REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL APPEAL NOS 1608, 1555 & 1554 OF 1984

NJUGUNA.....APPELLANT

V

REPUBLIC.....RESPONDENT

JUDGMENT

(Appeals from the judgments of the Resident Magistrate's Court at Thika, H R Aggarwal, Esq)

July 29, 1981, Cockar J delivered the following Judgment.

The three appellants and two other accused have been convicted on count 1 of stealing motor vehicle parts contrary to section 279(b) of the Penal Code and of stealing from a motor vehicle contrary to section 279(c) of the Penal Code. The two co-accused have been given non custodial sentences because of their young ages. Each of the three appellants'(that is accused 1, 2 and 5) have been sentenced to 3 years imprisonment plus 4 strokes on each count – the prison sentence to run concurrently.

The learned State Counsel did not support conviction of appellant Joseph Gitau Njoroge and Paul Wangai Njoroge (accused 1 and 2). I disagree with her. I have carefully considered the grounds of appeals filed by both and keeping them in mind. The evidence against these two appellants and the 3rd accused was that a driving mirror belonging to the complainants' motor vehicle which had over-turned on August 19, 1984 at 9.30 pm on a road at Muguga village and was left there for the night by the complainant, was on September 29, 1984 recovered from the room of the two appellants and the 3rd accused on all three of them being brothers who lived in one room. There is no doubt that each one of them was in recent possession of stolen property.

The 3rd accused in his sworn evidence had said that he had collected the mirror on August 22, 1984. Appellant Joseph Gitau (1st accused in his sworn evidence said that the motor vehicle had an accident on August 8, 1984. Next morning the complainant came with two askaris and asked for the 3rd accused as he had taken motor parts. They found nothing in his or his mother's house. On August 28, 1984 at around 9.00 pm youth wingers came with an askari and asked for the 3rd accused. He told them he had not arrived. They found the mirror. He told them the 3rd accused had collected it from the over-turned motor vehicle.

Appellant Paul Wangai (2nd accused) gave sworn evidence. It was more or less the same as appellant Joseph Gitau's.

The prosecution evidence, however, was completely different. Both PW 2 John Kimondo, the Assistant Chief and PW 3, P C Eliot Kimani, said that when they found the mirror in their room all three accused (both appellants and the 3rd accused) said that the mirror was theirs. They lived in one room. They said they had bought the mirror. They could not produce a receipt.

The significant aspect of their evidence is that none of the three accused cross-examined either of them on what he had said. What the appellants and the 3rd accused were alleged to have told them. It was not put to either of them by any of the three brothers that the 3rd accused had brought the mirror. In my view the trial magistrate was quite right in rejecting the defences raised by the two appellants (and the 3rd accused) as being made up stories. However, he had no basis for his assumption that they had attempted to throw the blame on the 3rd accused who was the youngest brother and evidently under age. But despite that misdirection, I am satisfied that the trial magistrate had sufficient evidence to find the two appellants guilty of stealing (count 1).

The two appellants were also found guilty on count 2 of stealing from a motor vehicle contrary to section 279 (c) of the Penal Code. I shall deal with that finding at a later state.

Mr Mwichia for appellant John Njoroge (5th accused) had stated five grounds of appeal in his memorandum. In his submissions he said that this appellant was found in possession of one plastic jerrican. He laid stress on the consistency of his explantion of how he came to be in possession of it. Both the Assistant Chief, PW 2, and the policeman, PW 3, had stated that the appellant had told them that he had found the plastic jerrican – on the road according to PW 2 and near the scene of crime according to PW 3. In his unsworn statement in court the appellant had said that he had found it on the road. It had a crack. He thought it had fallen from a vehicle. Mr Mwichia further submitted that having found the jerrican on the road, it would have been quite reasonable for him to assume that it had dropped from an unknown passing vehicle.

The trial magistrate had no doubt, nor do I have any, that the plastic jerrican in question is the complainants' property. In my view, the trial magistrate had very rightly commented on the fact that the crack in the plastic jerrican was filled with glue so how could this appellant because of the crack have assumed that it had dropped from a passing vehicle. I would go further and observe that when the appellant cross-examined the Assistant Chief the latter said that he had told them that he had found the jerrican near the scene of crime on August 19, 1984. The policeman PW 3 was not cross-examined but he said in his evidence-in-chief that the appellant had told them that he had found the jerrican near the scene of crime. In his unsworn statement the appellant had said that he found the jerrican on August 29, 1984. If that was so, why did he not put it to the Assistant Chief and the policeman that he had told them that he had found the item on 29th and not on 19th? That this change in date is an afterthought is obvious in view of the evidence of PW 1 who said that when he returned to the motor vehicle on August 20, 1984 at 6.45 am in the morning he found the motor vehicle parts and plastic jerricans and the spectacles missing.

The trial magistrate had found that the appellant had not told the truth. In my view his account of how he came to possess the jerrican is neither true nor even a plausible explanation. To my mind the trial magistrate had very properly rejected this appellants'explanation and found him guilty of stealing from the motor vehicle as per count 2. However, the fact that this appellant stole items from a motor vehicle does not necessarily mean that he stole motor vehicle parts also. Likewise, the mere fact that the appellants Joseph Gitau (1st accused) and Paul Wangai (2nd accused) were found to have stolen a motor vehicle part does not necessarily mean that they also stole goods from that motor vehicle. There is no evidence to show or give rise to an irresistible conclusion that appellants Joseph Gitau (1st accused) and Paul Wangai (2nd accused) had acted jointly with appellant John Njoroge (5th accused) in the commission of these offences.

Conviction of each of the appellants Joseph Gitau (1st accused) and Paul Wangai (2nd accused) on count 2 is quashed and the sentence is set aside.

Appeal of each of the appellants Joseph Gitau (1st accused) and Paul Wangai (2nd accused) on count 1 is dismissed.

Appeal of appellant John Njoroge (5th accused) on count 2 is dismissed.

Each of the appellants on the above two counts had been sentenced to 3 years imprisonment with 4 strokes. Being mindful of all that was stated by the prosecution and the comments made by the trial magistrate, I feel that the sentences are manifestly excessive.

The prison sentence of the appellant John Njoroge (1st accused and Paul Wangai (2nd accused on count 1 and of appellant John Njoroge (5th accused) on count 2 is reduced to 2 years imprisonment with effect from the date of sentence by the lower court. The sentence of corporal punishment of 4 strokes imposed by the lower court on each of theappellants remains unaltered and is confirmed.

Dated and delivered at Nairobi this 29th day of July 1981/

A.M COCKAR

JUDGE.