



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO.77 OF 2002

JOHN NDEGWA NJUGUNA.....1ST APPELLANT

(Original Accused No.1)

=V E R S U S=

REPUBLICRESPONENT

CONSOLIDATED WITH

CRIMINAL APPEAL NO.78 OF 2000

TITUS MWANGI.....2ND APPELLANT

(Original Accused No.2)

=V E R S U S=

REPUBLIC.....RESPONDENT

(From Original Conviction and Sentence in Criminal Case no.4008 of 2000 of the Resident Magistrate's Court at Mombasa –K. Muneeni, Esq., - RM)

JUDGMENT OF COURT

The two Appellants above were jointly charged with others who may not have appealed, with the offence of conveying suspected stolen property contrary to Section 323 of the Penal Code and Escape from Lawful Custody contrary to Section 123 of the Penal Code. They were found not guilty under the 2nd Count but were convicted on the first one. They each appealed against conviction and sentence through their advocate Mr. Magolo.

After Mr. Magolo had addressed this court briefly the State Counsel Mr. Ogoti cut in and indicated that he does not at that stage wish to support the conviction. As a result Mr. Magolo terminated his arguments and both counsel left it to the court to write a judgment.

The facts were that the two Appellants and others numbering six, were said to be conveying properties suspected to be stolen. Six other persons were arrested in a Matatu motor vehicle carrying certain goods. They were arrested. The driver of the Matatu identified as KAH 671 Q on being questioned to give an explanation as to the goods the vehicle was carrying, stated that he was hired by the 1st and 2nd

Appellants herein. This led to the arrest of the Appellants elsewhere and at a different time. They were however charged with others who were arrested in the Matatu aforesaid. The two Appellants denied the charge of conveying the property. They nevertheless convicted.

It was not denied that the two Appellants were not in the material motor vehicle which was carrying the material properties suspected to have been stolen. It is also on the record that the only reason why the Appellants were later arrested was because the driver of the vehicle who was PW.1 in the case, mentioned their names. Clearly therefore, the two Accused were not found conveying the property in question, because they were not in the motor vehicle. Nor can the evidence of PW.1 who himself was in a position of an accomplice, be the basis of any conviction without corroboration from other independent evidence. These circumstances should have been taken into account by the trial Magistrate when considering whether or not the requirements of S.323 of the Penal Code as read with S.26 of the Criminal Procedure Code have been fulfilled. He failed to do so and if he did so he glaringly came to a wrong conclusion which must be interfered with.

Since the State Counsel for the Respondent does not support the conviction, I hold that the trial Magistrate erred in convicting the two Appellants. I therefore quash the conviction and set aside the sentence of two years.

The Appellants in Criminal Appeals 77 of 2002 and 78 of 2002 are hereby set at liberty forthwith unless otherwise lawfully kept in prison.

It is so ordered.

Dated and delivered at Mombasa this 30th day of May, 2002.

D.A. ONYANCHA

J U D G E