REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

CRIMINAL APPEAL NO. 731 OF 1983

PATRICK NDUNGU MATHAI ……..… APPELLANT

VERSUS

REPUBLIC……..…RESPONDENT

JUDGMENT

The appellant Patrick Ndungu Mathai was charged with Peter Wainaina with the offence of store breaking and stealing contrary to section 306(a) of the Penal Code, that they on September 21, 1982 at Gatunyu Village Muranga district jointly broke the store of John Mbui Njonjo and stole the property of the complainant being three spraying pumps and, in the alternative, handling stolen property contrary to section 322(1) of the Penal Code. The appellant was convicted of store breaking and stealing as charged while Peter Wainaina was acquitted. The appellant was sentenced to four years' imprisonment with six strokes from which conviction and sentences he now appeals to this court.

When the complainant, John Mbui Njonjo, was called he said that on December 21, 1982, he received a report that his store had been broken into from which had been stolen three spraying pumps. He reported to the police who on the following day, December 22, 1982, showed him two pumps they had recovered which he identified as being two of his five stolen pumps. The next witness called was Thomas Kimani (PW 2) who said he knew both accused. He came to know that the complainant's store had been broken into on January 16, 1983 he then went on to give a hearsay evidence which he should not have been allowed to do.

The next witness called to give any material evidence was Samuel Matheru (PW 4) who said that on January 19, 1985 at about 8.50 pm while at Mununga market he met the appellant who asked him if he wanted his coffee sprayed. Then the appellant went away and came back with a spray pump Ex 1 which had been identified by the complainant as one of his stolen pumps. Samuel Gatheru told the appellant to come back the following morning to spray and he then took the pump Ex 1 and kept it in his house after it had been agreed that the cost of spraying would be 20 cents per tree. Then Samuel Gatheru told his wife what to do. The following day when Samuel Gatheru returned from work, he found his wife had been arrested and so he went to Kandara Police Station and explained how his wife came to be in possession of the spraying pump. Next was called John Mwaura, (PW 5) a *matatu* operator, who corroborated the evidence of Samuel Gatheru concerning the conversation and negotiations about the appellant spraying Samuel Gatheru's coffee and the bringing of the spraying pump Ex 1.

The appellant in his statutory statement from the dock said:

"On January 21, 1985 I met a person unknown to me who had a vehicle. It was 6.50 pm. He stopped his vehicle. He called me. He asked me the road to Karara. Another vehicle of (PW 1) came. It stopped. There was a police officer and an assistant chief. Police arrested me. I spent the night there. On January 23, 1983 I was taken to Kandara. I met (PW 3) showed me Ex 1 and Ex 2. I denied any knowledge. I was charged. I deny the charges."

The complainant's store was broken into and five spraying pumps were stolen therefrom. The complainant identified two of them which were recovered and according to the evidence of Samuel Gatheru corroborated by John Mwaura that the appellant was in possession of one of the stolen spraying

pumps about a month after the five pumps had been stolen. The trial magistrate said in his judgment:

"There is no direct evidence to show that Ex 1 was stolen by accused 2 (the appellant) from those stolen on December 21, 1982 but it was found to be in his possession on January 22, 1985 a month later. Having directed my mind to the doctrine of recent possession, nature of the article and the time element I find accused 2 guilty on the main charge of store breaking and stealing contrary to section 306(a) of the Penal Code and convict him accordingly."

As was said in the case of *R v Hassani s/o Mohamed* (1948) 15 EACA 121:

"On a finding that an accused was in possession of property recently stolen, in the absence of any explanation by him to account for his possession a presumption arises that he was either the thief or the receiver."

I find, making my own assessment of the evidence as I am required to do, that the appellant was quite correctly and properly convicted of the offence of store breaking and stealing as charged and so I dismiss the appellant's appeal against conviction. I observed that the trial magistrate has in this judgment said that the value of the three pumps was Kshs 8,400. I can find no evidence to this at all neither is there any value mentioned in the charge though that by itself would not be sufficient. I mention this fact as I am concerned about the sentence of four years with six strokes imposed. It is observed that one of the pumps is only a few shillings. I think the sentence imposed could be considered manifestly excessive. I think in the circumstances I must make a reduction in the sentence imposed and so I reduce the same to two years' imprisonment with six strokes of the cane otherwise the appellant's appeal is dismissed.

Dated and Delivered at Nairobi this 14th December, 1983

J.H.S. TODD

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JUDGE