REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

CRIMINAL APPEAL NO 294 OF 1983

KIRIRA…….....……APPELLANT

VERSUS

REPUBLIC….…….....RESPONDENT

JUDGMENT

The appellant was convicted, on his own plea, by the learned chief magistrate, Nairobi, on a charge of stealing goods in transit contrary to section 279(c) of the Penal Code, and sentenced to three years with six strokes of corporal punishment.

Through his advocate, Mr Njau, he has now appealed both against conviction and sentence. There are only two grounds of appeal -

1) The learned chief magistrate erred in convicting the appellant on an equivocal plea of guilty as he never had the facts of the case put to the appellant.

2) The sentence was excessive having regard to all circumstances and especially in view of the fact that another accused charged with the same offence constituted by the same facts and particulars got two years' imprisonment and with two strokes.

I have called for the case file involving the other person charged with the same offence which is chief magistrate's Criminal Case No 366 of 1983 and to which mention is made in the record of Criminal Case No 364 of 1983 from which the present appeal has arisen. The accused person in that case was one Abdallah Munyiri Ibrahim who was charged with the same offence of stealing goods in transit contrary to section 279(c) of the Penal Code as per the following particulars:

"On January 27, 1985, at Jomo Kenyatta International Airport within the Nairobi Area, jointly with others not before the court, stole 1,988,185 French Francs worth Kshs 3,478,733 the property of Air France from the Aircraft Flight No AF 466. Whilst the said property was in transit from Mauritius to Paris via Nairobi."

The present appellant was also charged on the same day ie February 15, 1985, before the learned chief magistrate on exactly the same facts and particulars. That accused person Abdallah Munyiri Ibrahim pleaded guilty to the offence on the same date and so did the present appellant. The learned court prosecutor then outlined the facts of the case which pointed to Abdallah Munyiri Ibrahim as one of the main culprits. As to the present appellant the prosecutor stated as follows:

“William Githitimbu (Criminal Case 364) - did not know about the theft when it was committed but joined the others in the vehicle carrying the money driven by Abdallah. Then he knew of the theft. He got his share of francs which changed into Kshs 120,000 Kenya currency and all of it was recovered. They were both arrested and charged. Both are cooperating with the police to track down the people with whom they changed the money.

Abdallah: I admit facts.

William: I admit facts.

Both accused in Criminal Cases 364 and 366 of 1983 guilty on plea and convicted.”

Both of them were then remanded for record and sentence on February 22, 1983 and on that day each of them was sentenced to three years’ imprisonment with six strokes of corporal punishment. Now on the face of it, there is substance in a part of the first ground of appeal that the facts of the case were not put to the appellant but, as has been demonstrated above, that is not infact so.

As to the second ground of appeal it is factually incorrect in that Abdallah was awarded exactly the same sentence as the present appellant and in High Court Criminal Appeal No 388 of 1983, Abdallah’s appeal against sentence was summarily rejected by Brar J. If this appellant’s conviction were proper I would have had no hesitation in upholding the sentence in view of the nature and gravity of the offence. However, what has caused me concern is that, according to the prosecution’s own version of facts, this appellant “did not know about the theft when it was committed but joined the others in the vehicle carrying the money driven by Abdallah. Then he knew of the theft. He got his share of francs which (he) changed into Kshs 120,000 Kenya currency and all that was recovered.”

If the appellant did not know of the theft until after it had been committed, he was certainly not a principal offender - and could not be charged so - but could have been charged with being an accessory after the fact. His conviction for the offence of theft of goods in transit was, therefore, a nullity and must be quashed. The only issue remaining is whether the learned chief magistrate could have substituted a conviction for the offence of being an accessory after the facts to stealing goods in transit and whether, consequently, I can do so at this stage without declaring his conviction a nullity and ordering a retrial. Both Mr Bwonwonga and Mr Njau have agreed that I can do so and request me to do so, in order to save the appellant further agony. Therefore, in the peculiar circumstances of this case, I substitute a conviction against the appellant for being an accessory to a felony contrary to section 397 of the Penal Code. I take into account all that has been urged in mitigation by Mr Njau and I substitute a sentence of eighteen (18) months’ imprisonment in lieu of the present sentence of five years’ imprisonment and six strokes of corporal punishment. Mr Njau tells me that two strokes of corporal punishment have already been administered. If that is so, it is highly improper. No corporal punishment should be inflicted until an appeal has been disposed of.

Dated and Delivered at Nairobi this 31st May, 1983

S.K. SACHDEVA

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JUDGE