REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAKURU
CRIMINAL APPEAL NO.200 OF 2001
(From original conviction and sentence in Criminal Case No.1438 of 2000 of the Senior Resident Magistrate's Court at MOLO – J. KIARIE (S.R.M.)

DANIEL NDEGWA KANGETHE ……. .APPELLANT

VERSUS

REPUBLIC……RESPONDENT

J U D G M E N T

The Appellant DANIEL NDEGWA KANGETHE was charged with a main count of ROBBERY WITH VIOLENCE contrary to Section 296(2) of the Penal Code. In the alternative count, the Appellant faced a charge of HANDLING STOLEN PROPERTY contrary to Section 322 of the Penal Code.

In count 1 the offence is alleged to have been committed on the night of 18th and 19th May, 2000 at Eastleigh. The alternative count alleges that the Appellant was on 20th July, 2000, found with the stolen property namely one wrist watch make SEIKO 5.

He was convicted for the alternative charge of Handling Stolen Property and sentenced to 10 years imprisonment. His main ground of appeal was that he never participated in the trial and that his request for the trial court to transfer his case to another count was denied. He alleges that the trial court had sentenced him to five years imprisonment in another case. He urged court to order retrial. He said the recovered watch was his.

The Learned State Counsel opposed the appeal against both conviction and sentence. He urges the court to find that he fully participated in the trial. He relied on the evidence of PW3 who was an employee of the Complainant and who saw the Appellant with the Complainant's alleged stolen SEIKO 5 WATCH. It had been stolen two months before. He informed the Complainant, PW1, who identified it as his. The Appellant was arrested and later charged.

I have carefully considered the grounds of appeal raised by the Appellant together with the submissions by the State Counsel and the entire proceedings. It is not true that the Appellant did not participate in the proceedings. He fully participated even cross-examining the witnesses. He also made an unsworn statement in defence. There is no proof that he even asked the Learned Trial Magistrate to disqualify himself from hearing his case.

The prosecution case was that the Appellant was found with the watch allegedly stolen from the Complainant 2 months before. The Complainant identified the watch by:-

> ***"I was able to identify it as its screen had broken. I refixed it with shoe repair gum. This is the watch (exhibit 2). Gum is vissible***.

Issue is whether that identification was sufficient for the court to find the watch positively identified as the Complainant's stolen watch? For the court to be satisfied that this item was positively identified, it must be shown tha there were distinctive marks on it that enabled the Complainant to identify the item as his. The distinctive marks in my view should be of such character as to satisfy the court that they were

capable of being accurately identified without possibility of mistake. The Complainant must satisfy the court that the marks were unique and give his reasons for that.

Considering the marks identified by the Complainant in this case, a broken screen repaired by shoe glue, I am not satisfied that they were of any uniqueness as to enable one to say that the watch belonged to the Complainant without a possibility of doubt. The doubt is not removed by confirmation of the Complaints evidence by PW3 who infact was the first to identify the said watch. PW3 did not say on what basis he identified the watch as exclusively belonging to the Complainant.

I find the basis of the conviction was unsafe and accordingly allow the appeal, set aside the conviction and sentence, I further order that the Appellant should be set at liberty unless otherwise lawfully held.

JESSIE LESIIT

JUDGE

Read, signed and delivered this 18th day of June, 2003.

In presence of

JESSIE LESIIT

JUDGE