

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

APPELLATE SIDE

CRIMINAL APPEAL NO 236 OF 1984

(From Original Convictions and Sentences in Criminal Case No 3585 of 1983 of the First Class District Magistrate's Court at Nairobi, P J D Mwangulu Esq)

PAUL NDUNGU APPELLANT

Versus

REPUBLIC RESPONDENT

CORAM PORTER J

Appellant absent, not wishing to be present and unrepresented. C W Gatonye (Principal State Counsel) for Respondent. -----

J U D G M E N T

The appellant was convicted in the court below of Warehouse Breaking and Theft, Contrary to Section 306(a) Penal Code, and sentenced to 7 years imprisonment.

The appellant was involved because the police found a carton of goods in his shamba, similar to those stolen, ¾ miles away from the warehouse where the theft occurred, buried in freshly dug wet earth with dry grass on top, 10 feet away from where the appellant was working at the time within 5 hours of the theft, at 8 am.

The appellant did not agree with these facts and said he was interrogated and taken to another lady's house in respect of some paint and then, was given this carton. The learned trial magistrate, did not believe him, pointing out that the carton was indeed covered in fresh earth: and accepted the account of the Police Officer. On my own account of the evidence, I would agree. The question is, whether identification of the carton was sufficient. The case of Republic v Muindi (1978) K L R (page 44) is relevant. This case shows that although positive identification is the best way, the goods can be identified by circumstantial evidence, to the same standard. I have set out the matters compelling the conclusion of proper identification in this case. The learned trial magistrate was quite right to be satisfied as to it. On my own assessment, I would agree.

This conviction was safe. The sentence was the maximum but the appellant has 4 previous convictions. The sum involved was great, many people were involved and, the victims manhandled: the sentence is richly deserved. The learned trial magistrate has not ordered strokes, which are mandatory, I would add 2 strokes of corporal punishment, to comply with the law. Appeal dismissed.

Dated and delivered at Nairobi, this 20th June, 1984.

D C PORTER

JUDGE