Case Number:	Criminal Appeal 135 of 1981
Date Delivered:	30 Mar 1983
Case Class:	Criminal
Court:	Court of Appeal at Nairobi
Case Action:	Judgment
Judge:	Eric John Ewen Law, Cecil Henry Ethelwood Miller, Kenneth D Potter
Citation:	Ngui v Republic [1983] eKLR
Advocates:	-
Case Summary:	**Ngui *v* Republic** Court of Appeal, at Nairobi March 30, 1983 Law, Miller & Potter JJA Criminal Appeal No 135 of 1981 (Appeal from the High Court at Nairobi, Masime J) ***Sentencing*** *- corporal punishment - order of - whether corporal punishment can be ordered to be concurrent or consecutive.* ***Appeal*** *- first appellate court - duties of - assessment of findings of lower court.* ***Evidence*** *- evaluation of - consideration of - by first appellate court.* The appellant was charged with burglary and stealing and was convicted on both counts. The appellants appeal to the High Court was dismissed hence this appeal on the grounds that the judgment on the first appeal was not satisfactory. **Held:**

	1. Sentences of corporal punishment cannot be ordered to be concurrent. 2. The first appellate court must reconsider the evidence, evaluate it itself and draw its own conclusions in order to satisfy itself that there was no failure of justice, it is not sufficient for it to merely scrutinize the evidence to see if there was some evidence to support the trial courts' findings and conclusions. *Appeal allowed; conviction quashed.* **Cases** 1. *Okeno v R* [1972] EA 32 2. *Pandya v R* [1957] EA 336 **Statutes** Penal Code (cap 63) sections 279(b), 304(2)
Court Division:	Criminal
History Magistrates:	-
County:	Nairobi
Docket Number:	-
History Docket Number:	-
Case Outcome:	Appeal allowed; conviction quashed.
History County:	Nairobi
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Law, Miller & Potter JJA)

CRIMINAL APPEAL NO. 135 OF 1981

BETWEEN

NGUI.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from the High Court at Nairobi, Masime J)

JUDGMENT

The appellant was charged, on the first count, with burglary and stealing, contrary to section 304(2) and 279(b) of the Penal Code, and on the second count with burglary contrary to section 304(2) of the Penal Code. He was convicted on both counts by a senior resident magistrate at Nairobi and sentenced to 3 years imprisonment with 2 strokes of corporal punishment and 2 years imprisonment with 2 strokes on the two limbs of count 1 respectively, and to 3 years imprisonment with 2 strokes on count 2, the magistrate adding the following order :-

“All sentences to run concurrently”.

Sentences of corporal punishment cannot be ordered to be concurrent. The appellant appealed to the High Court. The leaned 1st appellate judge dismissed the appeal on the first count, and allowed the appeal on the second count. The judgment on the first appeal was not satisfactory. The facts were dealt with by the learned judge in the following short passage:-

“Finally as to the merits of the appeal as a whole I am satisfied that the learned senior resident magistrate was entitled to the findings he made and properly convicted the appellant on count 1.”

We draw the attention of the learned judge to *Okeno v R* [1972] EA 32, and to *Pandya v R* [1957] EA 336, As was said in *Okeno*’s case, at page 36 :-

“The first appellate court must reconsider the evidence, evaluate it itself, and draw its own conclusions.

It is not enough for the first appellate court merely to scrutinize the evidence to see if there was some evidence to support the trial court’s findings and conclusions. It is accordingly incumbent on this court to make its own evaluation of the evidence, so as to satisfy itself that no failure of justice has been occasioned by the defects in the first appellate court’s judgment. Nor was it appreciated in the High Court that the order that the sentences should run concurrently was irregular so far as the sentences of corporal punishment were concerned.

The facts of the instant case were as follows. Thieves broke into the house of Major Mutuku at Bahati

Duck Farm near Nairobi on the night of December 15 to 16, 1980, at a about 1.30 to 2.00 am. A quantity of property was stolen. The telephone wires were cut. Soon afterwards the house of a neighbour, Mr Streets, was also broken into. Nothing was stolen on this occasion because Mr Streets fired a gun in the air and frightened the thieves who ran away. Mr Streets telephoned the police who were soon on the scene. Included in the police party was a police dog and its handler police constable Mutune. Police Constable Mutune was the only witness other than the two complainants called at the trial. He deposed that the dog led him to a place 5 kilometers away where he saw 6 people carrying goods. He released the dog. The people ran away, but the dog caught one, the appellant, who according to Police Constable Mutune had been carrying " a huge luggage of goods" which he threw away. Police Constable Mutune arrested the appellant and retrieved the bundled of goods. He deposed that the appellant led him to Major Mutuku's house, where according to the record Major Mutuku identified the appellant . As Major Mutuku had deposed that he could not recognize any of the thieves, we looked at the original record in the magistrate's handwriting. Unfortunately it is indecipherable on this important point. Police Constable Mutune did not mention another important point in his evidence, that before going to Major Mutuku's house, the police party first went to their original starting point which was Mr Streets' house. The appellant in his unsworn statement in his defence said that he had been visiting a friend that night who at 10.30 pm escorted him back to the Kiambu road and there left him. Then he was stopped by a policeman. Later another policeman came with a dog and bundle. He was bitten by the dog, and taken to Mr Streets' house, and then to Major Mutuku's. It is common ground that the appellant was then taken to Muthaiga Police Station and charged. No "charge and caution statement" by the appellant in answer to the charge was produced at the trial, as it should have been. It may be that he said nothing. If so, the trial magistrate should have been so informed. The evidence of the officer who charges an accused person should always be available at a criminal trial, because a statement made by an accused person at the first opportunity may assist him by showing consistency on his part in his defence.

The evidence against the appellant was most unsatisfactorily. Many points should have been cleared up, by questions from the bench if necessary as the appellant was undefended. For instance, it was dark when the appellant was first apprehended. The dog had been released, and Police Constable Mutene was following some distance behind. How could he see that the appellant was carrying anything, or that it was the appellant who threw away the bundle" All the property stolen from Major Mutuku appears to have been in the bundle allegedly carried by the appellant. What then was being carried by the other 5 men Police Constable Mutene says he saw" These and many other questions at once spring to mind. The strongest piece of evidence against the appellant was that he led the police to Major Mutuku's house, an allegation denied by the appellant. Major Mutuku had not been able to report the burglary to the police as his telephone wires had been cut. But it seems to us possible that somebody in the police party was informed of the burglary at Major Mutuku's house. Mr Streets may well have heard of it, and told the police. He was not asked about this. There were other police on the spot, investigating. They did not all follow the dog.

In all these circumstances, we do not think that the appellant should be convicted mainly on Police Constable Mutune's statement that it was the appellant who led the police party to Major Mutuku's house. Police Constable Mutune does not appear to us to have been a particularly reliable witness. The possibility that the appellant was an innocent passer-by who by mischance happened to be near a gang of thieves when the police dog arrived, and was arrested by mistake, cannot be excluded. Both the trial magistrate and Police Constable Mutune were in error in saying that the appellant led the police to Major Mutuku's house, without mentioning the first visit to Mr Streets' house, where news of the robbery at Major Mutuku's house may well have been received. This was very much of a border-line case, but in the absence of concurrent findings of fact in the two courts below we can only say that we are left in doubt as to the propriety of the appellant's conviction on count 1, the only remaining count.

We allow this appeal, quash the conviction for breaking into and stealing from Major Mutuku's house, as charged in count 1, and set aside the sentences of imprisonment and corporal punishment passed on that conviction.

Dated and Delivered at Nairobi this 30th day of March 1983.

E.J.E.LAW

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JUDGE OF APPEAL

C.H.E.MILLER

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JUDGE OF APPEAL

K.D.POTTER

.....

JUDGE OF APPEAL

I certify that this is a true

copy of the original.

DEPUTY REGISTRAR