



**Kinya & another v Prosecution (Criminal Appeal E071 of 2021)
[2023] KEHC 1494 (KLR) (23 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 1494 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CRIMINAL APPEAL E071 OF 2021
TW CHERERE, J
FEBRUARY 23, 2023**

BETWEEN

RUTH KINYA 1ST APPELLANT

IBRAHIM NGAITA 2ND APPELLANT

AND

PROSECUTION RESPONDENT

*(Appeal against conviction and sentence in Meru Chief Magistrate's Court
Criminal Case No. 851 of 2016 by Hon. S. Abuya (CM) on 30th March, 2021)*

JUDGMENT

1. Ruth Kinya and Ibrahim Ngaita, (1st and 2nd Appellants respectively) were charged with stealing by servant contrary to section 281 of the [Penal Code](#). The particulars of the charge are that:

On April 7, 2016 at Raha Express Limited parcel delivery office in Nairobi County being servants of Raha Express Limited jointly stole 6 techno c 8 phones, 8 infinix x600 4g mobile phones, 8 infinix x551 mobile phones, 4 techno J5 mobile phones, 4 infinix X510 mobile phones, 6 Techno Y6 mobile phones, 10 Techno Y3S mobile phones, 10 Techno Y2 mobile phones, 8 Itel 1503 mobile phones, 4 Itel 6800 mobile phones, 1 Itel 1407 mobile phone and 8 Itel 2020 mobile phone all valued at KES. 506,000/- the property of Moses Kimondo Muthanga which had been entrusted to the to deliver to the said Moses Kimondo Muthanga

2. Moses Kimondo Muthanga stated that on April 7, 2016, he made an order for mobile phones via a WhatsApp message and on the same day paid KES. 500,000/- to the vendor one Mohamed. It was his evidence that the said Mohamed informed him he had dispatched the phones in two cartons via Raha Express Ltd on the same day but found only one carton when he went to collect them the following day. Mohamed Hassan Mohamed stated that upon receiving an order for phones and KES. 500,000/-,



he parked various phones in two cartons and gave them to one Victor Ombayi to dispatch to the complainant in Meru via Raha Express Ltd and later learnt that only one carton was received. Victor Ombayi stated that he delivered two cartons to the 1st Appellant on 07th April, 2016 and was issued with Waybill No. 975 which indicated Accessories and receipt for two boxes. In cross-examination, he stated he did not see the contents in the two boxes. An inventory of phones in the carton that was received was taken by the investigating officer and after investigations, both Appellants were charged.

3. Both Appellants denied stealing complainant's phones. 1st appellant confirmed she received 2 cartons from Victor Ombayi who said they contained accessories and she issued a waybill and a receipt in respect thereof. She handed over the cartons to the 2nd Appellant who then handed them over to the loader who loaded them in a van for onward delivery to Meru. 2nd appellant confirmed he received from 1st appellant two cartons containing accessories that were delivered by Victor and handed them over to a loader to load them in a van for delivery to Meru.
4. At the conclusion of both the prosecution and defence cases, the trial court disbelieved the Appellants, convicted them and fined them KES. 100,000/- each and in default each to serve 2 years' imprisonment.

The Appeal

5. Dissatisfied with the conviction and sentence, Appellants lodged the instant Appeal mainly on the ground that the Complainant neither proved that he ordered for mobile phones, paid for them nor that Appellants stole the carton containing 6 technoc 8 phones, 8 infinix x600 4g mobile phones, 8 infinix x551 mobile phones, 4 technoj5 mobile phones, 4 infinix X510 mobile phones, 6 Techno Y6 mobile phones, 10 Techno Y3S mobile phones, 10 Techno Y2 mobile phones, 8 Itel 1503 mobile phones, 4 Itel 6800 mobile phones, 1 Itel 1407 mobile phone and 8 Itel 2020 mobile phone all valued at KES. 506,000/-.

Analysis and determination

6. The duty of the first Appellate Court is to carefully examine, consider and set out the evidence that was tendered before the trial court and subject the whole evidence to a fresh and exhaustive re-examination and re-evaluation so as to arrive at own independent conclusions on the appellant's guilt or otherwise. (See Michael Muriuki Munyori v Republic [2107] eKLR).
7. From the evidence on record, it is on record that out of the two cartons that were dispatched to the complainant, only one was received. The issue is whether the prosecution established beyond any reasonable doubt that the missing carton contained mobile phones.
8. Of all the prosecution witnesses, only Mohamed appears to have seen the alleged stolen phones which he stated he parked in two cartons. Victor Ombayi who delivered the cartons to 1st Appellant neither saw the phones nor declared that the cartons contained phones. Appellants stated that it was the policy of their employer not to open customer's goods but to record what is declared and that according to them, the missing carton contained accessories and not phones.
9. The degree of proof in criminal cases was properly established in the classicus English case of *Woolmington vs. DPP* 1935 A C 462. Similarly, in *Bakare vs. State* 1985 2NWLR, Lord Oputa of the Supreme Court of Nigeria adopted the principle as follows at page 465: -

“Proof beyond reasonable doubt stems out of the compelling presumption of innocence inherent in our adversary system of criminal justice. To displace the presumption, the evidence of the prosecution must prove beyond reasonable doubt that the person accused is guilty of the offence charged. Absolute certainty is impossible in any human adventure,



including the administration of criminal justice. Proof beyond reasonable doubt means just what it says it does not admit of plausible possibilities but does admit of a high degree of cogency consistent with an equally high degree of probability”.

10. From the evidence on record, evidence by Mohamed that he had packed phones in two cartons was not corroborated. Appellants’ defences that they did not steal any phones in my considered view cast doubt on the uncorroborated prosecution case.
11. The essential question is not the truth or untruth of the defence but whether, the case for the prosecution was proved beyond reasonable doubt, and after a very careful consideration of the evidence on record, I am not satisfied that it was.
12. Whereas this court does not condone crime, a party who fails to declare goods entrusted on another should be ready to bear the consequences of such non-disclosure. From the foregoing analysis, I am persuaded that the evidence presented before the trial court was insufficient to sustain a conviction. The conviction was against the weight of evidence.
13. Accordingly, the convictions are quashed and the sentences imposed on the Appellants set aside. It is further ordered that the fines paid by the Appellants be refunded to them.

DELIVERED AT MERU THIS 23RD DAY OF FEBRUARY 2023

T. W. CHERERE

JUDGE

In the presence of:

Court Assistant - Kinoti

1st Appellant - Present

2nd Appellant - Present

For Appellants - Mr. Mageria Advocate

For the State - Ms. Rita ((PPC)

