



Nganga v Republic

High Court, at Nairobi

1984 January 26,

Brar J

Criminal Appeal no 539 & 541 of 1983

Criminal law - theft of a handcart and in alternative handling stolen handcart whether conviction of all accused on alternative charge of handling proper.

The two appellants were in a band of four men charged with the offence of theft of a handcart contrary to section 275 of the Penal Code and in the alternative faced a count of handling the stolen handcart contrary to section 322(2) Penal Code. Each of them was convicted on the alternative court and sentenced to the statutory minimum of 7 years' imprisonment with hard labour plus the mandatory post incarceration police supervision for 5 years. This provoked the 2 appeals consolidated and heard together.

Held:

1. It was most likely that the 4 men had stolen the handcart and not received it dishonestly (*Kipsaina v Republic* [1975] EA 253).
2. The evidence did point to the handcart being dishonestly received rather than stolen and the conviction on the alternative charge was prejudicial to the appellants.
3. In exercise of powers under section 364(1) Criminal Procedure Code sentence of 2 co-accused who did not appeal also altered.

Appeal allowed. Sentence substituted.

Cases

Kipsaina v Republic (1975) EA 253

Statutes

1. Penal Code (cap 63) section 275, 322(2)
2. Criminal Procedure Code (cap 75) section 364(1)

Advocates

B Chunga (Assistant Deputy Public Prosecutor)

January 26, 1984, Brar J delivered the following Judgment. The appellants (A1 and A2) and their two co-

accused (A3 and A4) were jointly charged on the main count with theft of a handcart contrary to section 275 of the Penal Code (cap 63) and on the alternative count with handling the stolen handcart contrary to section 322(2) of the Penal Code. Each of them was convicted on the alternative count and was sentenced to the statutory minimum sentence of 7 years' imprisonment with hard labour to be followed by mandatory police supervision for 5 years.

Sometime between 11.00 a m and 11.30 on November 27, 1982, a handcart (Ex 2) was stolen from Kirinyaga Road in Nairobi where it was parked by PW 1 who had hired it from PW 2. The same day at about 2.00 p m and after 4 days as stated by the learned magistrate in his judgment, the appellants and their co-accused were seen by two police constables (PW 3) and (PW 4) with the stolen handcart on State House Road. The police officers suspected that the loads the 4 men were carrying on the handcart were stolen and after questioning they took them and they loaded handcart to Kileleshwa Police Station where the handcart was identified by PW 2 on December 2, 1982 as his property.

The learned trial magistrate found it as a fact that the stolen handcart was recovered from possession of the appellants and their two co-accused but erroneously thought that it was recovered from them 4 days after the theft. He considered they were receivers or thieves but without giving any reason for his conclusions, convicted all 4 accused on the alternative charge of handling.

The evidence in this case does not, in my view point to the handcart having been dishonestly received rather than stolen and the convictions on the alternative charge of handling were prejudicial to the appellants and their co-accused as they involved the consequences of receiving sentences quite disproportionate to the offence of theft which they were just as likely to have committed. In my view the magistrate in these circumstances erred in law in convicting the 4 men of the alternative charge of handling. The learned Assistant Deputy Public Prosecutor also supports the view that it is more likely that the 4 men had stolen the handcart and not received it dishonestly – see *Kipsaina v Republic* (1975) EA 253. I therefore quash each appellant's conviction on the alternative charge of handling and set aside the sentence of 7 years' imprisonment with hard labour and the order for police supervision and substitute therefore a conviction for the offence of theft and sentence of two years imprisonment.

In the exercise of my power on revision under the provisions of section 364(1) of the Criminal Procedure Code (cap 75) I make a similar order in respect of each of the appellant's two co-accused (A3 and A4 who have not appealed and impose identical sentence on each of them also. The custodial sentence in each case will follow the sentence the appellants and A3 and A4 are serving in Kibera Court Cr case No 9560/82.