REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

Criminal Appeal No. 276 of 2002 & 382 of 2001

JARSO KUNO SORA ……...…… APPELLANT

VERSUS

REPUBLIC …… RESPONDENT

(Appeal from original Judgment and Conviction in Chief Magistrate's Court at Nyeri in Criminal Case No. 4118 of 2000 by Mr. C. D. Nyamweya – S.R.M. – Nyeri)

HIGH COURT CRIMINAL APPEAL NO. 382 OF 2001

MOHAMED HAPPI BAGAJA …….....……. APPELLANT

VERSUS

REPUBLIC …… RESPONDENT

(Appeal from original Judgment and Conviction in Chief Magistrate's Court at Nyeri in Criminal Case No. 4118 of 2000 by Mr. C. D. Nyamweya – S.R.M. – Nyeri)

J U D G M E N T

Jarso Kuno Sora the appellant in criminal appeal No. 276 of 2002 (hereinafter referred to as 1st appellant) and Mohamed Happi Bagaja the appellant in criminal appeal No. 382 of 2001 (hereinafter referred to as the 2nd Appellant) were jointly tried together with Dabaso Wako Jaldesa (hereinafter referred to as the Co-Accused) before the Senior Resident Magistrate Nyeri for the offence of Robbery with violence contrary to section 296(2) of the Penal Code.

Each of the appellants also faced an alternative charge of Handling stolen Property contrary to section 322(2) of the Penal Code.

The two appellants were each acquitted of the main charge but convicted on the alternative counts. Each appellant was sentenced to serve 6 years imprisonment. Being dissatisfied, they have now each filed an appeal which appeals have been consolidated for purposes of hearing.

During the trial in the lower court 5 witnesses testified on behalf of the prosecution. Their evidence was briefly that on the night of 18th/19th February 2000 at around mid-night Josphat Mutatu Mutahi (hereinafter referred as the watchman) was guarding the premises of one Gichingo when he was attacked

by a gang of robbers who blindfolded him and forced him to call Alice Mirigo Ndorori (complainant) a sister in law to Gichingo who was the only person in the house. The robbers demanded money and complainant took a box containing Kshs.28,000/= and gave them through the window. The men were however not satisfied. They cut the grills of a window and entered the house. They flashed the complainant from the bedroom where she was hiding. They then searched the house and carried away clothing including jackets, trousers, T-shirts, sportshoes and bottles of soda. The men then went away having locked the watchman who was injured during the robbery in a rabbit house. The robbery was reported at Naru-Moru Police Station and P.C. Charles Mwai who received the report visited the scene and commenced investigations.

On 13th November 2006 during the course of investigations into another robbery, P.C. Charles Mwai received information that led him to arrest the 1st and 2nd Appellant. He took them to their houses which he searched and recovered many assorted goods and jackets. The 2nd appellant also took P.C. Mwai to the house of the Co-Accused where more clothing were recovered. The complainant was contacted and upon examining the recovered items identified 3 jackets each of which was recovered from the appellants and the Co-Accused. The Co-Accused was subsequently arrested by P.C. Thomas Muriuki when he went to the office of the Deputy O.C.P.D.

Dr. John Okullo of Nyeri P.G.H. produced a P3 report which he signed in respect of the watchman whose injuries he assessed as harm.

In their defence each of the appellants and the Co-Accused are indicated as stating that they had no other defence than that stated in criminal case No. 411 of 2000.

In his judgment the trial magistrate found that the complainant did not see any of her assailants and that although the watchman purported to identify the 2nd appellant as one of the robbers no identification parade was carried out and the identification was therefore not satisfactory. The trial magistrate however found that the 1st and 2nd appellants were found in possession of jackets positively identified by P.W.1 as having been stolen during the robbery. He therefore convicted the 1st and 2nd appellant of the alternative charges of Handling.

In their grounds of appeal the appellants have complained inter alia that the trial magistrate erred in finding that the jackets were proved to be stolen property and that the trial magistrate failed to give due weight to their defence.

We have carefully reconsidered and evaluated the evidence. We find that as regards the evidence of recovery of the jackets there was only the evidence of P.C. Charles Mwai whose evidence was as follows:

"***The first Accused took me to his house. I searched and I carried many assorted goods and jackets. The first Accused led me to adjacent house which he claimed to be owned by 3rd Accused his son in law. I conducted search in house of Accused 3. I recovered various clothings. I also proceeded to the house of Accused 2 and recovered various clothings which I took possession."***

It is evident that this witness did not give a list of the items which he recovered from the respective houses but just talked generally. He only purported to identify the jackets as having been recovered from the appellants after they were identified by the complainant. This raised a doubt. The possibility of a mix up cannot be ruled out particularly as there were many other items alleged to have been recovered.

Further the identification of the jackets by the complainant through a tear and paint was also not very satisfactory given that there was no evidence that the complainant gave this description prior to the recovery of the items.

It is also apparent from the record of the lower court that the trial magistrate took the defence of the appellants in a very unorthodox way by adopting evidence given in another case. The appellants have complained that they had several trials which were all handled by the same magistrate who advised them

that they did not need to repeat the defence but could adopt what they had already stated in another case. This is precisely what the trial magistrate did by considering the defence which the appellants had given in another case and this was clearly wrong. Moreover in a situation where Accused persons have several cases pending, particularly in a station such as Nyeri where there are other magistrates, it is not desirable to have one magistrate hearing all the cases as this results in prejudice to the Accused persons as the magistrate may find it difficult to ignore other factors which may have come to his knowledge in the other cases.

Further in considering the defences the trial magistrate erroneously shifted the burden of proof to the appellants when he stated:

"This receipt does not strike me as being genuine even if the Accused was not required to prove his innocence, a witness from this shop where the jackets were purchased could have sufficed."

However the 2nd Appellant having produced a cash sale receipt for the jacket to show that he had bought them, that was a reasonable explanation for his possession of the jackets. It remained the responsibility of the prosecution to prove that the receipt was not genuine and not for the appellant to prove that the receipt was genuine. In this case the jackets were recovered 9 months after the robbery. In this day and age when "mitumbas" or purchase of second hand clothes have become so popular, the possibility of the 1st appellant having purchased the jackets was not completely ruled out.

All in all we find that the conviction of the 1st and 2nd appellants for the offences of Handling stolen property was not safe as there were doubts which ought to have been resolved in their favour. We therefore allow the appeals quash the convictions of each appellant and set aside the sentence imposed. The appellants shall each be set free unless otherwise lawfully held.

Dated signed and delivered this 29th day of March 2006.

J. M. KHAMONI

JUDGE

H. M. OKWENGU

JUDGE