



**REPUBLIC OF KEYA**

**Kastelo v Republic**

**High Court, at Mombasa**

**May 6, 1992**

**Omolo J**

**Criminal Appeal No. 476 of 1991**

May 6, 1992, **Omolo J** delivered the following Judgment.

The appeals of Lucas Safari Kastelo (1st Appellant) and Maganga Zefu Huza (2nd Appellant) were consolidated. The charge against them in the court of the Magistrate was stated to be Preparation to Commit a Felony Contrary to Section 308(2) of the Penal Code, and the particulars given were that on the 23rd October, 1991 at 11.30 p.m. at Malindi township, the two appellants were jointly found not at their place of abode, and they had with them articles for use in the course of or in connection with burglary viz. one iron cutter, one panga, one 7-Up and one kitchen knife.

The evidence of the prosecution as stated by PC. Titus Mukina (PW.1) and PC. Mohamed Koja (PW.2) was that on the 23rd October, 1991 at about 10.30 p.m. they were on patrol duties within Malindi town and that at about 11.30 p.m. they headed towards Kisumu Ndogo. Near Malindi Inn, they saw two people standing in the bush in the darkness and they stopped their vehicle. When the two people in the bush saw them, one started to run away but one remained behind. The person who remained behind was the 2nd appellant, while the one who ran away was the 1st appellant. When the 2nd appellant was asked to come by PW.1 and PW. 2 he also started to run away. They chased him and caught him. They took him back to where he had run from and according to the two officers they recovered a metal cutter, a knife, an iron bar and a panga. These items were produced before the magistrate as exhibits 1-4 respectively. It is noteworthy that in their evidence the officers did not mention anything about a "seven-Up", whatever that may mean. The 2nd appellant subsequently led the officers to the house of the 1st appellant who was then arrested. The defence of the 1st appellant was that on that day he was coming from Barani and took the Kisumu Ndogo road. On the way he noticed a vehicle and he gave it way to pass. It approached him and stopped near him. He was beckoned by the driver and when he approached them the driver questioned him about what he was carrying. He stated that he was carrying his tools of trade which included a metal cutter – Exhibit 1. He was ordered inside the vehicle and arrested. The police then took him to the police station and interrogated him about the metal cutter. He was taken to his house which had two rooms. One of those rooms was occupied by the 1st appellant. The police searched his room and found a knife, an iron bar and a panga. He and the 1st appellant were then arrested. The 1st appellant stated in his evidence that the police went to his house and found him asleep. The police were accompanied by the 2nd appellant. They arrested and charged him.

The magistrate believed the two police officers and disbelieved the sworn evidence of the two appellants. As I have pointed out however, the police did not mention anything about an iron bar in their charge sheet. They only mentioned an iron cutter, one panga, a sevenup and a kitchen knife. The seven-up was never mentioned in the evidence of any of the two officers. They explained that the 2nd appellant led them to the house of the 1st appellant, but they did not say whether that house was in the same compound with that of the 2nd appellant. It has to be remembered that both the appellants contended that they lived in one compound and the 2nd appellant said he was taken to his house and not that he was leading the police to the 1st appellant. Again the prosecution did not attempt in the least to show that the items which they allegedly found the appellants with were for use in the course of or in connection with burglary. These items have their lawful uses; an iron cutter has other lawful uses just as a panga or a kitchen knife. The 2nd appellant admitted that he was found in possession of these things, but he called them his tools of trade, and that he was working as a Jua Kali artisan. There is nothing strange in working

under a tree as the 2nd appellant said he was doing, and in my view, the police should have attempted to show that these things could be adopted for use in a burglary, apart from their lawful uses. Even if the appellants had run away from the police, as they alleged, mere running away from the police, in the Kenyan circumstance, cannot be conclusive proof that the person so running away is necessarily guilty of some crime. The story given by the 2nd appellant had a ring of truth about it and it is to be noted that in their charge sheet, the police officers were not certain as to what articles they had found the appellants with. In my view the learned magistrate should have given the appellants the benefit of doubt and acquitted them. I quash the convictions recorded against each one of them, set aside the sentences imposed, and order that they be released from prison forthwith unless otherwise lawfully held.