REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

MISCELLANEOUS CRIMINAL APPLICATION NO. 88 OF 1982

BETWEEN

PATRICK GATHOGO NJUGUNA.....1ST APPELLANT

PAUL MUTURI MWANGI..... 2ND APPELLANT

AND

REPUBLIC.....RESPONDENT

JUDGMENT

May 24 1988 **Torgbor J** delivered the following Judgment.

The two appellants, Patrick Gathogo Njuguna (1st accused) and Paul Muturi Mwangi (2nd accused) were convicted for breaking into a *kiosk* and stealing therefrom shs 1,000 in cash and a weighing machine valued at sh 6,000 and were sentenced to 3 years' imprisonment and 4 strokes of the cane.

Principal State counsel Mr Nyaga, has said that the charge is bad because it combines into one count two offences that are in fact separate. I think it is desirable to deal with this point before considering the merits of the appeal.

The charge is worded as follows:

"Kiosk breaking and stealing contrary to section 306 of the Penal Code and stealing contrary to section 279 of the Penal Code."

It is clear that two distinct charges have been framed in one count but I do not agree with Mr Nyaga that the charge was thereby rendered bad in law. It is indeed desirable where different offences are committed to draft the charge in relation to those offences under separate and distinct counts so that the accused person knows precisely what he is to defend himself against. The particulars of the offence charge are:

"On the 6th day of May 1987 at Donyo Sabuk trading center in Matungulu location in Machakos District of the Eastern Province, jointly broke and entered the kiosk of Janiffer Juma and stole cash sh 1000 and a weighing balance valued shs 6,000 the property of the said Jannifer Juma."

On reading the particulars of the charge it becomes abundantly clear that the offences disclosed are fully described and are those appearing in the first part of the charge and that the further offence of theft under section 279 of the Penal Code is superfluous and unnecessary surplusage, and further that it added nothing and took nothing away from the offence charged under section 306 of the Penal Code. I am of the view therefore that, although the charge is ineptly drafted, when that charge and the particulars were read to the accused they must have fully understood the offence upon which they were to defend themselves. I am satisfied therefore that no prejudice of any sort was caused to the appellants by reason of the poorly drafted charge.

The complaint in grounds one and three of the appeal was that the appellants were not properly identified and that the trial magistrate failed to warn himself that corroboration of the identification evidence was necessary.

The complainant's evidence was that she was woken up at 2. a.m. on the material date by the sound of stones hitting the door of her *kiosk* in which she slept. She saw two people by the light of torches held by the intruders and there was also moonlight. The intruders had entered her *kiosk*. She knew the two accused persons before then. She used to collect milk from the father of the 1st accused and attended the same church with the 2nd accused. She saw them clearly in her *kiosk* at the material time and recognized them. The first accused took the weighing machine while the 2nd accused took the money (sh 1000 in cash). She screamed. The accused took to their heels and fled to the river.

It seemed that the complainant had opportunity to observe her assailants because she said they demanded money from her. Then she made significant observations during her cross examination by the appellants to the 1st accused (1st appellant) she said.

"You were in fact feeling the machine heavy" and "You used to bring milk for 3 months" to the 2nd accused (2nd appellant) she said:

"I saw you ... you then ran away... I chased you. You were infront while accused 1 was behind. The weighing machine was too heavy for accused 1".

And further she added:

"You put on a sweater and white sleeved shirt. I had seen you during the theft ... I have known you for many years."

It is clear than that this was identification by recognition of persons previously known to the complainant. Such identification is quite different from identification of a stranger seen for the first time at night by a complainant. In this case the categorical evidence of recognition of the appellants both of whom heard her evidence and had opportunity to refute those statements. In my view the vigorous rules or principles governing the reception of identification of a total relevance in relation to identification of a total stranger. In the case of *Roria v Republic* [1967] EA 583 at 584 the Court of Appeal said:

"The danger is of course, greater when the only evidence against an accused person is identification by one witness and although no one would suggest that a conviction based on such identification should never be upheld it is the duty of this court to satisfy itself that in all circumstances it is safe to act on such identification."

The Court of Appeal then quoted with approval the following passage from *Abdala Bin Wendo v R* [1953] 20 EACA 166 at page 168:

“Subject to certain well-known exceptions it is trite law that a fact may be proved by the testimony of a single witness but his rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct pointing to guilt, from which a judge or jury can reasonably conclude that the evidence of identification although based on the testimony of a single witness can safely be accepted as free from the possibly of error.”

In the instant case it has not been demonstrated that the conditions for identification of the appellants were difficult and as already noted this was a case of identification by recognition of persons already known to the complainant. Again it is clear from the above passage that the evidence of a single witness may in appropriate circumstances be received. In my view it has not been demonstrated in this case that the identification evidence of the complainant may be mistaken. I therefore find no merit on grounds 1 and 3 of the appeal.

The complaints in grounds 2 and 4 of the appeal are that the alibi evidence of both appellants were summarily dismissed without due consideration and that the judgment was against the weight of the evidence.

The unsworn statement of the 1st appellant was that he did not steal anything and denied the charge. He said he was asleep that night with another person. His first witness said he slept with this appellant that night in the same bed while the second witness said he didn’t know whether or not the appellant stole anything. In the light of the complainants categorical recognition of this appellant the trial magistrate rejected this alibi and on my own assessment of the evidence I am of the view that he did so properly. As an unsworn statement of this appellant carried lesser weight than the sworn evidence of the complainant and the endorsement given to that unsworn statement by the appellant’s first witness did not in my judgment improve or give it greater weight. The second witness knew nothing about the whole affair. The believable and therefore preferred evidence of the complainant would render the alibi defence false and the appellant’s first witness would have endorsed a falsehood with a falsehood

The second appellant’s unsworn statement was that he was at home on the material night and his witnesses endorsed the said statement. They were the appellant’s father, grandmother and wife respectively all of whom, by reason of family ties had reason to protect the appellant. It is on the evidence, my view that the complainant’s evidence rendered this alibi also false and likewise the endorsements. For these reasons I would reject grounds 2 and 4 of this appeal. Consequently the appeals against conviction fail.

Regarding sentence (ground 5) it is noted that the appellants were first offenders and both asked the court to forgive them. The first appellant was 19 years old and the second a peasant farmer. The offence carried a maximum sentence of seven years’ imprisonment with corporal punishment. The properties stolen were not recovered and had a total value of sh 7,000. The complainant suffered no personal injuries. I would show some leniency and impose a term of imprisonment for 2 years on each appellant. The sentences of the lower court are accordingly substituted.

Both appellants had been on bond from the date of first conviction until 24th May 1988 when the bonds expired and were not extended. The prison sentences imposed by this court will be in force from the 24th May 1988.

Order accordingly.

Dated and delivered at Machakos this 24th day of May , 1988

E.A TORGBOR

JUDGE