



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

APPELLATE SIDE

CRIMINAL APPEAL NO.407 OF 1999

IBRAHIM KOMBO APPELLANT

CONSOLIDATED WITH CRIMINAL APPEAL NO.408 OF 1999

MUTINDA KAWEKE APPELLANT

- VERSUS -

REPUBLIC RESPONDENT

(From Original Conviction and Sentence in Criminal Case No.674 of 1999 of the

Chief Magistrate's Court at Mombasa –B. Maloba, SRM)

J U D G E M E N T

Appellants with 3 others were charged with school breaking and stealing contrary to section 306(a) of Penal Code. It was said that on 19-20/6/1997 within Kwale District with others they broke into and entered Gulanze Polytechnic and stole from therein 4 heads of sewing machine valued at KShs.180,000/-. They was tried and convicted and were sentenced to 3 years with 2 strokes of the cane. During the cause of trial PW.7 IP James Mbaite who recorded statement under inquiry was giving evidence saying the appellant refused to sign his statement but before producing same the appellant objected to its being produced whereupon the learned magistrate set the matter for trial within a trial for 15-10-99 but on that day the witness did not come to court and the prosecution case closed. But in the judgement the Learned Snr. Resident Magistrate referred to the same statement saying it had been produced as Ex.2 by PW.7. There is no such fact on record as what is there is that on the day the statement was to be admitted or rejected the witness did not come to court. The Learned Snr. Resident Magistrate's omission or confusion or whatever it is makes the record completely inadequate. The Snr. State Counsel Mrs. Mwangi while prosecuting this appeal rightly conceded the appeal and said that the mistake could not be cured under S.382 of Criminal Procedure Code, but she has asked for a retrial.

The appellant said from the bar that his case has been withdrawn twice under S.87A of Criminal Procedure Code and that he had been re-arrested and re-charged twice before and that he had been in custody since 1997. This applies to both of them as these appeals are consolidated.

Normally re-trial can be ordered where and only where original trial is either illegal or defective but it should be ordered only for interest of justice and is not justified and ought not be ordered where it will

create injustice to appellant.]

Here the judgement was completely illegal and null and is what should justify a retrial, but I take it that the appellant has been in custody for almost three years and I agree with him that he has been discharged and re-arrested two times. It is like a cat and mouse game. It gives no good picture for judicial justice. To order a re-trial would make them suffer double jeopardy and reeks of unfairness.

I quash the conviction, set aside the sentences and set appellants free unless otherwise lawfully held.

Dated this 8th Day of September, 2000.

A.I. HAYANGA

JUDGE

Read in open Court before:

1. Miss Kwena, Snr. State Counsel for State.
2. Two appellants – present.

A.I. HAYANGA

JUDGE