



**IN THE COURT OF APPEAL**

**AT MOMBASA**

**(Coram:masime, J.a., Gicheru & Kwach, Ag. JJ.A.)**

**CRIMINAL APPEAL NO. 155 OF 1988**

**BETWEEN**

**DAN OLOGI.....APPELLANT**

**AND**

**REPUBLIC.....RESPONDED**

**Appeal from an order of the High Court of Kenya at Mombasa (Aragon, J.) dated 30th April, 1986**

**in**

**H.C.CR. APPEAL NO. 402 OF 1985)**

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**JUDGMENT OF THE COURT:**

The appellant's first appeal to the High Court of Kenya at Mombasa was summarily rejected by Aragon, J. under Section 352(2) of the Criminal Procedure Code. He had been charged in the court of first instance with the offence of stealing contrary to section 275 of the Penal Code and with an alternative count of handling stolen property contrary to section 322(2) of the same Code.

The subject-matter of stealing and/or handling was a typewriter belonging to Dansons Agencies whose office is situated along Moi Avenue, Mombasa. Its value was about Shs. 15,000/-. This typewriter was stolen on 19th March, 1985 after 4.00 p.m. but before 5.00 p.m. At the latter time, the appellant and another were in possession of the typewriter. At this time, the appellant and another were in possession of the typewriter. At this time, the appellant asked Peter Mukura Chege (P.W.2), a receptionist with the Splendid Hotel, Mombasa, to keep the typewriter for them. The appellant was known to this receptionist as he was a customer to the aforesaid Hotel. He and his companion were to collect the said typewriter which was in a carton on the same day. Indeed, at about 9.00 p.m. on the same day, the appellant picked up the typewriter. On 20th March, 1985 at about 11.00 a.m. this typewriter in its carton was found by Joseph Wambua Kinyosi (P.W.3), a supervisor with the Hotel mentioned above, besides the door steps to the bar of the said Hotel. This supervisor handed it to the Hotel's Managing Director who kept it in a store at the Hotel. On 29th May, 1985 the appellant was arrested. On the same day, he led the

police to the aforementioned Hotel where it (typewriter) was recovered.

On this evidence, the trial court convicted the appellant for the offence of handling stolen property contrary to section 322 (2) of the Penal Code and sentenced him to 7 years imprisonment with hard labour together with 3 strokes of corporal punishment. In so convicting the appellant, the aforesaid court appears to have had no use for the principal charge of stealing contrary to section 275 of the Penal Code with which the appellant was indicted. It made no reference to this charge.

One of the appellant's grounds of appeal to the first appellate court was that the learned trial magistrate erred in law and in fact when he failed to appreciate that the entire evidence before him did not disclose the offence of handling stolen property contrary to section 322 (2) of the Penal Code. This ground was not based on the appellant's conviction being against the weight of evidence nor on the sentence passed on him being excessive. Indeed, although the imposition of 3 strokes of corporal punishment mentioned above was illegal, none of the appellant's grounds of appeal to the aforesaid court concerned sentence. In itself, this ground took away the application of section 352(2) of the Criminal Procedure Code to the appellant's appeal.

In this second appeal, the matter of law raised is whether the first appellate court (Aragon, J.) could properly summarily reject the appellant's appeal under the above mentioned section. From the foregoing, it is clear that this could not be done. The summary rejection of the appellant's appeal was improper.

Before convicting the appellant on the alternative charge, it was incumbent on the trial court to make a finding as to why he could not be convicted on the principal charge. This was not done. The trial court proceeded as if the alternative charge was the only charge against the appellant. This was wrong.

From the facts set out above, the appellant with another were found in possession of the stolen typewriter within a period of about one hour after the same had been stolen. This was a very recent possession of the stolen typewriter. A typewriter is not the kind of property that readily passes from hand to hand. In these circumstances, and there being no explanation by the appellant and his companion to account for their possession of the stolen typewriter, a presumption of fact arose that they stole it. The appellant could very properly have been convicted on the principal charge of stealing contrary to section 275 of the Penal Code. Accordingly, under the provisions of section 361 (4) of the Criminal Procedure Code, we quash the appellant's conviction for the offence of handling stolen property contrary to section 322 (2) of the Penal Code and substitute therefore a conviction for the offence of stealing contrary to section 275 of the Penal Code. The appellant's sentence of 7 years imprisonment with hard labour together with 3 strokes of corporal punishment is set aside and we substitute therefor a sentence that will result in the appellant's immediate release unless he is held in custody for any other lawful cause. To this extent the appellant's appeal succeeds.

**Dated and delivered at Mombasa this 21 day of July, 1989**

**J.R.O. MASIME**

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**JUDGE OF APPEAL**

**J.E. GICHERU**

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**AG.JUDGE OF APPEAL**

**R.O. KWACH**

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**AG. JUDGE OF APPEAL**

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**DEPUTY REGISTRAR**



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