

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI
CRIMINAL APPEAL CASE NUMBER 417 OF 2003
(From the original Conviction and Sentence in Criminal Case Number 246 of 2003 in the Resident Magistrate's Court at Othaya by T. K. Kimutai – (R.M.

PETER GACHIE MAINA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

Peter Gachie Maina hereinafter referred to as the Appellant was tried together with one Christopher Muguku Kaminji (*hereinafter referred to as Co-Accused*) on 3 counts of the offence of Housebreaking and Stealing Contrary to Section 304(1) and 279(b) of the Penal code, 2 counts of Bar Breaking and Stealing Contrary to Section 306(a) 2 counts of Butchery Breaking and Stealing Contrary to Section 306(a) of the Penal Code and 1 count of Robbery Contrary to Section 296(1) of the Penal Code. They also faced alternative counts of Handling Stolen Property Contrary to Section 322(2) in respect of each of the 8 counts. The appellant's Co-accused was convicted of all the main counts whilst the Appellant was convicted of all counts except for the Robbery charge. The appellant was sentenced to concurrent terms of 3 ½ years in respect of each of the 7 counts whilst his Co-Accused was sentenced to concurrent terms of 6 years in respect of each of the 8 counts of which He was convicted.

Being dissatisfied with his conviction and sentence, the appellant lodged this appeal citing 4 grounds. In short the appellant maintains that the trial magistrate was wrong in relying on uncorroborated evidence of the prosecution witnesses, that nothing was recovered from the appellant and that in any case the ownership of the recovered items was questionable and finally that the appellant was denied a right to defend himself.

Learned Principal State Counsel Mr. Orinda contended that the Appellant was in constructive possession of the goods which were recovered from the house of his Co- Accused. He however conceded that the trial was a nullity as it was conducted by an incompetent prosecutor. Noting that the Appellant has already served a substantial part of the sentence He left the issue of a retrial to the court.

From the proceedings of the lower court, it is evident that the trial of the Appellant and his colleague was conducted by Sergeant Musyoki a person who is not qualified as provided under Section 85(2) of the Criminal Procedure Code. The Appellants trial was therefore a nullity and his conviction cannot stand. It is evident that there was sufficient evidence against the Appellant as He was arrested wearing a pair of shoes and having a jacket which were stolen from the complainants. On interrogation He led the officers to the house of his Co-Accused where more of the stolen items were recovered.

I do however concur with the Principal State Counsel that the appellant having served about half of his sentence a retrial may not be appropriate. I do therefore allow this appeal quash the conviction and set aside the sentence imposed.

The Appellant shall be set free unless otherwise lawfully held.

Dated, signed and delivered this 5th day of August 2005.

H. M. OKWENGU

JUDGE