REPUBLIC OF KENYA

HIGH COURT, AT NAIROBI

CRIMINAL APPEAL NO 1028 OF 1982

KIMARU ……...…..…… APPELLANT

VERSUS

REPUBLIC…….……...…….. RESPONDENT

JUDGMENT

The appellant who was the first accused in the court below was convicted of workshop breaking and committing a felony contrary to section 306(a) of the Penal Code for that he jointly with another (who was acquitted on the basis that he had no case to answer page 7 of the record) for that he on the night of March 5 and 6, 1982 along Juja Road, Nairobi within Nairobi Area jointly with others not before the court broke into the workshop of Joseph Waithaka Mwangi and stole one battery charger, one armature machine, one coil, four car batteries, bearing for Nissan, one cut out seven M/V headlights, two side mirrors, nine sets of carbon brushes and six bottles of acid all valued at Kshs 8,526 the property of Joseph Waithaka Mwangi.

Having convicted the appellant on the above charge the alternative charge of handling that property remained on file. After trial the appellant was convicted of the offence and sentenced to three years' imprisonment with four strokes. The case against the appellant was that the items in the charge sheet were stolen from the workshop of the complainant during the night of March 5 and 6, 1982. Amongst the items which were stolen was an armature machine and according to PW 3 he and another officer were on patrol duty in plain clothes on March 10, 1982 ie within five days of the theft on Duruma Road when they saw the appellant carrying something in a paper bag and they stopped him. It turned out to be the armature machine referred to in the charge sheet and was identified by the complainant.

Counsel for the appellant submitted that the record was very confusing since this machine was referred to on page 4 as MFI 7 and on page 6 as MFI 2. I have had the opportunity of looking at the original file. The error arises from the handwriting of the learned senior resident magistrate and it is easy to mistake the way he has written MFI 7 as MFI 2 and that is what the typist has done. The machine in any event was produced quite clearly as Exh 7 and there is no doubt at all that it is the same machine which was identified by the complainant. It was the case for the appellant that he was only walking along Duruma Road and he was not carrying anything. He was standing when he was arrested and there was a bag khaki in colour lying on the ground close to him and the police picked it up and arrested him.

The learned Senior Resident Magistrate in his judgment has considered the evidence of the police officer and the accused about whether the accused was in fact carrying exhibit 7 or whether it was lying on the ground near where the accused and PW 3 asked him to pick it up. He pointed out that the accused did not put his story to PW 3 to give him the opportunity of denying it. There is no indication in the evidence that PW 3 had any grudge against the accused or any reason to pick him out as being responsible for Exh 7. The learned senior resident magistrate has said that he does not believe the accused's story and has given reasons for it. On my own assessment I am of the same view.

State counsel in this case does not support this conviction. He says that the evidence before the court was really insufficient to discharge the burden of proof but he submitted that there was sufficient evidence for the learned district magistrate to convict under section 323 of the Penal Code, that is for conveying suspected stolen property. It is true to say that section 188 of the Criminal Procedure Code gives power

when a person is charged with stealing anything and the facts proved amount to offence under section 323 of the Penal Code he may be convicted of that offence although he was not charged with it. However section 323 of the penal Code is a very special and specific type of offence. It is not committed until after various facts have been proved and the accused does not give an account to the satisfaction of the court of how he came by the property reasonably suspected to have been stolen. This has not happened in this case and indeed it might be thought that if the appellant had been asked in the specific terms of section 323 of the Penal Code how he came by the property and it had been pointed out that he would commit an offence unless he explained to the satisfaction of the court that in itself might have been a ground of appeal fatal to conviction under the offence under which he was charged. There is therefore not sufficient evidence on record to convict on an offence under section 323 of the Penal Code. Nor can I see why state counsel feels section 323 would be more appropriate to those facts. What the learned senior resident magistrate has found is that the appellant was in possession of one of the items stolen from the workshop of the complainant within five days of its theft. The learned senior resident magistrate has found that he lied in court in denying possession of that property and clearly in all the circumstances he has felt that the evidence justified the conclusion that the appellant being in possession of one of the items so soon after the theft that he must have been the thief. Bearing in mind the justified conclusion the learned senior resident magistrate came to with regard to the credibility of the witnesses that was a perfectly proper finding and I can see no reason to interfere with it.

The advocate for the appellant in arguing his grounds for the appeal has criticized the judgment of the learned senior resident magistrate on a number of grounds. First he says that one has not look at the evidence of the complainant who says that the properties recovered were worth Kshs 3,500 and yet the value of the properties in the charge was Kshs 8,525. That may be so but of course one only has to look at the list of the properties stolen in the charge and the list of the properties recovered to see that not everything stolen has been recovered. I cannot therefore see that this apparent discrepancy assists very much. Mr Kirundi also referred to the question of the apparent discrepancy arising from the fact that the record had been wrongly typed showing Ex 7 to have been produced as MFI 2. That clearly is an error and I have checked the original file. There is nothing in this.

Mr Kirundi also alleges that the judgment was hurriedly written and gives as an example that the second accused was not dealt with specifically. I am unable to understand this point since at line 3 of page 7 of the record the learned senior resident magistrate states “there is not a shred of evidence connecting the second accused with any of the charges and I discharge the second accused.” I therefore have some hesitation in jumping to the conclusion as Mr Kirundi does, that the learned senior resident magistrate’s judgment was hastily written. For all those reasons and despite the fact that the state counsel does not support this conviction I am nevertheless of the view that it would be wrong to interfere with the learned senior resident magistrate’s conviction of the appellant. However on the question of sentence the learned senior resident magistrate had sentenced the accused to three years’ imprisonment and four strokes. The appellant was a first offender and the property involved amounted to Kshs 8,500. Taking everything into consideration I am of the view that that sentence was manifestly excessive. For the above reasons therefore the appeal against conviction will be dismissed and the appeal against sentence will succeed only insofar as the sentence of one year’s imprisonment will be substituted for the period of three years’ imprisonment.

Dated and Delivered at Nairobi this 3rd Day of March, 1983

D.C. Porter

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Ag JUDGE