REPUBLIC OF KENYA

IN THE COURT OF APPEAL
AT NAKURU

(CORAM: GICHERU, LAKHA, JJ.A. & BOSIRE, AG.J.A)
CRIMINAL APPEAL NO. 28 OF 1997

BETWEEN

JOHN KAMUNDIA GITAU

MICHAEL GITONGA .... APPELLANTS

AND

REPUBLIC ....RESPONDENT

(Appeal from a Judgment of the High Court of Kenya at Nakuru
(Justice Rimita) dated 14th March, 1997

JUDGMENT OF THE COURT

This is a second appeal. The appellants were convicted in the Principal Magistrate's Court at Nyahururu of handling stolen goods, contrary to section 322 (2) of the Penal Code having received or retained two bearings knowing or having reason to believe them to be stolen goods.

The facts of the case were that on 8th November, 1994, some stolen property including two bearings were stolen from a saw-mill in Ol-Joro Orok of which Ezekiel Mwenja Ngure was the owner. It was not in use as part of it had been damaged by fire. On information supplied by Accused 4 who had been jointly charged with the appellant but acquitted, the police in the course of its investigation found some items to have been sold to a businessman at Rift Valley Engineering Works. These were sold to him by the first appellant who was a scrap metal dealer and who was informed by Accused No. 1 Isaac Kuria Mwenja (a son of the complainant who was also jointly charged with the appellants but pleaded guilty to stealing and was duly convicted and sentenced) that he had been authorised by his father to sell the goods to him.

The first appellant then directed the first Accused to the second appellant who had no reason to suspect that the goods were stolen. Bearings, subject of the charge, were in fact found in the neighbour's garage but the second appellant was not aware of the same. At the trial, both the appellants gave evidence on oath and were cross-examined but maintained their version of events. The Acting Principal Magistrate in convicting the appellants said that the second appellant was related to Accused No. 1. He should therefore have known that Accused No. 1 could not have been the owner of the said property which he was trying to dispose of as scrap metal. He should have questioned himself as to the ownership of the

same. Further, he noted that the first appellant was a scrap metal dealer and the second appellant was a mechanic. One look at those shafts should have warned him that the same were valuable items which should not have been peddled as scrap metal. These appellants, in his considered view, knew after all that the Accused No. 1 had not obtained these items locally.

With great respect, there is no basis to infer guilty knowledge on the part of the appellants that the goods were stolen. The fact that the second appellant was a relative is no basis to impute any knowledge in the first appellant that the accused No. 1 could not have been the owner of the property. The second appellant was only a motor mechanic with perhaps no knowledge of the parts of a saw mill. There was no evidence that he had any such knowledge. Nor was there any evidence of any value of the items involved. At no time did the appellants admit knowing that the items were stolen property. In our judgment, there was no evidence to support the trial magistrate's finding of guilty knowledge on the part of the appellants. The first appellate Court stated in its judgment that it had evaluated the evidence on its own and found the conviction safe. With respect, there is no indication in the judgment that any such evaluation was made. In our view, the first appellate court, in the words of the Court of Appeal for Eastern Africa in Dinkarrhai Ramkrishan Pandya v. Republic (1957) E.A. 336, "..... erred in law in that it had not treated the evidence as a whole to that fresh and exhaustive scrutiny which the appellants were entitled to expect, and, as a result of its error, affirmed a conviction resting on evidence which, had it been duly reviewed, must have been seen to be so defective as to render the conviction manifestly unsafe."

Another matter which has caused us concern is that neither court adverted to a piece of evidence given on oath by the first appellant which seems to us to deserve consideration. He stated that Accused No. 1 said he had been given irons by his father. We fully agree that it must be a possibility that Accused No. 1 did have such consent. The trial magistrate rejected this defence without commenting on it. With respect, this was a misdirection. The law in East Africa on this point is well settled. In Kipsaino vs. Republic 1975 E.A. 253 at p.255 it is stated as follows:-

"Where an accused person is charged with receiving stolen property, his guilt is not established if the explanation that he has given is one which is reasonable and might possibly be true, even if the trial court is not convinced that it is in fact true."

With respect we agree. We see nothing inherently improbable in the first appellant having been given consent, as he contended. Such an explanation is reasonable and might possibly be true. In our view, the appellants' convictions were wrong in point of law.

Although there may be suspicion against the appellants, we are not satisfied that their guilt has been proved beyond reasonable doubt. Suspicion, however strong, cannot supply a basis for inferring guilt when proof of guilt cannot be inferred beyond reasonable doubt on all the evidence.

We, therefore, allow this appeal, quash the conviction, set aside the sentence and order that the appellants be set at liberty forthwith unless otherwise lawfully held.

Dated and delivered at Nairobi this 17th day of October, 1997.

J.E. GICHERU

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JUDGE OF APPEAL

A.A. LAKHA

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JUDGE OF APPEAL

S.E.O. BOSIRE

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AG. JUDGE OF APPEAL

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

DEPUTY REGISTRAR

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