



REPUBLIC OF KENYA



KENYA LAW
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**Ouya v Republic (Criminal Appeal E009 of 2022)
[2022] KEHC 12602 (KLR) (25 July 2022) (Judgment)**

Neutral citation: [2022] KEHC 12602 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITALE
CRIMINAL APPEAL E009 OF 2022
LK KIMARU, J
JULY 25, 2022**

BETWEEN

SOLOMON ONDITI OUYA APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal arising from original conviction and Sentence in Kitale Chief Magistrate's Criminal Case No. 2353 of (E819) OF 2020 delivered by Hon. V. Karanja – (PM) on 8/2/2022))

JUDGMENT

1. The appellant was charged with two counts of Stealing. In the first count he was charged with Stealing by Servant contrary to section 281 of the Penal Code. The particulars of the offence were that on diverse dates between 1st and 4th December 2020 at Kitale township in Trans Nzoia County, the appellant, being a servant of Uzuri Foods Limited, stole 1,100 bales of golden baking flour valued at Kshs 1,507,000/=, the property of Uzuri Foods Limited which came to his possession by virtue of his employment. He was further charged with Stealing Motor vehicle parts contrary to section 279(G) of the Penal Code. The particulars of the offence were that at the same time and in the same place, the appellant stole two (2) batteries and six (6) tyres valued at Kshs 129,000/= from motor vehicle trailer registration No. KCA 403B, the property of Uzuri Foods Limited. When the appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charge. After full trial, he was sentenced to serve three (3) years imprisonment in the 1st count and fined Kshs 100,000/= or in default serve twelve (12) months imprisonment in respect of the 2nd count. The appellant was aggrieved by his conviction and sentence. He filed an appeal to this court.
2. In his petition of appeal, the appellant raised several grounds of appeal challenging his conviction and sentence. He was aggrieved that he had been convicted on the basis of prosecution's evidence that was full of inconsistencies that raised reasonable doubt that he had committed the offence. He faulted the



trial magistrate for convicting him yet no complainant had testified in the case. He was aggrieved that he had been convicted on the basis that he was an employee of the complainant yet no documentary proof had been presented to court to establish the fact of his employment. The appellant faulted the trial magistrate for relying on contradictory prosecution evidence and relying on manufactured documents by the complainant to convict him. He took issue with the fact that he had been convicted after the trial court had relied on mere allegations and had shifted the burden of proof to the appellant and thereby arrived at the erroneous decision. He was finally aggrieved that he had been sentenced to serve a custodial sentence without an option of a fine. In the premises therefore, the appellant urged the court to allow the appeal, quash the conviction and set aside the sentence.

3. During the hearing of the appeal, this court heard oral rival submissions made by Mr. Gemenet for the appellant and by Ms Kiptoo for the prosecution. Mr. Gemenet submitted that the prosecution did not produce the complainant in the case. He pointed out that although evidence was adduced to the effect that the motor vehicle that the goods were stolen from belonged to a Limited Liability Company, no director of the company appeared in court to adduce evidence in support of the prosecution's case. He faulted the trial court for relying on oral evidence as regards the ownership of the motor vehicle when no log book of the motor vehicle had been produced in evidence. Learned counsel submitted that for the prosecution to establish its case, it was required to prove that there existed an employer-employee relationship between the appellant and the complainant. No such evidence was adduced. The appellant asserted that it was therefore erroneous for the trial court to have found that there existed such a relationship in the absence of documentary evidence. Learned Counsel submitted that the evidence adduced by the prosecution witnesses was full of contradictions and inconsistencies that a court of law applying its mind to the facts would have reached the conclusion that the prosecution had failed to establish the charges to the required standard of proof. As regards sentence, learned counsel faulted the trial court for sentencing the appellant to serve a custodial sentence without an option of a fine. He was of the view that there was no reason why the appellant should not have been given an option of a fine in view of the nature of the charges that he was facing.
4. Ms Kiptoo for the prosecution opposed the appeal. She filed written submission in opposition to the appeal. In addition, she made oral submission to the effect that the prosecution had established to the required standard of proof that the appellant stole from his employer. The witness who testified on behalf of the complainant was a bona fide employee of the company and therefore competent to testify on behalf of the complainant. The witness testified that the appellant had been employed by the complainant. Documentary evidence was produced to establish that indeed the appellant had been so employed. Learned prosecutor submitted that the prosecution had adduced cogent evidence which established that the goods and the motor vehicle were in the custody of the appellant at the time the goods and the motor vehicle spare parts were stolen from the motor vehicle. She urged the court not to interfere with the sentence meted on the appellant because it was an exercise of discretion by the trial court which was within the law.
5. This being the first appeal, it's the duty of this court to re-consider and re-evaluate the evidence adduced before the trial court so as to reach its own independent determination whether or not to uphold the conviction. In doing so, this court is required to take into consideration that it neither saw nor heard the witnesses as they testified and therefore cannot make any comment regarding the demeanour of the witnesses (See *Njoroge - vs - Republic* [1986] KLR 19). In the present appeal, the issue for determination is whether the prosecution established the charges brought against the appellant to the required standard of proof beyond any reasonable doubt.
6. In the present appeal, the prosecution witnesses testified that the appellant, being an employee of Uzuri Foods Limited (employed as a driver) was instructed to deliver 1,100 bales of home baking flour to



G.H. Turner, a wholesaler in Kitale town. Uzuri Foods Limited is based in Nairobi. The appellant was instructed to deliver the said goods on December 1, 2020. He was to deliver the said goods in a lorry – trailer registered as KCA 403b. According to the prosecution witnesses, the goods were not delivered to the complainant’s customer. The complainant sought the assistance of a motor vehicle tracking company to trace the whereabouts of the motor vehicle. The motor vehicle was traced to Kitale in a forest near Kenya Seed Company Limited. The goods were missing. The two batteries of the lorry had been removed. Six of the tyres which were new had been exchanged with worn out tyres. The appellant was nowhere to be seen. He was later traced in Nairobi in late December 2020 where he was arrested, brought to Kitale and charged with the present offences for which he was convicted.

7. The appellant has challenged the evidence adduced by the prosecution connecting him with the offences. The appellant asserts that the offence of Stealing by Servant cannot be proved without the prosecution establishing the existence of an employer-employee relationship. This court agrees with this submission. From the evidence adduced by the prosecution, it was evident that the appellant was an employee of the prosecution, it was evident that the appellant was an employee of the complainant. Documentary evidence was produced by the complainant which established to the required standard of proof beyond any reasonable doubt that the appellant was an employee of the complainant at the time the theft was committed.
8. On the issue whether the witness who testified in court had legal authority to testify on behalf of the complainant, this court noted that PW1 Absolom Orado testified that he was the transport manager of the complainant. His day-to-day duties included managing the transport fleet of the complainant. He was thus a competent witness to testify on behalf of the complainant as he was involved directly with the events that led to the loss of the goods under the care of the appellant. This court does not agree that in all circumstances it is a legal requirement for a director of a company to testify in a case involving the loss of his property. An employee of such a company who has information is a competent witness to testify in the case.
9. As regard the question whether the prosecution had established to the required standard of proof that the motor vehicle was under the custody of the appellant at the time of the theft of the goods and motor vehicle parts, this court holds that the prosecution was able to establish that upon the loading of the motor vehicle that was being driven by the appellant, the appellant was handed custody of the goods to deliver to the complainant’s customer at Kitale. The goods never reached the customer. The motor vehicle was recovered in a forest near Kitale town. The appellant was nowhere to be seen. When he was put on his defence, he did not say anything to rebut the strong culpatory evidence adduced against him by the prosecution.
10. In the premises therefore, this court holds that the prosecution established to the required standard of proof beyond any reasonable doubt the two charges that were brought against the appellant. The appeal against conviction lacks merit and it is hereby dismissed.
11. On sentence, this court will not interfere with the exercise of sentencing discretion by the trial court because, in its considered opinion, the sentence meted on the appellant fitted the crime. The appeal against sentence lacks merit and is also dismissed. It is so ordered.

DATED at KITALE this 25th day of July 2022.

L. KIMARU

JUDGE

