IN THE COURT OF APPEAL

AT KISUMU

(Coram: Masime, Gicheru & Kwach, JJA)

CRIMINAL APPEAL 126 OF 1989

Between

PIUS MAINGI KINOI..... APPELLANT

AND

REPUBLIC.....RESPONDENT

JUDGMENT

December 7, 1989, Masime, Gicheru & Kwach, JJA, delivered the following judgment.

Pius Maingi Kinoi, the appellant in this appeal (hereinafter called "the appellant") was convicted by the District Magistrate, Webuye, of burglary and stealing and being in possession of a small quantity of bang (cannabis sativa). He was given a prison term of 6 months together with one stroke of the cane for burglary, and 3 months for stealing, which were ordered to run consecutively. On the charge of possession of bhang, he was fined Kshs 600 or 3 months' imprisonment in default to run consecutively with the terms imposed for burglary and stealing. His appeal to the High Court against both conviction and sentence was dismissed as the judge agreed with the findings of fact reached by the trial magistrate.

The facts as found by the trial magistrate can be briefly stated. The appellant and the complainant were policemen and were both residing at the Webuye police lines. They are both Kambas and were also friends. The complainant had a civilian brother staying with him in whose box the complainant kept the money which the appellant is alleged to have stolen. Although items belonging to the complainant's brother were also kept in this box, it was always locked and the complainant kept the keys. On the fateful day, the appellant, appellant's girl friend and the complainant went for a drink at one of the bars in Webuye and as things turned out, the appellant was short of money and asked the complainant to lend him Kshs 100. As a result of this request, both the complainant and the appellant returned to the complainant's house where, in the presence and full view of he appellant, the complainant opened the box and took out a hundred shilling note from a bundle containing Kshs 7,600. He put back the rest, locked the box, and together with the appellant, they returned to town to continue with their drinking. Although the appellant has asked for alone, for some reason the complainant changed his mind about this and decided instead that he would pay for the drinks himself instead of lending the appellant the money. At the end of the evening the complainant returned to his house but before he retired, the appellant knocked his bedroom widow and persuaded him to dress up and return to town ostensibly to meet some friends from Malakisi who were in town and desired to see him. The friends from Malakisi were not traced but when the complainant returned to his house finally he returned in without checking to see if the box containing the money was in place or not; he had no reason to.Apparently, the following morning his brother asked him for the key to the box which he gave him. At that state it was discovered that the box

and its contents including the sum of Kshs 7,500, had disappeared. The theft was reported to the police and inquiries began at once. The complainant made it plain that the appellant was the suspect.

The basis for the complainant's suspicion was that the appellant knew he had the money and had actually seen it earlier the same evening; that the appellant had led him to a false rendezvous with the friends from Malakisi in order to offord the appellant an opportunity of returning to the house to steal the money; and that when the complainant was returning to his house, he met the appellant walking back to town from the lines. The officer in charge of the station (OCS) carried out a search in the appellant's house which yielded a total of Kshs 3,424.30 and a small quantity of bhang in the pocket of a shirt which was found lying on the appellant's bed.

The appellant denied all these allegations and in relation to the bhang, he went so far as to suggest that it had been planted by the police. The trial magistrate correctly appreciated that the evidence against the appellant was purely circumstantial but in the ultimate analysis he came to the conclusion that it was good enough to sustain the appellant's conviction on both counts.

At the hearing before the judge the learned state counsel did not support the conviction for burglary and stealing but he was overruled by the judge. Before us the learned principal state counsel has conceded the appeal not only in respect of burglary and stealing but also in respect of being found in possession of bhang. And having read the record ourselves and considered the evidence, we agree with him entirely.

In order to gain access into the complainant's bedroom and steal the money, the thief, whoever it was, removed one of the window panes which was then replaced after the event. Although this particular window pane was available to the police, for reasons which were never explained, it was never dusted for finger prints to determine whether the appellant was indeed involved in the burglary. As this elementary yet essential step was not taken, the trial magistrate's conclusion, which was endorsed b the High Court, that the inculpatory facts were incompatible with the innocence of the appellant and incapable of explanation upon any other reasonable hypothesis than that of the appellant's guilt, cannot, in the circumstances be correct. It s quite probable that the money could have been stolen by a person other than the appellant and the absence of finger print evidence makes this other hypothesis even more real. Secondly, as the appellant was not wearing the shirt in whose pocket the bhang was alleged to have been found, his contention that it had been planted by the police was not beyond the realms of possibility. In our view, if these possibilities had been taken into account it would have become immediately apparent to the trial and first appellate courts, that the circumstantial evidence against the appellant was inconclusive and incapable of sustaining a conviction on the charges laid.

The result is that we consider the appellant's conviction to be unsafe and we accordingly allow his appeal, quash the conviction on each count and set aside the sentences. As we have been informed that the appellant has already been released from prison having served the custodial sentences, an order for his release would be superfluous.

Date and delivered at Kisumu this 7th day of December , 1989

J.R.O MASIME

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JUDGE OF APPEAL

J.E GICHERU

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JUDGE OF APPEAL

R.O KWACH

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR