



REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA AT NAKURU

Criminal Appeal 66 of 1983

WAWERU KARIUKI.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Nakuru (Masime, J) dated 15th October, 1982

in

Criminal Appeal 155 of 1982)

JUDGMENT OF THE COURT

On March 18, 1982 David Waweru Kariuki, the Appellant, was convicted by the Resident Magistrate, Naivasha, of kiosk breaking and stealing contrary to section 306 of the Penal Code, and sentenced to 6 years imprisonment with 6 strokes corporal punishment.

He appealed from his conviction and sentence to the High Court and stated he wished to be present when his appeal was heard to urge it.

It was heard on October 8, 1982 by the High Court in Nakuru (Masime, J.) in his absence and a week later it was dismissed.

He has appealed to this court against conviction and sentence and we heard all he had to say.

At the outset we have to say we have no jurisdiction to entertain his appeal against sentence for it was a legal one.

His grounds of appeal amount in the end to only one matter of Law, namely, his conviction was against the weight of evidence. The learned judge was satisfied this was not so.

The magistrate recorded the testimony of Mrs Kimani, the kiosk owner, Muhu, a watchman at the Naivasha Railway Club, and Constable Jetan of Naivasha Police Station all for the Republic, and the Appellant's unsworn statement. The Republic's case was that during the dark hours of October 17 and 18, 1981 Mrs Kimani's kiosk at Naivasha was broken into and the offenders committed the felony of theft. They stole her sacks, baskets, eggs, bottles of aerated waters, knife, paper, weighing machine

clutching the collar of his coat. The other man ran off.

The Constable's calls for help fetched Muhu and a colleague to the scene and Muhu helped the constable march the appellant whom he found holding the sack to the post office in Naivasha where he left them telephoning the police for a vehicle to collect them. The other watchman sped after the appellant's crony but to no avail.

The appellant told the constable he purchased them all in Nairobi for his shop in Gilgil. Mrs Kimani identified them the next day as hers and as stolen from her kiosk during the previous night.

None of the prosecution witnesses knew or recognized the appellant.

The appellant claimed, in effect, the evidence of the constable and watchman was false. He left Kabati at about 9.45 pm to travel by train which he missed so he went to a petrol station near the Umoja butchery to find a private taxi.

Constable Jatan approached and asked him if he had seen a man running past and he said he had not, so the next question was where was he going and when he replied "Gilgil" he was made to accompany him to the some near shops. There the constable asked a Maasai watchman if he knew the appellant and when the answer was 'no' the constable said he would not release the appellant for he had been remanded a long time. The constable picked up the sack and made the appellant carry it to the post office where a police Land Rover found them and took them to Naivasha police station. He did not know what was in the sack or from where it came.

He criticized the Republic's case at the trial, in his memoranda of appeal and in submissions in this court. Muhu, the watchman, did not say what was in the sack.

His colleague of his previous convictions. The police did not hold an identification parade or produce evidence that revealed his fingerprints were on any of the stolen goods. Whoever reported the alleged offence to the police was not the kiosk owner.

The fact is, however, that Muhu swore he never saw what was in the sack. His fellow watchman from the club and the Maasai one would not have added anything to the prosecution evidence. The constable caught the appellant, arrested him, took him to the police station, and charged him so there was no call for an identification parade. Fingerprint evidence would perhaps have shown whether the appellant stole this property or handled it during the course of stealing it. Mrs Kimani, the kiosk owner, did not know the appellant on him break and enter it so who made the report is of no consequence.

So none of these submissions prevail. The appellant was caught with this property very soon after it was stolen from the kiosk, which had recently been broken into and entered. He denied all this. The magistrate and the learned judge believed the witnesses for the Republic and not the Appellant. His conviction was not against the weight of the evidence. It was properly entered.

Accordingly, the appeal is dismissed.

Delivered at Nakuru this 7th day of October, 1983.

C B MADAN

JUDGE OF APPEAL

A A KNELLER

JUDGE OF APPEAL

Z R CHESONI

JUDGE OF APPEAL

