



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI Criminal Appeal 97 of 2009

JULIUS KANG'ETHE MWANGIAPPELLANT

Versus

REPUBLIC.....RESPONDENT

JUDGMENT

James Kagori Ndirangu, Julius Kang'ethe Mwangi and Josphat Ndirangu Njeru were jointly tried on a charge of stealing contrary to section 275 of the Penal Code – with an alternative count of handling stolen property contrary to section 322 (2) of the Penal Code. When the case came up for hearing before the trial court, James Kagori Ndirangu pleaded guilty to the offence. He was then sentenced to 18 months imprisonment. The case against Julius Kang'ethe Mwangi, the appellant herein and one Josphat Ndirangu Njeru proceeded to its conclusion. In the end the duo were convicted and each sentenced to 3 years imprisonment. Being aggrieved, Julius Kang'ethe Mwangi, preferred this appeal.

On appeal, the appellant has listed the following grounds in his petition of appeal.

1. *The learned magistrate erred in law and in facts, convicting on evidence by the co-accused that wasn't tested or appellant given a chance to cross-examine the witness and that had no corroboration i.e lead to arrest the appellant or found with any of the stolen item or his name mobilized to the public.*
2. *The learned magistrate erred in law and in facts in allowing application for release of exhibits to prosecution without asking the appellant or informed him his right to object or concede over the application and to be specific on what exhibit so conserved otherwise, there were some claimed by appellant at defence which P.W.1 had this to state you took us to a Sagana house and people (identified) some of the properties we didn't find the owners of other items P 25 lines 7-9.*
3. *The learned magistrate erred in law and in facts, not finding that appellant could be a scape goat having been arrested or mob justified and rescued by P.W.2 for reasons not well spelt out as the members of public never come to testify.*
4. *The learned magistrate erred in law and in facts not finding that though P.W.1 was a police Officer and as well the complainant, there was a need to have an independent investigating officer to minimize possibility to prejudice the either party much more I the appellant and as well over alleged allegations of co-accused.*
5. *The learned magistrate erred in law and in facts, in failing to inform the appellant his rights under s. 211 CPC Cap 75 on whether he could have a witness to call a would wish to call any other evidence to support of his defence and whether the unsworn defence by the appellant was of his own choice under section this provisions.*

Miss Ngalyuka, learned State Counsel conceded the appeal on two main grounds: First, that the evidence which was used to convict the appellant were that of an accomplice which evidence was not corroborated. Secondly, that the appellant was not found with the stolen goods.

The case before the trial court appear to be short and straightforward. The prosecution's case was supported by the evidence of two witnesses. Sgt Nicholas Wambua (P.W.1), told the trial court that he was at Murang'a police canteen on 17th June 2008 when he discovered that lorry registration No. KAU 887G Canter had its battery missing. He said he went looking for the battery at the premises of scrap metal dealers. He said while he was in the premises of one of the dealers two people arrived carrying a battery in a carton. P.W.1 opened the carton before arresting, James Kagori Waithera. The other accomplice fled. P.W.1 identified the person who fled to be Josphat Ndirangu Njeru. P.W.1 said that the appellant herein had been mentioned by his co-accuseds as their accomplice.

When placed on his defence, the appellant herein denied ever committing the offence. In fact he told the trial court that he had gone to visit his mother in Murang'a on the material day, only to be stopped by police at 8.00 p.m. and charged with the offence of being drunk and disorderly. He said he was later charged with the offence of theft which he had no knowledge of. I have carefully considered the grounds put forward on appeal. There is no doubt that the learned State counsel concedes on the ground that the appellant was not found with the stolen property. It is also not in dispute that the appellant was solely convicted on the evidence of an accomplice. I have looked at the evidence and it is obvious that the same was not corroborated. It is therefore unsafe to sustain the conviction. On this score, I agree with the submissions of Miss Ngalyuka that the appeal should be allowed. I hereby allow the appeal by quashing the conviction and set aside the sentence. The appellant forthwith set free unless lawfully held.

Dated and delivered this 10th day of March 2010.

J.K. SERGON

JUDGE

In open court in the presence of Mr. Makura for the state and the appellant in person.

J.K. SERGON

JUDGE