



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CRIMINAL APPEAL NO. 217 OF 2017**

**HANS NATHANIEL KIURE.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Being an appeal against the sentence of 7 years imprisonment imposed on me on charges of stealing goods in transit contrary to section 279(c) of the P.C. by Hon. E. Kagoni SRM on 11/7/2016 at Mombasa Law Court.*

**J U D G M E N T**

1. The Appellant Hans Nathaniel Kiure was accused in Mombasa Chief Magistrates Court CR. Case No. 576 of 2014 with an offence of stealing goods in transit contrary to Section 279(c) of the penal code.
2. The particulars of the charge were that the appellant on the 25<sup>th</sup> day of January 2014 within Changamwe sub-county along Mombasa-Nairobi Highway jointly with Others not before court, stole 600 bags of CAN fertilizer valued at Kshs.1,200,000/= (One Million and Two Hundred Thousand Shillings) the property of M/S Export Trading Company Ltd from a truck registration No. KAR 303X make Volvo and hailer No. ZC 5092 while the sand consignment was in transit from the port of Mombasa to Changamwe Export Trading Company Warehouse.
3. Based on the evidence of the prosecutions 6 witnesses and the unsworn statement of the appellant, the trial Magistrate convicted the appellant and sentenced him to 7 years imprisonment.
4. The appellant was aggrieved by the sentence of 7 years and he filed the appeal herein on the following grounds:-
  - i. That the learned trial Magistrate erred in law and fact in convicting the appellant on reliance of evidence which was not proven beyond reasonable doubts.
  - ii. That the trial Magistrate erred in law and fact when convicting the appellant without considering that the evidence tendered before the court did not warrant an impartial conviction given that the benefit of doubt is meritorious to the accused person.
  - iii. That the trial Magistrate erred in law and fact in convicting the appellant without considering that the most crucial witnesses were not summoned in court to clean all traits of doubts in the prosecuting case.
  - iv. That the learned trial Magistrate erred in law and fact herein convicting the appellant without considering that his source of arrest was not established fully and had no connections with the matter in question.
  - v. That the trial Magistrate erred in law and fact which convicting the appellant without considering his defence statement which cast doubts to the prosecution case hence the doubt had to give her the benefit of it.
5. The appellant prayed that his appeal be allowed, conviction quashed and sentence set aside. The prosecution's case at trial was that the appellant was employed as a driver Pelican Haulage and that he was entrusted to transport 600 bags of fertilizer belonging to M/S Export Trading Company Ltd using motor vehicle Reg. No. KAR 303X make Volvo 7 trailer no. ZC 5092 from the port of Mombasa to complainant's warehouse in Changamwe on 25<sup>th</sup> January 2014. It was the evidence of the prosecution witness that the appellant after taking delivery of the said bags of fertilizer did not reach its destination in Changamwe.
6. That after leaving Mombasa port the appellants phone went off air and the lorry truck was found the following day 26/1/2014 abandoned in Miritini area with no goods. The appellant went missing until in March 2014 when he was arrested in Namanga and escorted back to

Mombasa where he was charged.

7. This appeal was canvassed by way of written submissions. The appellant consolidated all grounds in his handwritten submissions and asked the court to consider the 27 months he spent in remand custody in his sentence of 7 years. He submitted that the sentence of 7 years was harsh and punitive and exposed him to psychological torture and he asked for leniency. He urged that he should be given relief considering he has served three quarters of his term. He said it should be considered that he was a 1<sup>st</sup> offender and forgiven promising he will not repeat the offence.

8. The Respondent in submissions relied in the authority in **Charles Ndirangu Kibue vs Republic (2016) eKLR** in support of their position that sentencing is a discretion of the trial court to impose an appropriate adequate, just and proportionate sentence commensurate with the nature and granting of the crime and the manner in which the crime is done.

9. The Respondent argued that a deterrent sentence was called for consider rampant theft of goods in transit in Mombasa. It was also contended that the maximum sentence for theft of goods in transit was 14 years and these evidence meted out was within the law and there is no reason therefore for the court to interfere with the sentence herein. It was urged that the conviction and sentence be upheld.

10. This being 1<sup>st</sup> appeal this court has a duty to re-evaluate the evidence on record for the prosecution and the defence in the lower court and come up with own conclusion as to whether or not the appellant's conviction and sentence was proper.

11. The issue for determination in this appeal is whether the sentence meted against the appellant was excessive in consideration of the offence for which he was convicted. The appellant was entrusted with goods with Kshs.1,200,000/= to transport from Mombasa Port to Changamwe godowns. He did not deliver the goods to their destination and he went missing from 25<sup>th</sup> January 2014 upto 18<sup>th</sup> March 2014 when he was traced and arrested at Namanga and he didn't satisfactory explanation where the goods disappeared to. In consideration that the maximum penalty for the offence of stealing goods in transit is 14 years imprisonment, the 7 years meted out to the appellant was within the law and commensurate with the offence committed in consideration however that appellant was in custody from 19<sup>th</sup> March 2014 when he was arraigned in court.

12. I would take that period into account and have him serve the 7 years from 19/3/2014. The appeal succeeds partially.

Right of Appeal – 14 days explained to appellant.

**Dated, signed and delivered at Mombasa this 11<sup>th</sup> day of February, 2021.**

**HON. LADY JUSTICE A. ONG'INJO**

**JUDGE**