



REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CRIMINAL APPEAL NO 390 OF 1986

KAMAU NGATIA1ST APPELLANT

JULIUS MUNYIRI MITHANMO.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The two appeals are consolidated.

1st Appellant (Kamau Ngatia, Original 1st accused) was convicted of housebreaking contrary to section 304 (1) (a) of the Penal Code (Cap 63) and theft from dwelling house contrary to section 279(b) of the said code. He was sentenced to concurrent terms of imprisonment for 4 years on each limb and to 4 strokes on the second limb of the charge.

2nd Appellant (Julius Munyiri Mithamo, Original 3rd accused) was convicted of handling stolen property contrary to section 322 of the Penal Code and was sentenced to statutory minimum of 7 years imprisonment with hard labour.

On July 1st 1985, the complainant, found his gas cylinder missing in his father's house. He summoned his employee John Kinyua (PW 2) who said that he had seen another employee of the complainant called Stephen Kinyua (PW 3) and the 1st appellant carrying a cylinder on the way from the house of the complainant. The complainant summoned Stephen, who admitted that he and 1st appellant had taken the cylinder and sold it to 2nd appellant for Kshs 500. The complainant took Stephen and 1st appellant to Karatina police station. The cylinder which was recovered from the 2nd appellant was identified by the complainant, by the initials MN which stand for his name Michael Nyaga.

John Kinyua (PW 2) testified that on June 16, 1985 in the evening, he saw Stephen and 1st appellant carry the cylinder and thought that the complainant had sent Stephen and 1st appellant to collect the same. On July 1 1985, when complainant queried the missing cylinder, John told the complainant what he had seen. The complainant questioned Stephen who admitted that they took the cylinder. John identified the cylinder as similar to one in the court.

After John testified, Stephen who was the 2nd accused, indicated that he wished to change his plea; admitted the charge and was sentenced to 12 months' concurrent imprisonment on each limb with 2 strokes on the 2nd limb.

Stephen (PW 3) then testified and said that on June 16, 1985 during day time, 1st appellant approached him and told him that someone had asked him (1st appellant) to look for a cylinder. Then they removed a cylinder from the house, which he (Stephen) it from underneath the bed and handed it to 1st appellant who was standing outside the house. He identified the cylinder as one in court. When evening came, they (Stephen and 1st appellant) took the cylinder to the house of 2nd appellant, where 2nd appellant paid Kshs 500 to the 1st appellant after they discussed the price, though they did not tell 2nd appellant how they had obtained the cylinder. Later, when the complainant questioned him, he told him (the complainant) everything. He led the police to the house of the 2nd appellant but they did not get the cylinder there. Under cross-examination by the counsel for the 2nd appellant, Stephen claimed that 1st appellant told 2nd appellant where the cylinder had come from.

Constable Simon Bwaringa (PW 4) testified that the complainant brought 1st appellant and Stephen to the police station and reported the theft of the cylinder. He interrogated these two suspects who led the constable to the house of 2nd appellant, which was searched but the cylinder was not found. At the police station, 2nd appellant volunteered to take the police to where the cylinder was. He led the police to a coffee plantation about 200 yards from the house of 2nd appellant where he showed a hole, which was covered with grass. The 2nd appellant dug the hole and the cylinder was recovered.

1st appellant denied any dealing with the cylinder and suggested that Stephen mentioned his name to the complainant, because they used to meet quite often.

2nd appellant denied that the cylinder was recovered from his house. He called his mother to support his contention.

Mr Mahan for 1st appellant contends that because the 1st appellant stood outside the house, he is not an offender. With respect, I do not subscribe to the same. Under section 20 (b), (c) and (d) of the Penal Code, the 1st appellant was a principal offender, if the evidence adduced by the prosecution were to be accepted. I also do not accept Mr Mahan's contention that Stephen was not a competent witness. Although Stephen was an accomplice, his evidence was amply corroborated both by John Kinyua and the complainant. I also do not accept the submission that the cylinder was not properly identified. Having regard to all the evidence before the trial court, there was not doubt that the cylinder which was recovered by the police was the one which was stolen from the house of the complainant.

However, there was no evidence that the house of the complainant was broken into. Stephen was an employee of the complainant, who used to sweep the house. He found the door open, entered the house and stole the cylinder. In the circumstances, the conviction for housebreaking was not correct. I quash the conviction for housebreaking in respect of both the 1st appellant and Stephen.

I am satisfied that 1st appellant together with Stephen stole the gas cylinder from the house of the complainant, whose obvious value exceeds Kshs 100. In the event, I sustain the conviction of the 1st appellant for theft from dwelling house.

Stephen Kinyua, who pleaded guilty and co-operated with the police was sentenced to 12 months' imprisonment with 2 strokes, whilst 1st appellant who was found guilty after trial was sentenced to 4 years' imprisonment together with 4 strokes. The disparity between the two sentences is glaring. Of course, a person who pleads guilty and co-operates with police deserves to be treated with leniency. Equally, an accused person has inherent right to plead not guilty and require the state to prove the charge against him. The fact that an accused person had pleaded not guilty and is found guilty after trial, should not be considered as a factor to impose a sentence in excess of what ought to be a reasonable and just sentence. In the instant case, the stolen cylinder valued about Kshs 900 was recovered. 1st appellant was a first offender. In these circumstances, the sentence of 4 years imprisonment was manifestly disparate in comparison with the sentence meted out to Stephen.

Having regard to all the circumstances, I reduce the sentence of 1st appellant to 18 months' imprisonment together with 2 strokes.

The appeal of the 1st appellant is otherwise dismissed except to the extent of reduction of sentence as above.

As regards the 2nd appellant the learned trial magistrate misdirected himself in dwelling on the fact that the cylinder was sold to 2nd appellant's "at a throw away price". There was no evidence of the value of the gas cylinder, though the particulars of the charge stated that the value of the same was Kshs 900.

The cylinder was apparently second hand and the same was purchased by the 2nd appellant for Kshs 500. In the circumstances, it cannot be said that the cylinder was sold "at a throw away price".

Mr Mugu for the Republic contends that the 2nd appellant denied possession and therefore it was not an attitude of an innocent purchaser. The fact that an accused person has denied possession may not impute guilty knowledge at the time of acquiring possession. He may deny the possession when he realises that possession of a stolen article may land him in dire consequences. What must be established is whether the accused person had guilty knowledge when he received the stolen article. Mr Mugu further contends that the cylinder was found hidden in the coffee plantation which indicates that possession was not of an innocent purchaser. However, the learned trial magistrate did not direct his mind to this fact. It may be that the 2nd appellant hid the cylinder after he learnt that query was raised about the same.

I have anxiously pondered over this piece of evidence of the constable. I must give benefit of doubt to the 2nd appellant.

I am not satisfied that it would safe to sustain the conviction of the 2nd appellant. The same is quashed and so is the sentence passed thereon.

As the 2nd, appellant is on bail, he is discharged.

Dated and Delivered at Nyeri this 11th day of September, 1987

F.E ABDULLAH

JUDGE