REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT NAIROBI

(CORAM:PLATT, GACHUHI & APALOO JJA)

CRIMINAL APPEAL 23 OF 1987

ROBERT MUINDE MBATHI……APPELLANT

V

REPUBLIC…….……..RESPONDENT

JUDGMENT

This is a second appeal in a matter in which the appellant Robert Muinde Mbathi was convicted of the offence of stealing from the person contrary to section 279 (a) of the Penal Code and sentenced to three years imprisonment together with five strokes of corporal punishment. His first appeal to the High Court was dismissed summarily. The appellant now appeals to this court. The main ground of the appeal is that the High Court ought not to have dismissed the appeal summarily. Mr Nyamwamu took the point that matters of law had been raised in the petition of the appeal to the High Court and that therefore it was not a case in which the High Court could dismiss the first appeal summarily by virtue of section 352 of the Criminal Procedure Act. State Counsel conceded the appeal on this point and going further he conceded that the conviction of the appellant cold not be sustained on the evidence presented to the court.

Looking at the evidence it is clear that the complainant who had her Necklace (a gold chain) stolen from her had not recognized the people who had done so. Apparently they were two and they were chased from the scene. No description of the man being chased from the scene was given in evidence. But one of them was caught, and brought back to the scene of the incident. There was no evidence by the complainant as to whether she could identify or even describe the clothing of the second man before the first man was brought back under arrest. When the arrested man came to the scene he pointed out a person in the crowd whom he said had operated the theft with him and indeed had stolen the gold chain. This second person is the appellant. There was no other evidence upon which the police prosecution depended except what the appellant's coaccused said of him at the time of the appellant's arrest. None of the stolen property, namely, the gold chain and two pendants was recovered from the persons of either of the men arrested.

When the matter came to court the complain now alleged that she could recognize the appellant and his co-accused. She described clothing of the appellant which of course she had seen when he was arrested. She described the appellant's actions in taking away the gold chain, which of course had been the contention of the appellant's co-accused. When the appellant's co-accused came to give his defence, he gave an unsworn statement without implicating the appellant.

The appellant had protested that there was no proper evidence of his identification and he was absolutely right. The statement of his co-accused was not evidence against him; it did not even qualify as the weakest sort of evidence under section 32 of the Evidence Act (cap 80). If what the appellant's co-accused said amounted to a confession, it was inadmissible under section 29 of the Evidence Act, the most senior polices officer present being only a sergeant. Unless it were a confession it was not admissible. It was not even repeated as evidence in court.

Secondly, the only other evidence was that of the complainant who identified the appellant in court after seeing his arrest. She had not given any identification before his arrest to the police officers. She had not pointed our the appellant who was standing there. Only his co-accused pointed him out. It was clearly not

evidence which could be relied upon.

Thus the state counsel was therefore entirely right to concede the appeal. We think that the best course for this court to adopt is to allow the appeal on both grounds; firstly that it should not have been summarily dismissed and secondly that there was no evidence to support the conviction.

Accordingly we quash the conviction of the appellant and set aside the sentence and order him to be set at liberty forthwith unless otherwise lawfully held.

May 15, 1987

PLATT, GACHUHI & APALOO JJA