

REPUBLIC OF KENYA

Ndenderu v Republic

Court of Appeal, at Nakuru September 27, 1985

Hancox, Nyarangi JJA & Platt Ag JA

Criminal Appeal No 165 of 1984

(Appeal from the High Court at Nakuru, Masime J)

September 27, 1985, Hancox, Nyarangi JJA & Platt Ag JA delivered the following **Judgment**.

The appellant James Ndungu Ndenderu and Robinson Mwangi Kamau were convicted on May 16, 1984, of robbery contrary to section 296(1) of the Penal Code. They were each sentenced to 3 ½ years imprisonment together with, sum strokes of corporal punishment, and the mandatory 5 years of police supervision. Their first appeals to the High Court were summarily rejected.

The salient facts of the case were that on April 2, 1984, two persons robbed the complainant Waiguru Muritu on his way home from a market. They knocked him down and stole his gum boots and Kshs 40 cash. That same evening these appellant went to the witness Mr Samuel. He eventually bought the boots, but overnight he felt uneasy about his purchase, and reported the matter to AP Francis Ndungu early the next morning. The police had not yet received the complaint from Mr Waiguru Muritu. When the latter did complain, Mr Samuel was called again to produce the boots. He did so, the complainant recognized them. The appellants were then arrested. The strength of the case is not that the complainant identified the appellants, but that Mr Samuel Kariuki did so and reported that they had sold him the boots. If those facts were sound then the appellants had been in recent possession of stolen property. In the circumstances of the case the confession was that the appellants had robbed the complainant.

The learned judge was within his rights to dismiss the appeal summarily, in view of the issues in the appeal before him.

But the appellants press their appeals again to this court, and indeed have put forward supplementary grounds. If, for the sake of argument, it is accepted that he complainant would not be able to see clearly who attacked him, there is nothing sinister in the complainant waiting until the next morning to complain. There is nothing to be inferred from the fact that the complainant and Mr Samuel Kariuki reported separately the next day. The complainant and Mr Samuel witnessed separate incidents. There is no evidence that they had any contact.

The appellants rely on a strange view of the case. They allege that the police officer, to whom the report was made, concocted a plaint with the complainant and Mr Samuel, whereby Mr Samuel would keep the boots and then he would later accept their separate reports. The inference may be that as the complainant had not seen his assailants, it was decided to fabricate a case against these appellants, as the appellant James Ndungu at least had been involved in an old land case. The appellants press the point that Mr Samuel ought to have been charged with handling stolen property.

There is no recorded evidence which raises a doubt that this analysis might be true, let alone supports it was not put forward by either appellant in his defence. The origin of this analysis cannot be seen in the cross-examination of the police officer. It is therefore a matter which was untested at the trial.

But it is a fair argument that Mr Samuel might be considered an accomplice guilty of handling stolen property. It carries no weight, however, even though he did buy boots proved later to have been stolen from the complainant, because there is no suspicion that he knew that he was buying stolen property at the time of their purchase. His honesty was found to be assured because of his early report before their

theft had been discovered. Judging from the record, the lower courts were entitled to reach the conclusion that Mr Samuel was an honest witness. He unmasked the two appellants without knowing that he was doing so. Accordingly, the appellants were rightly convicted on his evidence.

It follows that as the sentences imposed were permitted by law the appeals of both these appellants are dismissed.