



REPUBLIC OF KENYA

IN THE COURT OF APPEAL
AT MOMBASA

CORAM: OMOLO, SHAH & O'KUBASU, J.J.A.
CRIMINAL APPEAL NO. 81 OF 2001

BETWEEN

JAMES OKELLO ISAAC APPELLANT

AND

REPUBLIC RESPONDENT

**Appeal from a Judgment of the High Court of Kenya at
Mombasa (Commissioner Khaminwa Mrs) dated 19th July,
2000**

**in
H.C.C.R.A. NO. 107 OF**

JUDGMENT OF THE COURT

The appellant, James Okello Isaac, was tried and convicted by the learned Senior Resident Magistrate (Mr. P. M. Ndungu) on a charge of burglary and stealing contrary to **sections 304(2) and 279(b)** of the Penal Code. He was sentenced to ten years imprisonment and five strokes of the cane on each limb of the charge. The sentences on the two limbs were to run concurrently so that in the end the appellant was to serve a total of ten (10) years imprisonment and receive a total of ten (10) strokes of the cane.

The evidence on record was to the effect that the appellant was arrested together with two other persons at about 4.00 a.m. on 13th August, 1997 by police officers who were on patrol duties within Kisumu Ndogo area of Kilifi Town. One of the appellant's companions managed to escape but the appellant and his other companion were arrested in possession of some household goods which included gas cooker and gas cylinders. The appellant and his companion then led the police to the house in which they had broken into and stolen the recovered goods. This was a house of one German national named Hans Wiest. The recovered items were later identified by Sheikh Agaf (PW1) who was the caretaker of Wiest's house. These recovered items were produced as Exhibits 1-17.

During the trial before the learned Senior Resident Magistrate, PC Bernard Barasa (PW2) and PC Robert Mutai (PW3) testified on how they arrested the appellant with his companions. These people were carrying these items and on seeing the policemen attempted to run away but were overpowered and arrested. The appellant made a charge and cautionary statement to Inspector Jacob Mwangi (PW4). In that statement the appellant admitted the offence. The statement was produced in evidence without any objection from the appellant. In his defence the appellant stated that the items in question had been given

to him by the person who managed to escape during the arrest.

The learned Senior Resident Magistrate considered the evidence before him and came to the conclusion that the appellant was guilty of the offence and convicted him accordingly. Perhaps, it should be pointed out that the appellant was convicted together with his other companion who did not appeal. The appellant's appeal to the High Court was dismissed. He now comes to this Court on a second appeal

On our part we have considered the evidence on record and evaluation of the same by both trial and appellate court and we are of the view that the appellant's conviction was inevitable. In the course of her judgment the learned Commissioner of Assize (Mrs. J. Khaminwa) stated inter alia:-

"It is obvious at this stage that there is evidence directly pointing to the Appellant as one of the men involved in the commission of the offence. Furthermore, in his statement of defence the Appellant admitted that he met the police while carrying some items and he was arrested together with 2nd accused."

In our considered opinion this is a case in which the appellant was caught red-handed with the stolen property. His conviction was therefore inevitable.

We cannot interfere with the sentence in view of the provision of section 361(1) of the Criminal Procedure Code which provides:-

"A party to an appeal from a subordinate court may, subject to subsection (8) appeal against a decision of the High Court in its appellate jurisdiction on a matter of law, and the Court of Appeal shall not hear an appeal under this section

(a) on a matter of fact, and severity of sentence is a matter of fact:

(b)....."

The sentence imposed although severe was not unlawful. In any case the appellant had a poor record of previous convictions. He deserved the long sentence.

The upshot of the foregoing is that we find this appeal unmeritorious and the same is dismissed in its entirety.

Dated and delivered at Mombasa this 19th day of July, 2001.

R.S.C. OMOLO

JUDGE OF APPEAL

A. B. SHAH

JUDGE OF APPEAL

E. O. O'KUBASU

JUDGE OF APPEAL

I certif that this is a true copy of the original.

DEPUTY REGISTRAR