

REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT NAIROBI
CRIMINAL APPEAL 229 OF 1986

MUTUAAPPELLANTS

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

This is a second appeal against the conviction of the appellant on a charge of handling stolen property contrary to section 322(2) of the Penal Code as an alternative to a charge of burglary and stealing contrary to section 304(2) and 279 (b) of the Penal Code. The appellant's first appeal to the High Court was summarily rejected under section 352(2) of the Criminal Procedure Code.

In his grounds of appeal to this court, he complains mainly that his conviction was against the weight of the evidence. His first ground of appeal however attacks the summary rejection of his first appeal to the High Court and so raises the legal issue of the property of that summary rejection.

It is submitted by learned acting deputy prosecutor that the grounds of appeal contained in the appellant's petition of appeal to the High Court did not of themselves raise a legal issue. However, he concedes that despite that the judgment of the learned trial magistrate raised a legal issue which the first appellate court ought to have appreciated and thus admitted the appeal to hearing rather than rejecting it summarily. That legal issue arises thus. The appellant and others were charged jointly with the offence of burglary and stealing contrary to section 304(2) and 279(b) respectively. In the alternative they were charged with the offence of handling contrary to section 322(2) of the Penal Code. The burglary and theft was alleged to have occurred on the night of 11 and 12 August, 1984. Some of the stolen items were found with three of the accused on August 13, 1984. The trial magistrate in his judgment made a finding that the items so found in possession of the accused made the doctrine of recent possession of stolen property come into play. Despite that and without giving any reasons for doing so he preferred to, and found this appellant and the other accused who apparently has not appealed guilty of the alternative charge of handling. In doing so the learned trial magistrate erred and the High Court equally erred in failing to see this error and in rejecting the appeal summarily. Consequently, in exercise of this court's powers under section 361(2) of the Criminal Procedure Code we quash the conviction of this appellant and the accused who has apparently not appealed and substitute a finding that the appellant and that accused are guilty of the main count of burglary and theft.

We set aside the sentence of seven years imprisonment imposed on both of them and sentence the appellant and that other accused to two years on the first limb and three years on the second limb of the offence. The appellant and the other accused are also ordered to receive three strokes of corporal punishment each.

It is further ordered that each be under police supervision for five years upon release from jail on completion of their sentences.

November 19, 1987

GACHUHI & APALOO JJA & MASIME AG JA