

REPUBLIC OF KENYA

Wairere v Republic

High Court, at Nairobi October 15, 1986

Mbaluto J, Bosire J

Criminal Appeal No 456 of 1986

October 15, 1986

Mbaluto J, Bosire J

Delivered the following Judgment.

In these consolidated appeals the two appellants were convicted of burglary contrary to section 304 (2) and stealing contrary to section 279 (b) of the Penal Code and each sentenced on the 1st limb of the offence to 3 years and 3 strokes and on the 2nd limb to two years and 2 strokes, the prison sentences to run concurrently. They have appealed against both the conviction and sentences.

In brief the case for the prosecution was that on March 16, 1985 at about 8.30 pm the complainant (PW 1) who lives in Maiihii village in Kiambu District was in the Kitchen with her children, having left the main house closed but unlocked. At about 9.00 pm she went to the main house to sleep and on reaching her room she found her Hitachi radio cassette missing. She screamed and neighbours came to her place. They searched around and saw some footmarks but could not trace the radio. They however recovered a radio knob inside the house and a battery cover for the radio outside the house. Later the complainant reported the theft to Kikuyu Police Station.

On March 21, 1985 Joseph Kinyanjui Thairu (PW 2) who lives in Gikambura village was approached by the two appellants. They wanted him to assist them get a buyer for a radio they had. PW 2 took the two appellants to Kawangware where they sold the radio for Kshs 900 to Ernest Karanja Kimani who was in the court below jointly charged with the two appellants but acquitted after the trial.

For the role he played in getting a buyer for the radio PW 2 was paid Kshs 100. On March 26, 1985, PW 2 led police constable Michael Kimandi (PW 3) to the house of Ernest Karanja Kimani who was later arrested and the radio recovered from him. The complainant identified the radio as the one stolen from her house on the material day. She noted that it did not have a knob and that the cover for the battery was missing.

Both appellants gave unsworn statements and called no witnesses. The 1st appellant said that he did not go out on the material night. As he was preparing to go to bed, he heard screams but since he was alone in the house he did not go out to find out what was happening. However, when his brother later came home, he informed him that the complainant's house had been broken into and her radio stolen. He was later arrested.

The second appellant said that on 21st he left work from Ukambani. He worked as a turn-boy. He went to the house of the complainant the following morning and she told him that her radio was stolen. He told her that he knew nothing about it. At about 11.00 pm police came and arrested him. They searched his house and recovered nothing.

In convicting the appellants the learned trial magistrate relied on the evidence of PW 2 whom he treated quite properly so in our view, as an accomplice. In a doing so he properly warned himself of the dangers of relying on the evidence of an accomplice but accepted it as truthful after finding that it fitted very well with the explanation given by Earnest Karanja Kimani (original 3rd accused). He also noted that there

was additional evidence which supported that of PW 2 and the explanation offered by original accused 3.

In his petition of appeal the 1st appellant claims that the evidence on the record showed that he was not present when the stolen radio was being sold and that he only accompanied the person who sold it. He also says that he was not involved in the party that stole the radio. The second appellant says that the radio was not found in his house and he was not involved.

Having reviewed and evaluated the evidence on record for ourselves, we are fully satisfied that there was ample evidence to support the conclusion that the magistrate arrived at in this case and that the conviction of the two appellants was sound. Firstly there is no doubt that on the date in question the complainant's radio cassette was stolen from her main house which she had left closed. According to the evidence of PW 2 whose evidence the learned trial magistrate found credible, though by an accomplice, the two appellants were in possession of the stolen radio on March 21, 1985 a mere 5 days after the theft. They then sold it to Earnest Karanja Kimani who was also charged with the offence but acquitted after explaining how he came to purchase the radio from the two appellants. The evidence of PW 2 was consistent and agreed in all material aspects with the explanation offered by Ernest Kimani. In our view therefore the unsworn statement of Ernest Kimani lends assurance to the evidence of PW 2. It was PW 2 who took the police to the place where the radio was sold and from where it was recovered. Having in our view properly warned himself of the dangers of relying in accomplice evidence, the learned trial magistrate was quite right in accepting as credible the evidence of PW 2. We are therefore satisfied that the two appellants were found in recent possession of the stolen radio and were properly convicted. They did not provide any explanation for the possession of the radio, their respective defences being mere denials of their involvement in the offence. These defences had no substance and were properly rejected by the learned trial magistrate. Their appeals against conviction have therefore no merit and are dismissed.

As regards sentence we note that the appellants were 1st offenders and each was sentenced to 3 years and 3 strokes in respect of the 1st limb of the offence on 2 years and 2 strokes in respect of the 2nd limb. Having anxiously considered the matter we cannot say that the sentences were harsh or excessive and we would also dismiss the appeals against sentence. Orders accordingly.