



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CRIMINAL APPEALS NOS 586 AND 605 OF 1988 (CONSOLIDATED)
BETWEEN
MAITHA & ANOTHER APPELLANT
AND
REPUBLIC.....RESPONDENT

JUDGMENT

(Appeals from Original Conviction and Sentence of the Principal Magistrate's Court at Mombasa, J Manyasi, Esq, Ag R M in Criminal Case No 2022 of 1988)

June 9, 1989, **Githinji J** delivered the following judgment.

The appellant in this criminal appeal was the first accused in the trial and I will refer to him in this appeal as the first appellant. Appellant in criminal appeal No 605/88 was the second accused in the trial and is hereinafter referred to as the second appellant.

The two appeals have been consolidated for purposes of judgment.

Both were convicted for the offence of burglary and stealing contrary to section 304(2) and 279(b) of the Penal Code.

Each was sentenced to 21/2 years imprisonment and 2 strokes of the cane on each limb of the charge to run concurrently. Each was also convicted of the offence of being in possession of offensive weapon contrary to section 11(1) and 5 of L N 264/63 – and sentenced to 6 months imprisonment.

Each appeals against conviction and sentence.

The complainant's house was broken into in his absence on 29/6/88 between 8 pm and 12 midnight. All his things including a mattress, bed, 2 pillows and 2 bed-sheets were stolen. On the following day 30/6/88 at about 4 p.m., some of the complainant's stolen properties were recovered in the house of the first appellant.

The first appellant in unsworn statement explained that the goods were brought to his house by the second appellant on 30/6/88 at about 2 pm; that 2nd appellant told him that he had been evicted from his house and wanted first appellant to keep the things as 2nd appellant looked for another house; that he agreed to keep them; that 2nd appellant then left and came back in the evening and slept in the first appellant's

house; that on the following morning both left for work and when he returned at 4 pm police went to his house and in presence of 2nd appellant told police that the things belonged to 2nd appellant; that the second appellant became worried and denied the items were his.

The 2nd appellant also in an unsworn statement stated that he went to house of first appellant on 30/6/88 and found him with the police. They were then taken to police station and later police went away with first appellant and came back with things.

The first appellant called one Omari Abdalla (DW 1) as a witness. DW 1 testified that first accused is his tenant and one day at 2 pm he saw the 2nd appellant take a bed and a mattress to the house of the first appellant. In cross-examination DW 1 testified that the things stayed in the house of first appellant for 2-3 days.

In short Mr Gatonye for the first appellant argues that there was no evidence to connect first appellant with offence of burglary and stealing; that learned magistrate failed to consider evidence of DW1 and that the first appellant defence was not considered.

Mr Metho for the State concedes the appeal by the first appellant and states that considering all the evidence and nature of items the learned magistrate could have come to the conclusion that the items were taken to first appellant's house by the 2nd appellant.

The appeal of the 2nd appellant was argued later and Mr Metho submitted that the conviction of 2nd appellant was unsafe as DW 1 did not clearly link 2nd appellant with goods.

The learned magistrate considered the evidence and found that both the appellants were in joint possession of the stolen goods and further stated that the fact that each of them tried to throw blame on the other shows that each of them was involved in the offence.

There was ample evidence that the complainant's home was broken into on 29/6/88 between 8 pm and 12 midnight. There was also ample evidence that properties were stolen and that on the following morning the complainant reported to Likoni Police Station. It was not disputed that a bed, mattress, 3 bed-sheets and 2 pillows were recovered in the house of first appellant on the following day – 30/6/88 at about 4 pm. Those properties were identified by complainant as his. Musau Mukanda (PW 2) also identified the goods as those of complainant.

The first appellant accepted that the goods were found in his house but claimed that they were taken there by the 2nd appellant on 31/6/88.

Is the explanation of first appellant as to how he came in possession of the goods true?

Firstly, 31/6/88 which date first appellant states the goods were taken to him does not exist. If he made an error on the date, then his statement of defence shows that the goods were taken to him a day before the arrest at 2 pm. The goods stolen on night of 29/6/88 between 8 pm and 12 midnight and were recovered on 30/6/88 at about 4 pm. First appellant was arrested at about 4 pm on 30/6/88. From the statement of defence of the first appellant, the goods could only have been taken to his house on 29/6/88 at 2 pm. That cannot be true because on 29/6/88 at 2 pm, the goods had not been stolen. The evidence of Omari Abdalla (DW 1) does not say the day the 2nd accused bought the goods but says that they were in the first appellant's house for 2-3 days. DW 1 had heard the prosecution evidence as he was seated in court before he was called as a witness.

If the goods were brought to first appellant's house 2-3 days before recovery on 30/6/88, then they were brought to first appellant's house before 29/6/88 and therefore before they were stolen. Further, as DW 1 did not witness the burglary, he would not know whether first appellant was involved or not. It is possible for both first and 2nd appellant to have been involved, then hide the goods and 2nd appellant to collect them later and take them to first appellant's house. Further the statement of first appellant that 2nd appellant took the things there is inconsistent with what he told PW 1 and PW 3 that he had bought the

goods from the second appellant.

There was no evidence against the 2nd appellant other than being found in the house of first appellant. The unsworn statement of first appellant is no evidence against the second appellant. It is the first appellant who had the key to the house. There are no circumstances to show that the 2nd appellant had knowledge that the goods were in the first appellant's house or that he had given consent to first accused to keep them. Once the evidence of DW 1 falls as incredible, then no case is proved against 2nd appellant.

The first appellant was found in possession of goods less than 24 hours after they were stolen. The evidence shows that the house of complainant and that of the first appellant are both in Likoni. First appellant was recently in possession of stolen goods and the learned magistrate properly made an inference that he was the thief.

The second count is possession of offensive weapon "contrary to section 11(1) and 56 Legal Notice No 264/63."

That charge is fundamentally defective. Legal Notice 264/63 does not have S11 (1) and s 56. Further, Legal Notice 264/63 does not create an offence. It only declares that the provisions of S11 of Public Order Ordinance (Act) shall apply throughout Kenya in all hours of day and night. The case of *Uganda v Keneri Opidi*, [1965] EA 614, shows that such a charge is incurably defective.

Even if the framers of the charge intended to charge the appellants under S 11(1) of Public Order Act (Cap 56), possession of offensive weapon is only an offence if the appellants had the offensive weapon in a street or public place. The evidence is that the iron bar was found in the locked house of the first appellant.

The sentence of 21/2 years imposed against first appellant was not manifestly excessive.

For reasons stated above I dismiss appeal against first appellant against conviction and sentence for the offence of burglary and stealing but allow his appeal against conviction and sentence for the offence of being in possession of offensive weapon – quash that conviction and set aside the sentence.

The appeals against 2nd appellant in both counts are allowed, convictions ashed and sentences set aside. 2nd appellant to be set at liberty forthwith unless lawfully held for another offence.

Dated and delivered at Mombasa this 9th day of June , 1989

E.M GITHINJI

JUDGE