

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT BUSIA

Criminal Appeal 54 of 2009

GODFREY OJIAMBO MANGENI.....APPLICANT

-VERSUS-

REPUBLIC.....RESPONDENT

(From the conviction and sentence of E.H. Keago, Resident Magistrate in Busia Principal Magistrate's

Court – Cr. Case NO.1581 of 2006)

JUDGEMENT

The appellant, Godfrey Ojiambo Mangeni, was jointly charged with two others with the offence of shop breaking, contrary to Section 306 (a) of the Penal code. He also in the alternative charge faced the offence of handling stolen property contrary to section 322 (2) of the Penal Code. He was convicted of the main charge of shop breaking and sentenced to six years imprisonment. He appeals against both the conviction and sentence.

The facts of the case are that on the 29th July, 2006 at Busia Bus park, one Corporal Kipketer and PC Mbandu were in general Patrol. They met two young men, the 1st and 2nd accused in the lower court, who were carrying some bags which they suspected were carrying goods illegally obtained or stolen. On inquiring how they obtained the goods, the two suspects said they carried the goods on behalf of a third person who had gone ahead to the Bus Park. The two persons led the police to the appellant who was also found unloading more goods. The three were arrested, taken to Busia Police Station and later charged with these offences. The first two persons pleaded guilty to shop breaking and were sentenced to four years imprisonment. The appellant underwent a full trial and was convicted on evidence.

During the taking of plea the appellant stated he was merely a boda boda operator who was hired by the other two persons to carry the goods for them and was not a participant in the shop breaking or in the stealing. In his eventual full defence the appellant maintained the same defence. He demanded to cross-examine his co-accused since they are the people who implicated him and whom he claimed had hired him to carry the goods for them to the bus park. For some reason, the co-accused persons were not eventually produced either to give evidence or to be cross-examined.

I have carefully considered the evidence and the circumstances thereof and upon which the appellant was convicted. I am satisfied that the trial magistrate failed to give the appellant's defence a proper consideration. As a result and in the absence of the evidence of the co-accused persons, the trial magistrate denied the appellant the right to cross-examine the co-accused and apparently, basically convicted on the principal of recent possession.

The explanation of possession of recently stolen property by the appellant was sufficiently innocent. Appellant stated from the start, even during the plea, that he was only escorting the property as a boda boda operator for the 1st and 2nd accused. No evidence was produced by the prosecution to contradict that. Appellant repeated the explanation in his defence. The only persons who could have contradicted the appellant's otherwise valid and sufficient defence would be the two co-accused persons. The latter failed to give evidence

for the prosecution even after the appellant applied and demanded that they do so.

In the circumstances I am persuaded beyond a reasonable doubt, that the appellant gave an explanation which pointed to his innocence. On the other hand his explanation created a serious doubt of his participation. Further more the appellant was denied his basic right to cross examine to co-accused which in my finding, is fatal to the conviction.

For the above reasons, I find that the appellant's appeal as high merit. I hereby allow the appeal. The conviction against him is hereby quashed. The sentence of six years is hereby similarly set aside. The appellant is ordered immediately released from prison unless otherwise lawfully thereat held. Orders accordingly.

Dated and delivered at Busia on 12th day of July, 2010

D.A ONYANCHA

JUDGE