

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

APPELLATE SIDE

CRIMINAL APPEAL NO 139 OF 1982

(From the original convictions and sentences in Criminal Case No 157 of 1981 of the Resident Magistrate's Court at Kitui)

JOHN TOTHO APPELLANT

Versus

REPUBLIC RESPONDENT

CORAM: Brar J

Appellant absent, not wishing to be present and unrepresented, BM Mbai (State Counsel) for Respondent

JUDGMENT

The appellant and one Dominic Mwangangi were jointly charged before the learned Resident Magistrate Kitui with the offence of burglary and stealing in a dwelling house contrary to sections 304(2) and 279(b) of the Penal Code (Cap 63). Each of them also faced an alternative charge of handling stolen property contrary to section 322(2) of the Penal Code. The appellant's co-accused was acquitted on both the main and the alternative charges but he was convicted of the burglary and the theft charge and sentenced to one year's imprisonment with two strokes of the cane on the burglary charge and to two years' imprisonment with three strokes of the cane on the theft charge. He is appealing against both the convictions and the sentences.

The complainant (PW 1) who was a dealer in clothes lived at Kalundu in Kitui District. His house was burgled on the night of November 21 and 22, 1981 and according to the particulars of offence ten trousers, six bed sheets, four towels, thirty children's clothings, four small shirts, six big shirts, four petty coats and cash Kshs 119 were stolen therefrom in his evidence however, the complainant made no mention of the alleged theft of four towels, four petty coats and Kshs 119 or of any other cash amount and as to the number of big shirts he stated that four (and not six as stated in the charge sheet) were stolen in addition to some underwears and handkerchiefs which were not mentioned in the particulars of offence.

The appellant was also a dealer in clothes at the material time. On the morning of 23rd of the same month (ie November, 1981) he was found in possession of two bed sheets and one pair of trousers which the complainant claimed, belonged to him. Apart from his own word, the complainant produced no other evidence which would indicate that these items found in the appellant's possession in fact belonged to him (the complainant).

The learned State Counsel concedes that there was insufficient evidence to convict the appellant. He does not support the conviction. With respect I agree with him. There was at least a doubt as to the guilt of the appellant and I am satisfied that the charge against him was not proved beyond reasonable doubt.

The appeal is accordingly allowed. The conviction is quashed and the sentence is set aside. The appellant is ordered to be released forthwith unless he is held under some lawful order.

Delivered at Nairobi this 2nd day of November, 1982.

PS BRAR

JUDGE