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| Case Number: | Criminal Appeal No 616 of 1985 |
| Date Delivered: | 03 Oct 1985 |
| Case Class: | Criminal |
| Court: | High Court at Nairobi (Milimani Law Courts) |
| Case Action: | Judgment |
| Judge: | Joseph William Alexander Butler-Sloss |
| Citation: | Kibiriri v Republic[1985] eKLR |
| Advocates: | - |
| Case Summary: | - |
| Court Division: | Criminal |
| History Magistrates: | - |
| County: | Nairobi |
| Docket Number: | - |
| History Docket Number: | - |
| Case Outcome: | Dismissed |
| History County: | - |
| Representation By Advocates: | - |
| Advocates For: | - |
| Advocates Against: | - |
| Sum Awarded: | - |

**REPUBLIC OF KENYA**

# Kibiriri v Republic

**High Court, at Nairobi October 3, 1985**

**Butler-Sloss J**

**Criminal Appeal No 616 of 1985**

**(Appeal from the Resident Magistrate"s Court at Thika, R N Kamiro, Esq)**

Advocates

M Njoroge for the appellant

A Haq for respondent

**October 3, 1985, Butler-Sloss J delivered the following Judgment.**

On March 19, 1985, the appellant, John Nyoike Kibiriri, appeared before H R Aggarwal, resident magistrate, in the resident magistrate's court at Thika. He was there charged, jointly with another person, in criminal case No 140 of 1985, with housebreaking and stealing contrary to section 304(1) (a) and section 279(b) of the Penal Code. There was an alternative charge of handling stolen goods contrary to section 322(1) of the Penal Code.

Both accused pleaded not guilty to these charges, and were tried before R N Kamiru, Esq, resident magistrate. On April 30, 1985, the learned resident magistrate convicted the appellant on the first charge and made no finding on the alternative count. His co-accused was acquitted on both charges. The appellant was then sentenced to two years imprisonment with three strokes of the cane.

By his petition of appeal, which is dated May 14, 1985, and was filed in court on the same day, the appellant advances seven grounds of appeal. Mr Njoroge, who appeared for the appellant in the court below, also appears for him on this appeal. The respondent is represented by Mr Haq.

It is evident from page 15 of the record that the basis of the appellant's conviction was the doctrine of recent possession. The third ground of appeal is that the learned magistrate wrongly invoked that doctrine. Mr Njoroge puts it this way. He concedes that property was stolen on or about the March 5, 1985, and that, on March 16, 1985, that property was found by police in a box in the appellant's house. He argues, however, that the learned magistrate was wrong to reject the appellant's explanation. His explanation was that he shared his house with his brother; each had a box to contain personal belongings; the stolen goods were found not in the appellant's box but in his brother's box; the appellant had no means of access to his brother's box; he had no knowledge or means of knowing what it might contain, and was not in possession of the contents.

As to this, the learned magistrate, at page 14 of the record, said :

> ***"I have considered the defence of accused one that he shares the house with his brother. I do not at all entertain a doubt that the property was of the accused one. I disbelieve accused when he claims the two items were of his brother now at large. I invoke the***

***doctrine of recent possession to find that accused was found in possession of exhibits 1 and 2 on 16th March, 1985 which were part of property of complainant stolen on 4th and 5th March, 1985, to find that, having disbelieved his explanation, he was the person who did the actual stealing."***

I agree with the learned resident magistrate for the following reasons :

The appellant called as a witness in the court below, another brother Hussein Kibiriri. His evidence appears on page 10. He says :

***"They (i.e the police ) then took me to the house where accused one was. They forced open the house. The house has two partitions. They entered the partition where accused one lived. They searched it. They then went to the other partition used by my brother called Mburu Nyoike. They got the box now in court. The box belongs to my brother Nyoike. He is at large. It does not belong to accused one."***

However, under cross-examination, he said :

***"From the house of accused to my house is six metres. I saw Mburu for the last time in January."***

On that evidence, which was evidence called by the appellant, it is reasonable to conclude that the missing brother, the one who is at large, has not been home since January and that it was not he, the missing brother, who stole property on March 5, 1985 and kept it in a box in the house shared with the appellant where it was found on March 16, 1985. If it was not the missing brother then it can be no one but the appellant himself.

Moreover, the theory about the box being under the exclusive control of the missing brother was slow to develop. This appears from the evidence of PW 3 Philip Mbogo, a police officer attached to Kandara police station. Under cross-examination by Mr Njoroge, at page 7 of the record, this witness said :

"***I told them I wanted to carry a search into the house. I found many items but of interest to me was a box wherein I found the exhibit 2. The box was locked and I requested it to be opened but they declined without giving a reason. I then broke it: enquired as to the owner of the box. I enquired as to who was the owner but they never disclosed."***

Further down, on page 8 of the record, PW 3 says :

> "***I interrogated the two (i.e the appellant and his co-accused) and they claimed the items were theirs. Accused persons maintained the cups were theirs. I am not aware that the two could not open the box as it was not theirs. They never provided the keys."***

It appears, therefore, from this evidence, that what was at issue was whether the property in question belonged to the appellant or to the complainant. The idea of blaming it all on the missing brother only emerged as an afterthought. It is not surprising then that the magistrate disbelieved, and rejected this tardy explanation and convicted the appellant.

Mr Haq, for the respondent, conceded that the appellant should not be required to prove his explanation, and that if the explanation was reasonable, it should be accepted as true. However, it is clear that the missing brother had nothing to do with this stolen property.

I agree with the learned advocate for the respondent, and consider the appellant to have been rightly convicted.

The appellant also appeals against the sentence imposed by the learned resident magistrate of two years imprisonment plus three strokes of the cane. I do not consider that this sentence is excessive considering the gravity of the offences but it should be allotted to the offences without, however, being increased. The sentence will accordingly be varied to a sentence of two years imprisonment on the first limb of the charge and a sentence of two years imprisonment plus three strokes of the cane on the second limb of the charge, both sentences of imprisonment to be served concurrently and to run from the date the original sentence was imposed viz. April 30, 1985.

This appeal is dismissed.