec. 322(2) of the Penal Code. They were listed as separate counts though on the first sheet they were indicated to be alternative charges. The 1st and 5th appellants were convicted as charged on the alternative charges while 2nd, 3rd and 4th appellants were acquitted. However the 2 – 4th appellants have appealed against the order of forfeiture of the tea found in their possession. 1st and 5th appellants are dissatisfied with convictions and sentence and have appealed against the same.

The Petition of Appeal contains five grounds which the counsel lumped together in his submissions. Basically the appellants contention is that the prosecution evidence was unreliable and contradictory; the prosecution failed to call the Officer In Charge Station as witness who was given receipts by the accused persons in respect of their goods and lastly that the sentence meted was excessive in the circumstances.

The background of this appeal is that P.W.1 and 2 were travelling to Mombasa in motor vehicle KAD 953 C which belongs to Embu Highway Transporters. At Thange on Mombasa Road near Kibwezi , the vehicle was involved in a road accident. The vehicle was loaded with tea from Thumaita Factory in Kirinyaga which was being transported to Mombasa. People from around the area came and looted all the tea and escaped with it.The matter was reported to police. By the time the police came there was no tea in the vehicle nor were any of the looters found at the scene.

The vehicle in which the tea was being transported allegedly overturned early in the morning on 29.11.2002. From the evidence of P.W.5 and 4, the recovery of tea at Machinery was done on the same day. I believe the magistrate should have considered that the goods were recovered on the same day and those found with the tea were in very recent possession of the goods and should have convicted them on the first charge not the alternative.

In their evidence P.W.4 and 5 who recovered tea from the rooms of the appellants said 1st appellant was found with 2 bags of tea leaves, 2nd appellant was found with a total of 3 bags of tea leaves, 3rd appellant one bag of tea, 4th appellant had 8 bags and 5th appellant had 1½ bags of tea, P.W.5's evidence corroborated that of P.W.4 as to how much tea was found with appellants. P.W.5 went ahead in her evidence to specifically identify the tea found in the store of 1st appellant as bearing an identification mark PF 1 487/02-03 and F 1 489/02-03. These were marked as EXS 3 and 4. She said that in the store of 5th appellant a bale of tea bearing the mark PF1 489/02-03 and marked EX. 2 was found. P.W.1 and 2 identified the tea from 1st and 5th appellants store as part of the consignment stolen from their lorry that overturned. P.W.4 and 5 said that on recovery the tea from the appellant they took possession of the tea. P.W.3 who came to the station on 5.12.2002 contradicted the evidence of P.w.4 and 5 as to where the tea marked as Ex.2 3 and 4 were found.He said that on 5.12.2002 they went to Machinery trading Centre with Police, found three locked rooms, which the police broke into. The rooms had no occupants. They found a bag containing tea in each room which he identified as Ex.2, 3 and 4 belonging to Thumaita Tea Factory. By 5.12.2002 when P.W.3 and police allegedly recovered this tea Ex.2, 3 and 4, the appellants had already been arrested with tea and so the tea which P.W.3 recovered in company of police can not be the same as the one the police recovered on 25.11.2002. The appellants 1 and 5 admitted having been found with tea but not the one with marks and identified as Ex.2, 3 and 4. The prosecution did not adduce any evidence to reconcile the evidence of P.W.3, 4 and 5

as to where and when Ex. 2, 3 and 4 were recovered and it is still questionable whether or not they were found with 1st and 5th appellants. It therefore follows that the magistrate arrived at the wrong finding that the prosecution had proved beyond any doubt that 1st and 5th appellants were found with Ex. 2, 3 and 4 belonging to Thumaita Tea Factory. 1st and 5th appellants tea may well be amongst the 26 bags that P.W.3 saw at police station on 5.12.2002.

In his judgement the magistrate found that though P.W.1 and 2 found that the tea recovered with 2nd to 4th appellants had no identification the said tea was similar to that of Thumaita Tea. The magistrate correctly observed that the similarity could not be confirmed with the naked eye and it was upto the prosecution to prove that the tea without identification belonged to Thumaita Tea Factory. The magistrate went ahead to acquit the appellants. Nobody else claimed the said tea to be their and I find that there was no basis upon which the said tea was forfeited to state.

During cross examination of the prosecution witnesses, it emerged that the Officer in Charge Station had taken receipts from the appellants for verification as to their authenticity. The Officer in Charge Station was involved in the arrests and investigation of the case but was never called as a witness to confirm whether or not the receipts produced by appellants were authentic. The appellants maintained in their defence that the tea was theirs and they bought it. It was upto the prosecution to call the Officer in Charge Station as a witness to fill that gap and whether or not the appellants were the owners of the tea. Failure to call the Officer in Charge Station raises the presumption that he may have given evidence that would have been adverse to the prosecution case.

The sum of the above is that the 1st and 5th appellants were wrongly convicted on contradictory evidence and their conviction can not be sustained. It is hereby quashed. The sentence was quite lenient had it been properly deserved and it is hereby set aside.

The order of forfeiture of the unmarked tea to the state was wrong and it is hereby set aside. The said tea should be restored to the appellants if it is all fit for human consumption.

If it was not properly stored and is unfit for human consumption it should be destroyed. If the tea was however sold by the state, the proceeds be refunded to the appellants.

Orders accordingly.

Dated, read and delivered at Machakos this 16th day of March,

2004.

R. V. WENDOH

JUDGE