REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL APPEAL NO'S 608 OF 1985 and 265 OF1986 (CONSOLIDATED)

1. JULIUS MUGO KIARIE

2. PETER MAINA NDIRANGU..APPELLANTS

VERSUS

REPUBLIC...RESPONDENT

JUDGMENT

The appeals of Julius Mugo Kiarie (1st Appellant) and Peter Maina Ndirangu (2nd Appellant) have been consolidated.

The appellants were, after trial, convicted of shop breaking and stealing contrary to section 306(a) and 279 of the Penal Code (cap 63) and each sentenced to 3 years imprisonment plus I stroke of the cane. They have appealed to this court against both conviction and sentence.

The learned state counsel, Mrs Njogu did not, quite properly in my view, seek to support the two convictions.

As regards the second appellant, the only evidence against him was that of his co-accused, the 1st appellant. This evidence was to the effect that it was the 2nd appellant who brought the stolen property to the 1st appellant who brought the stolen property to the 1st appellant. Counsel for the 1st appellant very graciously argued in favour of the 2nd appellant, that this appellant was not given an opportunity to cross-examine the 1st appellant after the latter had implicated him in the offence. A perusal of the record reveals that the 1st appellant was cross-examined by the prosecutor but it is silent on whether any opportunity was accorded the 2nd appellant to cross-examine him. There is therefore considerable doubt about this.

In the case of *Mattaka v Republic (1971) EA 495* the Court of Appeal held that refusal to allow cross-examination of the co-accused will ordinarily result in the quashing of the conviction where the trial court has relied on the evidence. In the instant case there was no formal refusal to allow the cross-examination but the 2nd appellant was unrepresented. Failure on the part of the trial magistrate to avail the 2nd appellant on his right to cross-examine the 1st appellant resulted in a miscarriage of Justice.

Regarding the 1st appellant it is on record that he was a tailor with a shop in Nakuru. In his defence this appellant stated that he had received the materials the subject matter of the charge from the 2nd appellant for the purpose of making clothes for the 2nd appellant and his brothers. It is not uncommon for tailors to receive from customers materials in such circumstances. This was therefore a probable defence which the trial magistrate could have considered. In his judgment the trial magistrate merely stated that it was unlikely, without giving any reasons, that the 2nd appellant would have taken Exhibit 1 – 7 to the shop of the 1st appellant without prior arrangement with him. There was of course no evidence of any prior arrangement between the two appellants and the basis of the trial magistrate’s statement would appear to be unclear.

All in all, the evidence against the two appellants was in my view of the weakest type and consequently their convictions on the charge of shop breaking and stealing was quite unsafe. I would therefore allow the appeals quash the conviction and set aside the sentences imposed on each of them. The appellants are

to be set free forthwith unless otherwise lawfully held.

Dated and Delivered in Nairobi this 27th day of August 1986.

T.MBALUTO

JUDGE