

REPUBLIC OF KENYA

High Court , at Nairobi

Criminal Appeal No 61 of 1985

Dalington

v

Republic

(Appeal from the Ag Resident Magistrate's court at Kibera, R V P Wendoh, Mrs)

Advocates

S M Owinao-Ger for appellant

Miss L G Mbarire for respondent

October 14, 1985, Mbaya J delivered the following

Judgement.

The appellant was charged with theft contrary to section 275 of the Penal Code. It was said that he stole a box containing certain items of clothing valued at Kshs 12,000 the property of the complainant, Nancy Ikiugu PW 1.

The brief facts of this case are that PW 1, in the company of Joyce Mugambi PW 2, boarded a matatu registration number KVY 268 at Afya House on the way to town at about 6.30 pm on February 15, 1985. PW 1 had a suitcase (box) and another traveling bag in which she carried some of her properties, which were kept behind the driver's seat by the conductor, who happened to be the appellant. At one time near the Serena Hotel, the two witnesses saw the appellant holding the suitcase swinging it in his hands and the matatu slowed down a bit. On reaching the GPO Bus Stop, another matatu came from behind and one person in there talked to Omari Rajab PW 4 the driver. PW 4 then announced that a box had fallen at Serena Bus Stop. They went back but the suitcase and its belongings were never found.

PW 1 and PW 2 reported to police and the appellant was arrested and charged with this offence. The main issue is whether the suitcase actually fell as claimed by the appellant in his defence, or it was stolen. The evidence available is mainly circumstantial. Before the suitcase mysteriously disappeared, both PW 1 and PW 2 had seen the appellant swinging it while at the door-step of the matatu near the Serena Hotel. One would wonder why the appellant was swinging the suitcase. PW 1 testified :

“Before we reached Serena he took the box and started swinging it. I asked what he was doing with it and he said he was not a kid and would look after it. At Serena the matatu slowed and we asked the driver why the accused was swinging the box but the driver sped off.”

This conduct of the appellant in the circumstances must be considered along with the fact that the matatu was not full, and no passengers alighted or boarded it between Afya House and the GPO. No one therefore could have alighted with it. But at the same time it is surprising how the box could fall from inside the matatu without anyone noticing and hearing it fall. Lastly, there is the curious situation where the other matatu never picked the allegedly fallen box when they saw that happening. All these factors point irresistively to the fact that it was the appellant who in collusion, as did find the learned trial magistrate, with PW 4 and the people in the other matatu, got rid of the complainant's box and its

contents. Though the appellant was not actually seen to have passed the box from inside his matatu, he must be deemed to have done so in view his conduct and these other circumstances surrounding the disappearance of the box.

I agree with the trial magistrate's findings on facts, in which case I am satisfied that the appellant was properly convicted. The sentence of 6 months' imprisonment is neither harsh nor excessive. Accordingly, I dismiss this appeal in its entirety.

October 14, 1985

Mbaya J