

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO 898 OF 2001

(From original conviction and sentence in Criminal case no.311 of 2000 of the Principal Magistrate's Court at Nairobi) R. A MUTOKA (MRS) Esq

JOHN KIMATHI MBUTHIA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

The appellant John Kimathi Mbutia was charged jointly with others with the offence of stealing goods in transit c/s 279 (c) of the Penal Code. After a full trial, the appellant was convicted and placed on one year probation period. Being aggrieved by the said conviction he lodged an appeal.

As the first appellate court, it is my duty to re-evaluate the entire evidence and come to an independent conclusion. This I have done. At the hearing of the appeal, the learned counsel for the republic conceded the appeal and with respect I agree. Following that concession, it is not necessary to set out in detail the evidence that exonerated the appellant save to point out the salient points thereof.

For the offence of stealing to be proved, there must be evidence adduced that the subject matter alleged to have been stolen was moved and that it was the accused who did so. In this regard, the evidence of Pw5 and pw7 was instructive. In the first place the appellant was not found with anything incriminating, or linked to the stolen subject matter.

The goods stolen we said to be in a container at Jomo Kenyatta International Airport. The container was handled by many people but when it came to the evidence that tended to link the appellant with the said container, the evidence of Pw7 was that the said container was empty and nowhere was it suggested that, it was the appellant who emptied it of its contents.

The conclusion by the learned trial magistrate that the container was not empty is not supported by any evidence and the observation by counsel that the court turned into a prosecution witness may be justified. The appellant was also described by the learned trial magistrate as the chief player yet, with respect, no justification can be found for that observation.

The conviction in my judgment was most unsafe in the circumstances of this case.

Accordingly, this appeal is allowed, conviction quashed and sentence set aside.

Orders accordingly.

Dated and delivered at Nairobi this 29th day of May 2002

A. MBOGHOLI MSAGHA

JUDGE