



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**APPELLATE SIDE**

**CRIMINAL APPEAL NO.235 OF 2001**

(Being an Appeal from Original Conviction and Sentence in Criminal Case No.33 of 2001 of the Senior Resident Magistrate's Court at Taveta – G.M.Gogwe, D.M.I)

GEORGE MSAFARI KISANJE ..... APPELLANT

Versus

REPUBLIC ..... RESPONDENT

**JUDGMENT**

The Appellant was convicted and sentenced for an offence of Burglary contrary to Section 304(1)(2)(a) and stealing contrary to Section 279(b) of the Penal Code.

The prosecution evidence is that on 23/8/2000 according to charge sheet but on 8/8/2000 according to evidence (PW.2) appellant with others broke into the house of the complainant and stole certain items listed in the charge sheet the property of the complainant.

The arrest was made on 24/12/2000 after a period of 4 months from the date of offence. The evidence against the appellant is that a bicycle and a mattress part of stolen goods were found in his shamba.

On 30/12/2000 the bicycle was found in the shamba of the appellant. At the time the bicycle was found a co-accused was found with it and he was arrested. He was 3rd accused in the lower court. A search on the same shamba yielded a mattress which was collected from the bush. By this time the appellant was already in custody since 24/12/2000 for a different matter. The only evidence to connect the accused with the offence of burglary and theft was that of the goods found in the bush in his shamba the bicycle and mattress. It is also alleged that the appellant's wife said the items were brought into the garden by accused. This is hearsay evidence since the lady was not called to give evidence in court.

The other evidence is that the co-accused Kimae Kioko said in his defence that the goods were stolen by the appellant.

No one saw the appellant break into the complainant's house or taking away the stolen goods. The goods were found 4 months after the theft. This period is too long to give rise to the doctrine of recent possession. As for retaining the mattress was found in the bush. Did the appellant know that it was in the bush in his shamba? The bicycle was said to have been hidden under a mango tree in the same shamba by the co-accused. Can the appellant be blamed for it. Did he know it was hidden there. A search in the house of the accused yielded no stolen items. The co-accused was said to be a brother in law of the appellant. He had access to the Appellant's shamba. He is the only one connected with the stolen goods.

In my opinion the conviction of the appellant was based on hearsay evidence and also on the tainted evidence of the co-accused. The conviction cannot therefore stand. The appeal is allowed. The appellant shall be set free forthwith unless detained for any lawful cause.

**Dated at Mombasa this 22nd Day of May, 2002.**

**J. KHAMINWA**

**COMMISSIONER OF ASSIZE**

Read in presence of Appellant and State Counsel.

**J. KHAMINWA**

**COMMISSIONER OF ASSIZE**