

Temu v Republic

High Court, at Mombasa

July 9, 1992

Omolo J

Criminal Appeal No. 1 of 1992

July 9, 1992, **Omolo J** delivered the following Judgment.

I have consolidated the appeals of Alois Joseph Temu (1st Appellant) and Silvester Francis (2nd Appellant). During their trial before the District Magistrate at Taveta, the 1st Appellant was the 2nd accused, while the 2nd appellant was the first accused. On the 13 July, 1991, the house of Daniel Ngala Nzaku (PW.1) was broken into and his bicycle – Road-master, by name, was stolen therefrom. There was no dispute before the magistrate that subsequent to that theft the second appellant sold that bicycle to Samson Kinaro (PW.2). The sale to PW.2 was on the 2nd October, 1991, which was nearly 3 months from the date of the theft from the house of PW.1. The prosecution's case was that both appellants broke into the house of the complainant, and that was why the 2nd appellant was able to sell the same bicycle to PW.2 on 2nd October, 1991. The evidence connecting the 1st appellant with the theft of the bicycle was that Rose Masawe (PW.3) Mary Daniel (PW.4), Goodluck Augusta (PW.5) and to some extent, that of Francis Hemed (DW.3) who was the father of the 2nd appellant, and Rosalia Francis (DW.4), the mother of the 2nd appellant. All those witnesses stated in their evidence that sometimes in September 1991, the 1st appellant took the bicycle to the 2nd appellant. The 2nd appellant was then in his shamba watering his tomatoes with PW.5. The witnesses thought that the bicycle in court was the same one which the 1st appellant had taken to the 2nd appellant. It is not clear why the 1st appellant was taking the bicycle to the 2nd appellant. The 2nd appellant also said it was the first appellant who took the bicycle to him. The 1st appellant denied before the magistrate that he ever did anything of that sort. It appears that the learned magistrate did not wholly believe the witnesses who said that it was the 1st appellant who took the bicycle to the 2nd appellant; for if the magistrate had believed them, he would obviously have acquitted the 2nd appellant. He however convicted both of them, and to some extent that must mean he believed the 2nd appellant was also involved in the theft of the bicycle with the 1st appellant. It is the magistrate who saw and heard the witnesses give evidence before him, and it would be difficult for me to interfere with him on that finding. That leaves me in a position that it is one appellant blaming the other over the offence, and there seems to be no way in which I can resolve that dispute. Had the magistrate believed the witnesses who supported the 2nd appellant, he would have acquitted the 2nd appellant and I would have fully supported him. Mr. Metho for the Republic, takes the same position by not supporting the conviction of the 2nd appellant. I do not think it would be right for me at this stage, to believe one appellant with his witnesses who were not fully believed by the magistrate, and reject the claim of the other appellant. As I have said, what I have before me is the word of one appellant against the other, and in those circumstances, I must resolve the benefit of doubt in favour of both appellants, and allow their appeals. Accordingly I allow the appeals against the convictions, quash those convictions and set aside the sentences imposed on both appellants. They are to be set at liberty forthwith unless otherwise lawfully held.