



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: HANCOX JA, CHESONI & PLATT Ag JJA)

CRIMINAL APPEAL NO. 97 OF 1983

AGGREY..... APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant was convicted by a district magistrate II of stealing, contrary to section 275 of the Penal Code (cap 63). The district magistrate II then committed him to the chief magistrate's court under section 221(1) of the Criminal Procedure Code (cap 75) for sentence. Only one of his admitted two previous convictions was relevant. He was sentenced to eighteen months' imprisonment. His appeal to the High Court was summarily dismissed by Nyarangi J and he appeals to this court.

The exercise of the power of summary rejection of appeals under section 352(2) of the Criminal procedure code is strictly limited to cases where the appeal is brought on the ground that the conviction is against the weight of evidence or the sentence is excessive - *R v Karioki Gachuhi* [1950] 17 EACA 141 *Mulakh Raj Mahan v Reginam* [1954] 21 EACA 383. In his grounds of appeal to the High court the appellant complained that the prosecution evidence against him was fabricated lies and unreliable. When, therefore the substance of the grounds of appeal before the High Court are fairly looked at they do not amount to no more than a submission that the conviction is against the weight of evidence and had the learned judge bore in mind the above test on *Osongo and Another v Republic* [1972] E A 170 he would not have summarily rejected the appeal. The proper course in this kind of appeal is to remit the appeal to the High Court for admission to hearing. In this case that might work injustice to the appellant as the evidence against him is contradictory. We shall therefore deal with the appeal.

The case against the appellant was that the eight toilet holders and two switch sockets he was alleged to have stolen were the property of International House who therefore was the general or special owner. The key prosecution witnesses were Richard Ng'eno (PW 1) and Peter Munyao (PW 2). Richard was supposed to be the one who saw the appellant lock himself in the toilet and then he called Peter. The two were alleged to have seen the appellant come out of the toilet carrying a paper bag in which the toilet roll holders were hidden. The appellant admitted going to and coming out of the toilet but denied carrying a paper bag on his way out. He said Richard and Peter brought it out after forcing him back there. There was support for the appellant's version for although Richard and Peter maintained that he was the one who had the paper bag it will be noted that Richard said:

“He got the paper and we found the holder and a socket switch but we do not know where he got from”

and Peter said this:

“The paper bag contained the removed toilet paper holders and socket switches which did not belong to our building.”

If the words “our building” are understood to refer to Life International House, and that must be the most probable inference, then the toilet paper holders and the socket switches alleged to have been in possession of the appellant were not proved to have been the same as those removed and therefore stolen as charged.

It is true that the circumstances in which he was found and the screw drivers found in his socks raised grave suspicion against the appellant. However in our view the evidence did not support the charge as laid and in the circumstances it cannot be said that all the ingredients of the offence of theft contrary to section 275 were established.

For these reasons we allow the appeal, quash the conviction, set aside the sentence and order the appellant to be released forthwith unless he is otherwise lawfully withheld.

Dated and delivered at Nairobi this 1st November, 1983

A.R.W. HANCOX

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JUDGE OF APPEAL

Z.R. CHESONI

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JUDGE OF APPEAL

H.G. PLATT

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Ag JUDGE OF APPEAL