REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NAIROBI
CORAM: CHUNGA, CJ, OMOLO & TUNOI, JJ.A.
CRIMINAL APPEAL NO. 68 OF 1999

BETWEEN

SELIMIA MBEU OWUOR

DANIEL NJUGUNA NJAGU .....APPELLANTS

AND

REPUBLIC .....RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Nairobi (Angawa J) dated 10th

December, 1998

in

H.C.CR.A. NOS. 946 & 890 OF 1997)

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JUDGMENT OF THE COURT

SELIMIA MBEU OWUOR, the 1st appellant, and ***DANIEL NJUGUNA NJAGU***, the 2nd appellant, were among four people who were tried on various charges before a Senior Resident Magistrate in Nairobi. The other two people who appeared before the Magistrate with the appellants and who are no longer involved in these proceedings were the wives of the 1st appellant. In count one, all the four of them had been charged with the offence of robbery with violence contrary to ***section 296 (2) of the Penal Code***. All of them were acquitted by the Magistrate on that charge which had alleged robbery of a motor vehicle registration number KAE 904M. That vehicle was said to be the property of General Motors (K) Ltd which in turn had assigned it to one of its employees, Edward Wandera (P.W.1) for his personal use. P.W.1 was robbed of that vehicle on 20th December, 1995. On the second count, the appellant and his two wives were charged with the offence of being in possession of a fire-arm without a relevant certificate while in count three the three of them were also charged with being in possession of ammunition without the relevant certificate under the Fire-arms Act. Again in count four, the 1st appellant and his two wives were jointly charged with being in possession of a narcotic drug contrary to the provisions of the Narcotic Drugs and Psychotropic Substances Act. The last count, which was obviously an alternative charge to count one of robbery, charged the 1st appellant, his two wives and the 2nd appellant with the offence of handling stolen property contrary to ***section 322 (2) of the Penal Code.*** As it has turned out this is the

only charge remaining for us to deal with, the appellants having been acquitted of the other charges either by the Magistrate or by the superior court on their first appeal. The Magistrate, however, did not convict the appellants on the charge of handling stolen property. The Magistrate was of the view that while the facts which the Republic had placed before her did not prove the charge of handling stolen property, nevertheless, the facts conclusively proved a minor but cognate offence of "having in their possession suspected stolen property" under ***section 323 of the Penal Code.*** The Magistrate had then sentenced the appellants to three years imprisonment on that charge. On their first appeal to the High Court, Angawa, J thought that the charge of handling stolen property had been fully proved by the prosecution and she set aside the conviction recorded by the Magistrate under ***section 323 of the Penal Code*** and substituted it with a conviction under ***section 322 (2) of the Penal Code.*** The learned Judge also set aside the sentence of three years imprisonment imposed by the Magistrate and substituted that sentence with one of ten years for each appellant. This is what provoked the appeals before us.

When the appellants filed their petitions in the High Court, the same were placed before Patel, J for the purpose of admission or rejection in accordance with the provisions of ***section 352 (2) of the Criminal Procedure Code.*** In admitting the appeals to hearing Patel, J made an order that the appellants were not to be brought to court at the expense of the state for the hearing of their appeals. When Angawa, J heard their appeals on the 3rd December, 1998 none of them was present in court and accordingly none of them could have made any representations to the learned Judge.

The position, then, as we see it is this. The appellants had been convicted of a relatively minor offence and each of them received a sentence of three years imprisonment. They appealed, but in their absence and without hearing them, the learned Judge chose to substitute a far more serious conviction for the minor one recorded by the Magistrate and not only did the learned Judge do this, but she also proceeded to substitute the Magistrate's sentence of three years imprisonment with one of ten years. We are of the clear view that this was fundamentally wrong. A judge is entitled to substitute a conviction with another but where it is proposed to substitute a lesser charge with a far more serious one, then the rules of natural justice would require that the party to be affected by such an order and its consequences be given an opportunity to make representations, if any. On this point alone, we think the conviction recorded against the appellants by the superior court is unsafe.

The 2nd appellant also pointed out to us the fact that the alternative charge of handling stolen property was defective. P.W.3 and another police officer (P.W.5) stated in their evidence before the Magistrate that they first visited the premises occupied by the 1st appellant and there they recovered various items which were said to have been stolen. The 2nd appellant had no connection whatsoever with the premises occupied by the 1st appellant and his two wives.

Then P.W.3 and P.W.5 also visited the house occupied by the 2nd appellant and according to the two witnesses, they recovered the registration plate of motor vehicle KAE 904M which had been stolen from P.W.1 on 20th December, 1995. These recoveries were made on the 8th January, 1996. Once again there was no evidence connecting the house occupied by the 2nd appellant with the 1st appellant. But when it came to drawing up the charge of handling stolen property, the prosecution chose to lump together in one charge the items recovered from the premises occupied by the 1st appellant with the one item recovered from the house of the 2nd appellant. We think this was fundamentally wrong. The prosecution ought to have charged each appellant separately with handling only the items recovered in their respective houses. We agree with the 2nd appellant that the one charge of handling stolen properly brought jointly against them made that charge defective.

One more defect is this. The particulars of the handling charge were to the effect that the appellants

"... otherwise than in the course of stealing, dishonestly received or retained ..."

Under ***section 322 (1) of the Penal Code,*** a person handles stolen goods if he, otherwise than in the course of stealing, dishonestly

(a) receives;

(b) retains;

(c) undertakes or assists in their retention, removal etc.

The prosecution must accordingly choose under which of these sub-heads they wish to proceed and it is not open to them to combine dishonest receipt with dishonest retention in one charge; if they do that the charge would be bad for duplicity. The point is that an accused person is entitled to know whether it is being alleged that he dishonestly received the goods or that he dishonestly retained them and so on.

We have said enough, we think,to show that the conviction of each appellant on the charge of handling stolen property was, in all the circumstances, unsafe and ought not to be allowed to stand. We accordingly allow the appeal of each appellant, quash the conviction recorded against each of them, set aside the sentence imposed on each of them and order that each of them be released from prison forthwith, unless held for some other lawful cause. Those shall be the orders of this Court on the two appeals.

Dated and delivered at Nairobi this 5th day of November, 1999.

B. CHUNGA

CHIEF JUSTICE

R. S. C. OMOLO

JUDGE OF APPEAL

P. K. TUNOI

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR