



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CRIMINAL APPEAL NO 448 & 156 OF 1982**

**JOHN MWANGI MACHARIA.....APPELLANT**

**SAMUEL THUKU.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

These appeals which were consolidated were allowed, convictions quashed and sentences set aside. I now give reasons for the judgment.

The two appellants, John Mwangi Macharia and Samuel Thuku, were charged jointly with another person who was acquitted by the lower court with three counts of shop-breaking with alternative counts of dishonest handling of stolen goods contrary to Sections 306(a) and 322(2) respectively of the Penal Code (Cap 63). The two appellants were convicted on count 1 of shop-breaking and count 2 of dishonest handling of stolen goods. Samuel Thuku was sentenced to five years' imprisonment and three strokes on each count and John Mwangi Macharia to two years' imprisonment and three strokes, the sentences of imprisonment on both counts being ordered to run concurrently. They appealed to this court against their conviction and sentences. The evidence against John Mwangi was that of PW 3, a vegetable vendor in Nakuru, who gave evidence that this appellant came to her and pledged a weighing machine for a loan of Kshs 600 and that the police later came with this appellant and collected the machine from her house. The machine was not produced in court.

Samuel Thuku was arrested by PW 4 on information received. He was alleged to have given a statement under caution but he retracted or repudiated the statement at his trial. The trial magistrate misdirected himself by not holding a trial within a trial and in admitting the statement without such trial within a trial. I disregard his statement completely so far as it implicates this appellant or the other appellant. The statement, in any case, did not advance the prosecution's case as at all it did not disclose what was stolen and the names of the others mentioned therein do not implicate the other appellant or any other identifiable person.

Having disregarded the caution statements alleged to have been made by the appellants, the only evidence to implicate John Mwangi was that of PW 3, the vegetable dealer. She received the weighing machine from John Mwangi and it was possible that she was an accomplice. Her evidence, therefore, needed corroboration.

The evidence against the third accused was his admission in a caution statement. This was repudiated by the second appellant at his trial. The trial magistrate failed to hold a trial within a trial to determine the admissibility or otherwise of the caution statement. This was a misdirection. There was insufficient evidence to convict these appellants and in the absence of corroboration, the prosecution did not prove the guilt of the appellants beyond a reasonable doubt. For these reasons, the appeals were allowed, convictions quashed and sentences set aside.

Dated and delivered at Nairobi this 11th day of November 1982

**M.G MULI**

**JUDGE**