

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI LAW COURTS)

CRIMINAL APPEAL NO 745 & 746 OF 1983

Wambia.....Appellant

v

Republic.....Respondent

Criminal law - housebreaking and stealing - defence of alibi - onus of dislodging defence. The two appellants were jointly charged with the offence of housebreaking and stealing contrary to sections 304(1) and 279(b) of the Penal Code. The item alleged to have been stolen property was recovered but the complainant did not identify it as her property. The appellants had set up a defence of alibi. the appellants appealed. They were convicted after the hearing and both sentenced to 5 years' imprisonment on each count and 5 strokes (light cane) corporal punishment. Held: 1. The defence of alibi raised placed an onus upon the prosecution to dislodge it and this was not done.

2. The appellants were convicted on doubtful evidence and the convictions could not be sustained.

Appeals allowed. Cases 1. Sekitoleko v Uganda (1967) EA 531 at p 533 Approved & Applied

2. R v Johnson (1961) 3 All ER 969

Statutes Penal Code (cap 63) section 279(b) and 304(1) Advocates

JM Njongoro (state counsel) for Respondent. July 31, 1984, O'Kubasu J delivered the following Judgment. These two appeals have been consolidated. The two appellants were jointly convicted on a charge of house breaking and stealing contrary to section 304(1) and 279(b) of the Penal Code (cap 63). Each was sentenced to 5 years' imprisonment on each limb of the charge and five strokes of the light cane on the second limb of the charge. The sentences were ordered to run concurrently.

The learned state counsel did not wish to support these convictions as he argued that gas cylinder was not positively identified by the complainant. I have carefully considered the evidence on record and I agree with the submissions of the learned state counsel. Indeed when what was alleged to be stolen property was recovered the complainant did not identify what was hers.

The appellants raised defence of alibi and it was upon the prosecution to dislodge that defence. In Sekitoleko v Uganda (1967) EA 531 at p 533 Sir Udo Udoma C J held:-

“As a general rule of law, the burden of proving the guilt of a prisoner beyond reasonable doubt never shifts whether the defence set up is an alibi or something else. That burden always rests on the prosecution.”

In R v Johnson (1961) 3 All ER 969 the general principle of law applicable to defence of an alibi was enunciated. It was laid down as a general rule of law that if an accused puts forward an alibi as an answer to a criminal charge he does not thereby assume a burden of proving the defence and that the burden of

proving his guilt remains throughout on the prosecution.” In view of the foregoing I find that the two appellants were convicted on doubtful evidence. Hence these appeals are allowed, convictions quashed and the sentences imposed set aside. I order that the two appellants be released from prison immediately unless otherwise lawfully held. Order accordingly.