REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIM APP 200 OF 92

Chege v Republic

Mbaluto J

March 8, 1992,

Mbaluto J delivered the following Judgment.

The appellant was convicted in the court below on one count of theft contrary to section 275 of the Penal Code and was sentenced to 2 years imprisonment; he was also convicted on another count of theft in a dwelling house contrary to section 279(b) of the same code and was sentence to 2 years imprisonment together with 4 strokes of the cane. He now appeals to this court against conviction and sentence. As regards the conviction under section 275 of the penal Code there was clear evidence that the appellant was seen carrying the appellant's tool box on the date it went missing. Indeed one for the persons who assisted him carrying it was an unsuspecting witness (PW.4) who thought the appellant was the owner of the tool box. His defence to the effect that he had nothing to do with the offence was properly rejected by the learned trial magistrate. His grounds of appeal against conviction on that count has no merit.

The conviction of the appellant on count two solely depended on circumstantial evidence which did not irresistibly point to the appellant as the thief. Mary Wanjiru (PW.6) who was the complainant's girl friend had an opportunity to steal the money. The possibility that she was the thief was not ruled out. In those circumstances the test set out in the case of R. v Kipkering Arap Koske, and Another (1949) 16 E.AR.A. 135) that:- "That in order to justify, on circumstantial evidence, the inference of guilty, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt, and the burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any reasonable hypothesis of innocence is always on the prosecution and never shifts to the accused."

Was not in my view satisfied. The conviction of the appellant on count two was unsafe. With regard to the sentence meted out on count one, it cannot be said that 2 years imprisonment was in the circumstances of this case either harsh or excessive. The appeal against conviction and sentence on count two is allowed, conviction quashed and sentence set aside, but the appeal against conviction and sentence on count one is dismissed.