**REPUBLIC OF KENYA**
**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**
**CRIMINAL CASE NO. 1070 OF 2000**

**MUSTAPHER SAAD DAFALLA …… ACCUSED**

**VERSUS**

**REPUBLIC …...…… RESPONDENT**

**JUDGEMENT**

Appeals Numbers 1070/2000 and 1072/2000 were consolidated for hearing.

Each of the appellants was convicted of robbery contrary to section 296(1) of the Penal Code and sentenced to serve 6 years in prison and to receive 6 strokes of the cane.

Appellant in appeal No, 1072/2000, Peter Kyulu Mwangangi was the first accused in the lower court while appellant in appeal No. 1070/2000 was the second accused in the lower court. He is Mustapher Saad Dafalla.

I will refer where appropriate to the appellants in their numbers in the lower court.

The appellants have appealed against both conviction and sentence. Briefly the prosecution case was that the complainant PUSHPA VYAS had employed the first accused as a shamba boy. On 9th day of January, 2000, the complainant was in her house at Langata performing her house chores. The first accused was working outside. At around 10.10 a. m., the first accused told the complainant to open the door. She opened the door and two men entered very first. They closed her mouth and held her neck. They tied her up and locked her in the bathroom. They stole Kshs.90,000/= and 500 US dollars and jewellery. They also stole other things as shown in the charge sheet.

The first accused apparently did nothing to assist his employer.

The complainant was able to untie herself and went outside. She called the first accused but he was nowhere to be seen. The complainant then called a neighbour. Her daughter and her house – maid were called.

The matter was reported to the police. Investigations started. The first accused who had ran away from his employment was arrested on 24th January, 2000 near Kenyatta National Hospital. A pair of shoes, travelling bag, and a camera were recovered from the first accused.

The first accused directed the police to where the other suspects were. The second accused was arrested. A video camera and charger were recovered from him.

Both were charged with another who was acquitted and dealt with as earlier stated at the beginning of this

judgement.

When put on his defence, the first accused admitted that he worked for the complainant but went home on 19th January, 2000. He was arrested when coming back. He did not know anything about the robbery.

The second accused said that he was arrested as he had no identity card. He was shocked when he was charged with an offence he did not know.

The learned Magistrate did not and in my view rightly so, find favour with the defence put forward by the appellants.

I have evaluated the record on my own. I find like the learned Magistrate that the first accused conduct did not only raise suspicion. It showed that he was part of the gang that committed the robbery. He asked the complainant to open the door. If he was under duress, he should have acted immediately he was free. He also ran away from his employment.

There is also the issue of the stolen items. Each of the appellants were found with the stolen items. As the learned Magistrate correctly said none of the appellants wished to touch on the issue in their respective defences. The recoveries were made about 4 days after the robbery. In the

“evidence for magistrates part 1”

at P.67, it said noted; “The fact that an accused person is found in possession of recently stolen goods may be evidence of crimes other than those constituting receiving or theft of the goods.”

In Republic versus Macharia s/o Kichuki 22(2) K. L. R. 50, the accused a taxi driver was found in possession of stolen generators and other property, locked in the boot of his vehicle, only twelve hours after the property had been stolen. It was held that it could legitimately be inferred that the driver was guilty of the theft.

Having so considered the record, and the case law I find that the conviction of the appellants was safe. The appellants were lucky that the conviction was entered under section 296(1) of the Penal Code.

This is despite the fact that the ingredients of the offence under section 296(2) of the Penal Code had been proved. The sentence imposed on the appellants in not manifestly excessive.

I find no merits in the appellant’s appeals. The same are dismissed on their entirety.

Dated and delivered at Nairobi this 31st day of January, 2002.

**D. M. RIMITA**

**JUDGE**