

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL APPEAL NO 401 OF 1983

From original conviction and sentence in Criminal Case No 38 of 1983 of the Resident Magistrate's court at Kibera)

GATHOGO

GIKUMU.....APPELLANT

AND

REPUBLIC

.....RESPONDENT

CORAM:

BRAR, J

JUDGMENT

Appellant absent, unrepresented and not wishing to be present, B Chunga, Assistant Deputy Public Prosecutor for Respondent The appellant was charged before Resident Magistrate at Kibera with the offence of theft by servant contrary to section 281 of the Penal Code (Cap 63) and upon conviction was sentenced to 2 years imprisonment. He is appealing against both the conviction and the sentence. During the months of November and December 1982, he was employed by the complainant (P W 1) as a driver and he used to drive lorry registration number KTL 999. P W 2 was also employed on the same lorry as a turn boy. In the course of his employment, the appellant was instructed to transport the complainant's building stones measuring 1050 feet from Karen to a certain place in Eastleigh. Instead of taking the stones to that place, the appellant off-loaded them at Kariobangi where he sold the to someone. Thereafter he gave shs 5/= to the turn boy (P W 2) who apparently was not satisfied with this amount and reported the matter to the complainant. Later it wad discovered that a Jack, a chain and tow mirrors were also missing from the lorry. The matter was then reported to the police. When the appellant was questioned about the thefts, he admitted to P W 1 that he had sold the stones and that the missing mirrors and the Jack were at Machakos. He also showed the complainant and the police, the place where he had delivered the stones. A part of the stolen stones measuring 700 feet were recovered from that place. On 29.12.1982, Inspector Henry Mulwa (P W 5) recorded an inquiry statement (exh.2) after the usual caution and on 31.12.1982 he charged appellant with the offence of theft by servant. In reply to the charge and the usual caution the appellant made a statement (ex 3) voluntarily and without any threat, promise or inducement. Both exhibits 2 and 3 were admitted in evidence without any objection from the appellant. In ex 2 he admitted the theft of the stones but also implicated P W 2 and another turn boy named Wambua in the theft. In his cautionary statement (ex 3) he again confessed to the theft of the stones and also stated where the missing jack, the mirrors and the chain were. He once again implicated P W 2 and Wambua in the theft of the stones.

The learned trial magistrate, in my view, quite rightly rejected the appellant's story that he had not stolen the stones but had offloaded them at a place other than the one to which according to him had made the road to the intended place impassable. This story was, I think, an afterthought on the part of the appellant. P W 2 was quite obviously an accomplice in the theft of the stones but I am satisfied that the learned magistrate was entitled to rely upon his evidence 2 and 3 and also by his voluntarily showing to P W 1 and the police, the place where the stones were delivered.

Upon my own evaluation of the evidence before the lower court, I am satisfied that the appellant was

properly convicted. The sentence, though severe for a first offender, is not manifestly excessive.

The appeal against both the conviction and the sentence is accordingly dismissed.

Dated and delivered at Nairobi this 26th day of January 1984.

P S BRAR

JUDGE