



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL APPEAL NO 800 OF 1987

BETWEEN

MBARUA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

JUDGMENT

December 16, 1987 Porter J delivered the following Judgment.

The appellant was convicted in the court below jointly with another for theft by servant contrary to section 281 of the Penal Code.

He was convicted after trial, and sentenced to a fine of Kshs 1,000 in default 2 months imprisonment. He now appeals against conviction and sentence.

The property stolen was 2 Survey levels which were valued at Ksh 23,160.

They were recovered from a fish and chip shop in Nairobi, and there was evidence that the coaccused took them there. This was the basis upon which the 2nd accused was convicted, the only evidence against the appellant was that the 2nd accused made an unsworn statement and said that the appellant gave the things to him to carry to Nairobi and that he did not know what was in the cartons he was given.

The evidence of a coaccused cannot be used against the other accused if it is unsworn *Ozia v Rep* 1951 EA 36, cited in *Hasa v Republic* 1976 KLR 6. Indeed even even if the evidence is sworn it must be regarded with extreme caution if it is to be used against the co accused.

Nor can what the co accused told the police about another accused be used against that accused. (CA 82/83 unreported).

Where the confession is in a statement under caution, a statement which does not amount to a confession is only evidence against the maker. If it is a confession and implicates a co accused it may in a joint trial be "taken into consideration" against that co accused. It is however not only accomplice evidence but evidence of the weakest kind and can only be used as lending assurance to other evidence against the coaccused. In this case there was not sufficient evidence to convict the appellant. In addition to that there were many complicated problems as to ownership, employment and other matters which have been outlined by Mr Odero in his submission. This conviction was not safe. Learned State Counsel does not support it.

Appeal is allowed.

Conviction quashed and sentence set aside. Fine to be repaid to payee.

**December 16, 1987**

**PORTER**

**JUDGE**