

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 526 OF 2000

(From the Original Conviction and Sentence in Criminal Case No.248 of the Resident Magistrate Court at Kaloleni –K. Muneeni, Esq. –R.M.)

KAINGU KARISA KAPHINGO APPELLANT

VERSUS

REPUBLICRESPONDENT

JUDGEMENT

The Appellant was with another in the lower court, charged with the offence of School Breaking and committing a felony contrary to section 306 (a) of the Penal Code. He was found guilty and convicted and sentenced to imprisonment of three years plus two strokes of the cane. He was dissatisfied with both the conviction and sentence and appealed to this court against both.

The facts of the case are as follows: That on the 24.5.1999 some unknown persons broke into Mnazi Mwenga primary School and stole some iron sheets and several timber pieces. It is in evidence that the Appellant and another were suspected to be the culprits. There was no eye witness. The Headmaster of the school directed Administration Police Constables to the accused's home. There they recovered one iron sheet and one piece of timber. The witnesses claimed both were part of the stolen goods and the accused and his brother who was acquitted during the trial in the lower court, were arrested and charged.

There was no proper identification of the recovered goods which could easily on the other hand, have belonged to the Appellant. The Appellant suggested during the trial that the school Head master sold some of the iron sheets and pieces of timber to him and this suggestion was admitted by PW5 John Mulewa under cross-examination. PW 4, a Police Officer who did part of the investigation asserted that the pieces of timber he saw at the accused's home which were being claimed to belong to the school were really too heavy to be carried from the school to the house of the Appellant where they were found by the witnesses.

The State Counsel for the Republic could not support the conviction. Indeed the evidence on record was not sufficient to enable sustain the conviction. The prosecution did not, considering all the evidence on the record, discharge the burden of proof that lay upon it. The trial magistrate therefore erred in failing to hold any weakness in the prosecution case in favour of the accused. He thus erred in law. Had he carefully considered the issues raised herein above and weighed them in accordance with the laid down principles of law, he would not have come to the conclusion that he did. This court does not support his conclusions. Nor does the State Counsel.

This court accordingly immediately quashed the conviction against the Appellant on the 7.11.2001 and also set aside the sentence meted against the Appellant. He was set at liberty unless lawfully held, with orders that the grounds for such orders would be read in this judgement. This, I have done in this Judgment.

Dated and delivered at Mombasa the 16th day of November 2001.

D. A. ONYANCHA

JUDGE