



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT MOMBASA  
APPELLATE SIDE**

**CRIMINAL APPEAL NO.1 OF 2001**

**MWADZUMA MWABWANGA JULO ..... APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

**CONSOLIDATED WITH**

**RAMADHAN MUYAKA PATO ..... APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

**(Being appeals from Original Conviction and Sentence in Criminal Case  
No.270 of 2000 of the Resident Magistrate's Court at Kaloleni. Muneeni)**

**JUDGMENT**

The two appeals were consolidated at the request of State Counsel and there being no objection from Appellants.

The appellants were represented by counsel.

The evidence before the court is that PW.1 Muigai, was informed that there was theft of ingots from his employer's factory. He checked the stock and confirmed theft. The ingots stolen were 52 valued at Shs.168,,636/-. He was told that some people were arrested loading ingots. He did not see them. He confirmed 42 pieces of aluminum ingots were recovered only 10 were missing. Further PW.2 said that on 17.3.2000 at 5 p.m. he was in Changamwe. He was asked by Mwadzuma Mwabwaga Julu first appellant, to collect some scrap metal from Mariakani. He was paid Shs.1,000/- deposit of the agreed charge of Shs.2,500/-. The appellant told this witness that he had been sent by his colleague.

On 24.6.2000 (this must be a mistake since the witness was giving evidence on 31.5.2000) This must be the second time when this witness says he saw the aluminium ingots and he and first and second appellant boarded the vehicle and police officers met and stopped them, and they were arrested and taken to police station.

On 17.3.2000 PW.3 said he arrested Ramadhan Mohamed and on 23.3.2000 he with other officers intercepted a motor vehicle KYS.223 Mazda Pick-up. It was carrying others who escaped but he arrested the two appellants. There were ingots in the pick-up. On the this occasion he recovered 6 weights. From the above it will be observed that although PW.2 was arrested with the accused he turned police witness. The ingots were found in his vehicle and he must have been anxious to clear himself. His evidence must be taken with caution. This witness is the only one who implicated the appellants. The police corporal PW.3 could not have interrogated the Appellants without applying the usual caution. He already knew that there was theft at Kaluworks factory. He says of the people who were around he managed to arrest the two appellants. The prosecution shows that theft occurred on 23/3/2000 when the appellants were arrested and ingots found in the pickup of the PW.2.

No evidence shows that there was theft on 17/3/2000. The charge of theft on the charge sheet is not proved. It is said there was another case of theft of the ingots committed.

In my view the evidence against the appellants given by the PW.2 is not safe without corroboration. He was highly involved the ingots having been found in his vehicle. The corroboration cannot be found in the evidence of PW.3 who says there were many people contrary to what PW.2 says that they were only three and it is clear the appellants were arrested after a chase "we managed to arrest the two accused" It does not show that they were arrested from the pickup.

In his judgment the learned magistrate was influenced by the fact that he was aware that the other person charged jointly with the appellants not in this trial had already been convicted. This was prejudicial to the trial of the appellants.

The charge sheet is also defective. The handling charge should be an alternative to the stealing of the same goods. In the present case stealing is not proved at all.

In the circumstances I find the evidence relied upon by the trial magistrate is not safe upon which to base a conviction. I therefore quash the conviction and set aside sentence. The appellants shall be released at one unless otherwise lawfully held.

**Dated at Mombasa this 2nd Day of October  
2001.**

**J. KHAMINWA**

**COMMISSIONER OF ASSIZE**

Read in court before:

Mr. Gum - State Counsel.

Mr. Magollo for Appellants.

**J. KHAMINWA**

**COMMISSIONER OF ASSIZE**