REPUBLIC OF KENYA

Koli v Republic

High Court, at Mombasa

May 4, 1992

Omolo J

Criminal Appeal No. 237 of 1991

May 4, 1992, **Omolo J** delivered the following Judgment.

Nyambu Ngerenyi Koli, the appellant herein, was after his trial before the resident Magistrate at Malindi, convicted on two counts, one of stealing contrary to Section 275 of the Penal Code and a second one of failing to apply to be registered contrary to Section 14(a) of the Registration of Persons Act, Cap.107 Laws of Kenya. On that second count there was absolutely no attempt by the prosecution to prove that the appellant had not registered himself in accordance with the provisions of the law. The only witness who testified on that charge was Constable Ndiema, PW.3, and in his evidence in chief all he said was that "the accused has not produced his identity card". It is not clear whether that meant that the constable had asked the appellant to produce his identity card and the appellant had failed to do so. In cross examination PW.3 stated that the appellant had told him that he (the appellant) had lost his identity card.It may be that the burden was on the appellant to prove that he had registered himself but before the appellant could discharge that burden there was equally a burden on the prosecution to show by some evidence that he appellant had not registered himself. Failure to produce an identity card may amount to evidence showing that a person has not registered himself, but it is not conclusive evidence of non registration particularly where it is alleged the identity card has been lost. So that before the appellant was called upon to defend himself and discharge the burden, the prosecution had to lay a basis for their contention that the appellant had not registered himself, i.e. the prosecution had to take away from the appellant the presumption of his innocence. They failed to do so. The charge of failing to register is not supported by the Republic and I accordingly quash the conviction on that charge and set aside the sentence imposed thereon.

On the first charge of stealing a bicycle belonging to Alex Morris Wanje (PW.1); the bicycle was stolen on the 28th May, 1991, and this was sometime after 10.30 a.m., and later that day PW.1 and his brother Daniel Karisa Wanje (PW.2) came upon the appellant riding the bicycle. The appellant's contention was that he had received it from one Kazungu. It is unlikely that Kazungu would have stolen the bicycle that morning and later that day given it to the appellant. From his unsworn statement, the appellant would appear to be saying that he received the bicycle from Kazungu before the 28th May, 1991, but that cannot be right because the same was stolen from PW.1 on the 28th May, 1991. The magistrate was right to conclude on the evidence before him that the appellant's possession of the bicycle was so recent that he could not have received it from any other person, and that the appellant was in fact the thief. The prosecution evidence proved that charge of theft beyond any reasonable doubt, and I accordingly dismiss the appellant's appeal on the same. The sentence of 12 months imprisonment is not excessive or harsh. I dismiss the appeal against sentence as well.