

IN HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL APPEAL NO 498 OF 1986

SARONE.....APPELLANT

V

REPUBLIC.....DEFENDANT

JUDGMENT

November 28, Mbaluto J delivered the following Judgment.

The appellant was convicted on two counts of handling stolen property contrary to section 322 (2) of the Penal Code (cap 63) after having been charged and tried for the two counts of robbery contrary to section 296(1) with the handling charges in the alternative. He was imprisoned to concurrent terms of 7 years with hard labour on each count and now appeals to this court against both the conviction and sentences.

Briefly the case for the prosecution was that the two complainants Amina Ibrahim (PW 1) and Fatuma Isaac (PW 5) who live in the same house in Korogocho village were sleeping in their house on May 8, 1985 when at about 12.00 pm thieves broke therein. The two complainants woke up but the thieves who were carrying swords threatened to slash them if they made noise. It was very dark and the complainants could not see the thieves very clearly. The thieves took away from the complainants house two boxes containing clothes some of which belonged to the 1st complainant and others to the 2nd complainant. The two complainants reported the incident to the youth wingers.

On May 19, 1985 the two complainants were called either to the office of the youth wingers or the local police station where they identified the clothes stolen from them. PW 1 identified one lessso, one bedcover and one pillow case as some of the properties that were stolen from her on May 8, 1985. PW 4 identified one long trouser, one sports shoe and one lessso.

The evidence of PW 3 was that he is the Chairman of Kanu Youth Wingers in Kariobangi Location under which Korogocho village falls. On May 19, 1985 he and other youth wingers laid an ambush in Korogocho village and between 11.30 and 12.00 pm they saw a group of people carrying what he referred to as "baggage". Because the group carrying the baggage was armed with swords PW 3 and this party decided to follow from behind presumably to find out where the group was heading to. The group carrying the baggage moved to Highridge, then to Gititheru and eventually to Grogan village where they entered three rooms. PW 3's party did not challenge the group at the stage but arranged for reinforcements apparently to confront the group in full force. After the reinforcement had arrived at 5.00 am PW 2 and his party decided to move into the three rooms inside which they found a group of masaimen and a lot of clothes which they suspected to have been stolen. They therefore arrested them and took them to the police station.

Police constable Joseph Kamade (PW 2) is the officer who was on duty when the appellant and some other suspects were brought to Ruaraka Police Station. He testified that when the suspects were brought they had a lot of suspected stolen property. He took all the item of property that was brought with the suspects and kept in the police station. He produced as exhibit in court and said that he did not get to see the owners of the property.

Now the problem with the case at the court below was that none of the complainants was called upon to

identify as laws any of the things produced in court by PW 2. Despite this the learned trial magistrate in his judgment states that the assorted clothes found by the youth wingers in the possession of the appellant were “very positively identified by the complainants’ and that the accused has not offered any explanation as to how he came to possess them. Unless the learned trial magistrate was referring to the identification alleged to have been made to the identification alleged to have been made at the youth wingers office by PW 1 or at the Police Station by PW 5. I cannot see any evidence of identification of the stolen property by the two complainants. In my view there was no evidence whatsoever to show that the things that were produced in court by PW 2 had been stolen or if stolen had been stolen from the complainants. The conviction of the appellant for handling stolen property was therefore unsound and unsafe and cannot be allowed to stand.

For the above reasons, the appeal is allowed, the conviction quashed and the sentence imposed upon the appellant set aside. He is to be set free forthwith unless otherwise lawfully held.

November 28, 1986

MBALUTO J