



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

APPELLATE SIDE

CRIMINAL APPEAL 290 OF 1982

(From Original Conviction and Sentence in Criminal Case No 2513 of 1981 of the Senior Resident Magistrate's Court at Nairobi)

JOSPHAT NGOLA APPELLANT

VERSUS

REPUBLIC RESPONDENT

CORAM: PORTER AG J

Appellant absent, unrepresented M B Mbai (State Counsel) for respondent

JUDGMENT

This is an appeal against the conviction of the appellant by the Senior Resident Magistrate Nairobi for burglary and theft in a dwelling house contrary to section 304(2) and 279(b) of the penal Code.

The appellant was charged that during the night of 27th and 28th day of October, 1981 at Muthaiga Residential Area, in the Nairobi area jointly with others not before the court with intent to steal broke and entered a house used as a human dwelling of Jack Block and stole 51 precious stones, 20 video tapes, 3 suits, 2 trousers, 3 pillow cases, 3 pairs of shoes, 1 bathing costume, 2 towels, 1 small blanket and one Hitachi video, all valued at 112,400/-, the property of the said Jack Block.

There was an alternative charge of handling stolen property contrary to section 322(2) of the penal Code but the conviction was on the 1st count.

There is a preliminary matter in this case before I turn to the substantive matter of the appeal. The accused was arrested on the 28th of October, 1981 and brought to court on the 1st occasion on the 30th of October, 1981. The appellant was then represented by Mr Kapila. The appellant was released on his own bond of 25,000 with two sureties in the same sum. The case was mentioned from time to time and the appellant remained in custody no doubt because sureties were not available until the 30th of December, 1981 when the appellant was released on humanitarian grounds. The case continued to be mentioned until the hearing date which was the 14th of January, 1982 and on that occasion the appellant appeared represented by Mr Vohra who applied for an adjournment to another date because he had not had time to talk to the accused. The learned Senior Resident Magistrate refused to adjourn the case pointing out that the accused had been on bond she said since October, 1981 infact he was not actually released until the 30th of December, 1981 but had nevertheless been out of bond for 14 days before the hearing. The learned Senior Resident Magistrate also pointed out that she was starting the case late at 10.30 a.m. and

said that that was time enough for the accused and the advocate to organize themselves.

The accused said that he had nothing to say but he could not conduct the case himself and the learned Senior Resident Magistrate permitted Mr Vohra to withdraw. Then she said she was not prepared to grant any adjournment and continued with the case. The appellant then conducted his own case and cross-examined witnesses where relevant. He made an unsworn statement and the matter was then before the Senior Resident Magistrate to decide. It is clear that when deciding whether or not to adjourn the learned Senior Resident Magistrate did not realize that the accused had only been on bond for 14 days. She clearly from the file thought that he had been released on bond ever since he was arrested. Infact he was released on bond but subject to two sureties being available and that option was never taken up and the accused remained in custody. However what the learned Senior Resident Magistrate has said is that there was plenty of time for the accused and his advocate to organize themselves. That is clearly correct the appellant had 14 days whilst on bond to instruct an advocate and time before the court hearing to give complete instructions. The case by the time it was heard was two and a half months old. There have been other decisions in which the High Court has confirmed such adjournments. One is the case of *Adiedo v Republic*, 1969 EALR at page 586. In that case Mwendwa C J held that an hour and a half adjournment was quite sufficient for the accused and his advocate to prepare themselves. That case is very similar to this case and I see no reason to diverge from that judgment. For those reasons I see no merit in the 1st ground of appeal.

The evidence against the appellant was that the complainant on the 27th of October, 1981 went to bed after some guests had left and in the morning about 7.30 a.m. his servant discovered that the house had been broken into. A large number of things had been stolen and amongst them are 54 previous stone eggs which formed a collection which Mr Block had been getting together for about 11 years.

In the course of giving information to the police Mr Block had occasion to ring a Mr Bridges a geologist who knew the value of the stolen eggs because he was a geologist and had seen the collection at Mr Block's house and during the conversation Mr Block asked Mr Bridges to keep an eye out for anybody who wanted to sell him stone eggs. The same day at 4 p m Mr Bridge's secretary saw the two accused who came into the office saying that they had things to sell. When they were asked what the 2nd accused took two stone eggs from the pocket of the 1st accused and asked if the firm bought eggs. Mr Bridges secretary took the eggs to him to find out if he wanted to buy them and he sent her back to ask the accused if they had any more. When she went back the 1st accused produced three more eggs and she took the two accused to Mr Bridges office. Meanwhile Mr Bridges had seen the first two stones and recognized them as having been in the collection of Mr Block. They started negotiating the price when the two accused came into Mr Bridge's office and the 1st accused said he would sell them at a 100/- each. Mr Bridges left them there and went next door and called Mr Block who asked him to keep the two accused in the office. Mr Block then came to the office with the police and two eggs were found on the 1st accused. The further three which were produced at Mr Bridge's request were also taken by the police and after Mr Block and the police left three more similar eggs were found by Mr Bridges on the floor of his office. The 1st accused apparently said that they had obtained the eggs from somebody on the street pushing a cart.

The appellant elected to make an unsworn statement and he said that on the 27th of October he had worked upto 11.30 a m when he brought his curios to the city center to sell. When he finished work he came to town to get a bus and he met the 2nd accused who asked him to take him somewhere and they went into the city center to a building where the 1st accused saw the 2nd accused talking to a lady and then to a European who called them both inside and questioned them about items on the table. Shortly after that the police came and they were arrested and taken to the police station and the stones he said, were not his.

He indicated that he wanted to call a witness but on a later adjournment to enable that to be done he said he had no witness to call. The 2nd accused was infact acquitted by the learned S R M but the appellant was convicted on the basis of recent possession of the stolen eggs. The learned Senior Resident Magistrate pointed out that the appellant was found in possession of the stones within 24 hours of the time of the theft. The learned Senior Resident Magistrate compared the evidence of the prosecution with the

evidence of the appellant and said that she was not able to believe the explanation of the 1st accused that he only found the stones on the table in the office of Mr Bridges. She said that it was the 1st accused who had these stones in his possession and that he was according to the prosecution evidence the one who was negotiating the price with Mr bridges to sell each stone for 100/-. She considered all the surrounding circumstances in the office and the whole of the evidence to come to the conclusion that the accused was guilty of the offence with which he was convicted. She in particular had the advantage of seeing the witnesses and assessing them which I have not had. The learned Senior Resident Magistrate has in a very full judgment considered the whole of the evidence and can see no basis arising either from the record or from the grounds of the appeal to interfere with the conviction.

In regard to sentence three previous convictions were admitted by the appellant and the learned Senior Resident Magistrate pointed out that over shs 90,000/- worth of property was stolen. She sentenced the accused to five years on each limb of the main count and two stokes of the cane and ordered that the custodial sentences run concurrently. In view of the prevalence of this type of offence and the amount involved in this case in addition to the previous convictions which the learned Senior Resident Magistrate rightly took into account I cannot see that this sentence is manifestly excessive and I can see no reason why I should interfere with it. In those circumstances **the appeal against conviction and sentence will be dismissed.**

D C PORTER

AG JUDGE

28.1.1983