REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CRIMINAL APPEAL NO. 212 OF 2014

(AS CONSOLIDATED WITH CRIMINAL APPEAL NO. 213 OF 2014)

HENRY CHERUIYOT LANGAT.....APPELLANT

VERSUS

REPUBLIC.....DEFENDANT

(Being an appeal from the original conviction and sentence in Criminal Case No. 401 of 2012 at the Chief Magistrate's Court, Eldoret (Hon. Mary W. Njagi, SRM) dated 19th December 2014)

JUDGMENT

[1] The Appellant herein, **Henry Cheruiyot Langat**, was the 1st accused in **Eldoret Chief Magistrate's Criminal Case No. 401 of 2012**: **Republic vs. Henry Cheruiyot Langat & 3 Others**. He was therein jointly charged with **Daniel Mukuha Njau,** as the 2nd accused, **Paul Thuku Gachora** (3rd accused) and **Maurice Samule** (as the 4th accused). They were jointly charged with the offence of stealing by servant contrary to **Section 281** of the **Penal Code, Chapter 63** of the **Laws of Kenya**. The particulars thereof were that on diverse dates between **1st August 2011** and **21st January 2012** at Naivas Sokoni Branch within Eldoret Town in Eldoret West District of the Rift Valley Province, they jointly stole 57,075 units of assorted flour products valued at **Kshs. 6,064,428/=,** 52,436 units of assorted rice products valued at **Kshs. 21,059,103/=,** 47,776 units of assorted **Bidco Oil Refineries** products valued at **Kshs. 2,823,292/=,** 2-17 units of assorted sugar products valued at **Kshs. 3,979,302** and 1023 units of cooking gas products and accessories valued at **Kshs. 2,719,036/=**, all valued at **Kshs. 36,645,161/=,** the property of **Naivas Limited** which came into their possession by virtue of their employment. In the course of time, the case against the 4th accused was withdrawn under **Section 87(a)** of the **Criminal Procedure Code, Chapter 75** of the **Laws of Kenya**, as he remained at large and was yet to be traced upto that point in time.

[2] The Appellant herein denied that charge and, after trial, in which the Prosecution called evidence from 9 witnesses, he was found guilty of the offence charged. He was consequently convicted and sentenced to serve 6 years' imprisonment. Being aggrieved by that decision, the Appellant lodged this appeal on **30 December 2014** on the following grounds:

> **[a]** That the learned Magistrate erred in law and in fact in failing to find that the requirements of **Section 268(5)** of the **Penal Code** were not satisfied as no evidence was submitted to demonstrate that the appellant was seen physically carting away goods worth **Kshs. 36,645,161/=** as charged;
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> **[b]** That the learned Magistrate erred in law and in fact in failing to find that the existence and ownership of the goods worth **Kshs. 36,645,161/=** as charged was not established by the complainant by way of documentary evidence;
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> **[c]** That the learned Magistrate erred in law and in fact in failing to find that the prosecution of the appellant amounted to a double prosecution and an abuse of the criminal process as the Prosecution relied on the same invoice of **Kshs. 613,200/=** which was also relied on in **Eldoret Chief Magistrate's Criminal Case No. 402 of 2012: Republic vs. Henry Langat Cheruiyot and 3 Others.**
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> **[d]** That the learned Magistrate erred in law and in fact in failing to find that the mode of stealing by servant as charged was not proved as no evidence was tendered by the Prosecution to demonstrate how goods worth **Kshs. 36,645,161/=** left the custody of the heavily guarded supermarket without intervention from the security personnel on duty;
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> **[e]** That the learned Magistrate erred in law and fact in failing to find that no evidence existed to show that the appellant was involved in any breaking into the supermarket to steal the goods;
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> **[f]** That the learned Magistrate erred in law and in fact in failing to find that no eye witness was called to establish the charge;

[g] That the learned Magistrate erred in law and in fact in failing to find that the report of the document examiner related to an offence of stealing involving **Kshs. 613,200/=** and not **Kshs. 36,645,161/=** and further it did not relate to the signature of the appellant hence it did not support the charge;

[h] That the learned Magistrate erred in law and in fact in failing to find that the audit report was of no value in establishing the offence as charged;

[i] That the learned Magistrate erred in law and fact in failing to consider the defence of the appellant;

[j] That the learned Magistrate erred in law and fact in failing to find that the offence was not proved beyond reasonable doubt and in failing to accord the benefit of doubt to the appellant;

[k] That the learned Magistrate erred in law and fact in relying on speculation and suspicion in convicting the appellant.

[3] It was on the basis of the foregoing grounds that the appellant prayed that his appeal be allowed and that his conviction and sentence be set aside. His co-accuseds, **Daniel Mukuha Njau** and **Paul Thuku Gachora**, also filed separate appeals on more or less the same grounds. Their appeals were registered as **Eldoret High Court Criminal Appeals No. 211 and 213 of 2014**. Initially, it was proposed by Counsel that all the three appeals be consolidated for hearing and determination. It so happened however that **Daniel Mukuha Njau** required admission for an extended period of time; and out of the apprehension that his sickness would occasion delay in the disposal of the other appeals where the appellants have always been ready to proceed, learned counsel prayed for separate hearing for **Daniel Mukuha Njau's** appeal. Accordingly, on **25 July 2019**, directions were given for the consolidation of the instant appeal, **Criminal Appeal No. 212 of 2014** with **Eldoret High Court Criminal Appeal No. 213 of 2014;** so as to pave way for separate disposal of **Eldoret High Court Criminal Appeal No. 211 of 2014.** Thus, henceforth, the appellant in **Appeal No. 212 of 2014, Henry Cheruiyot Langat,** will be referred to as the 1st Appellant; while the appellant in **Criminal Appeal No. 213, Paul Thuku Gachora,** shall hereinafter be the 2nd Appellant.

[4] The consolidated appeals were urged by **Mr. Mogambi** on behalf of **Mr. Kigamwa** on **24 October 2019**. He relied on the written submissions filed herein by **M/s Wambua Kigamwa & Co. Advocates,** dated the **11 June 2019.** He submitted that it was vital that proof of movement of the goods in issue be proved, granted the provisions of **Section 268(5)** of the **Penal Code**, which states that:

"A person shall not be deemed to take a thing unless he moves the thing or causes it to move."

[5] It was the submission of Counsel that no evidence was adduced by the Prosecution before the lower court to prove that the appellants moved, or caused to be moved, the items set out in the particulars of the charge; and that no witness stated that he saw either of the appellants physically carting away the said items. He relied on **Nairobi High Court Criminal Appeal No. 2 of 2000: Paul Odhiambo Ngoche vs. Republic** in urging the Court to find that the mode of stealing by servant was not proved. It was further the submission of Counsel for the appellants that no stock records were produced to establish that indeed the complainant had acquired the said goods and that the same were in its possession at the time of the alleged theft. He urged the Court to find that the audit report produced by **PW1** was limited to goods worth **Kshs. 613,200/=** only.

[6] In respect of the assertion that the appellants were subjected to double prosecution, Counsel drew the attention of the Court to the Charge Sheet filed in **Eldoret Chief Magistrate's Criminal Case No. 402 of 2012** and the defence statement of the 1st accused therein, **Henry Cheruiyot Langat,** at page 84 of the Record of Appeal; and urged the Court to find that the 1st appellant was indeed subjected to double prosecution. Counsel also referred to the ruling dated **26 February 2015** by **Hon. Kimondo, J**. appearing at pages 120-124 of the 2nd Appellant's Record of Appeal and urged the Court to find, that both the conviction and sentence passed by the lower court in **Eldoret Chief Magistrate's Criminal Case No. 401 of 2012** are not only flawed but also militate against the fair administration of justice.

[7] Mr. Mogambi also took the position that, since the Document Examiner's report was limited to the incident relating to loss of **Kshs. 613,200/=** as opposed to **Kshs. 36,645,161/=** it failed to connect the two appellants to the particulars set out in support of the offence they were convicted of. He pointed out that the exhibits were not properly labelled and therefore that it was unclear whose handwriting was to be compared with the questioned writing on the invoice. The case of **Gari & 2 Others vs. Republic** [1990] eKLR was relied on for the proposition that the Prosecution was under duty to prove beyond reasonable doubt that either of the appellants forged the subject questioned invoice.

[8] In respect of the audit report, it was the submission of Counsel that it was wanting in material particulars. Firstly, he took issue with the fact that the document was not on the official letterhead of the complainant. He also mentioned the fact that the report makes no reference to the dates when the goods were acquired. Other than impugning the audit report on the ground that the appellants were excluded from the audit process, Counsel also questioned the fact that the report was prepared by a person who conceded to not being a qualified auditor. To buttress this point, Counsel relied on **James Onkoba Nyabando & Another vs. Republic** [2014] eKLR.

[9] Lastly, Counsel submitted that the trial magistrate misunderstood the concept of circumstantial evidence, and referred to page 140 of the Record of Appeal to support this assertion. Counsel accordingly posited that the conviction of the appellants was predicated on nothing but speculation and suspicion and urged the Court to quash the same. He relied on **Cecilia Muthoni Murirui vs. Republic** [2017] eKLR and the decision of the Court of Appeal in **Nairobi Criminal Appeal No. 2 of 2002: Joan Chebichii Sawe vs. Republic**, and prayed that the appeal be allowed; that the convictions and sentences imposed on the two appellants be set aside; and that they be set at liberty unless otherwise lawfully held.

[10] On behalf of the State, **Ms. Mokua** resisted the appeal, contending that the evidence which was presented before the lower court was watertight. She took the view that the mode of stealing by servant was well proved by **PW4**, who explained that he delivered the goods to **Naivas Sokoni** supermarket but was diverted by the appellants to **Sunrise Wholesalers**. She pointed out that the goods could only be entered into the complainant's computer system if they were delivered; which did not happen; hence the lack of documentation. She also conceded

that the appellants were charged, tried and convicted for a similar offence in **Eldoret Chief Magistrate's Criminal Case No. 402 of 2012**, but pointed out that the particulars related to a different period of time and therefore their situation does not amount to double prosecution as alleged. She accordingly urged for the dismissal of the appeal.

[11] I have given careful consideration to the appeal and taken into account the written and oral submissions made herein by Counsel for the appellant and the State. I have similarly made a careful perusal of the lower court record that has given rise to this appeal. This being a first appeal, the Court is under obligation to reconsider and re-evaluate the evidence adduced before the lower court with a view of coming to its own conclusions thereon, as was aptly expressed in **Okeno vs. Republic [1972] EA 32;** namely, that:

> **"An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination ... and to the appellate court's own decision on the whole evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions...It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses..."**

[12] The Prosecution called 9 witnesses before the lower court in proof of its allegations against the appellants. The evidence of **Sammy Karuri Hombe (PW1)** was that he was then working as a Loss Control Manager for **Naivas Ltd**, a chain of supermarkets with 28 branches countrywide. He was based at the headquarters in Nairobi. He testified that they have two branches in Eldoret; one of them being **Naivas Sokoni Branch**. He produced a Certificate of Incorporation No. C 8190 as the **Prosecution's Exhibit No. 1** and told the lower court that the 1st appellant, **Henry Cheruiyot**, was the Branch Manager of the **Sokoni Branch**; while the 2nd appellant, **Paul Thuku**, was the Receiving Clerk at the said branch. **PW1** testified that on **14 January 2012**, he was alerted by an informer based at **Sokoni Branch** that some goods intended for the **Sokoni Supermarket** had been diverted elsewhere. He accordingly travelled from Nairobi to Eldoret on **16 January 2012** with their Operations Manager, **Mr. Charles Mukuha,** to investigate the allegation.

[13] It was further the evidence of **PW1** that, on arrival in Eldoret, they interviewed the informer and got to know that the products in question had been procured from **Unga Ltd** on **13 January 2012**. He therefore checked the system but could not trace the transaction. He further stated that he went to **Unga Ltd**, Eldoret and held a discussion with the Manager, one **Mr. Njoroge**, and that he in turn questioned the driver concerned. It was then ascertained from the documentation that indeed flour had been delivered by **Unga Ltd** to **the Sokoni Branch** on **13 January 2012** worth **Kshs. 613,000/=**. **PW1** further testified that on questioning the driver, he explained that they went to the supermarket with the goods but were instructed by the two appellants, **Henry Langat** and **Paul Thuku**, to offload them at **Sunrise Wholesalers**, within Eldoret Town. On the basis of that information, **PW1** reported the matter to Eldoret Police Station.

[14] PW1 further stated that an audit was immediately conducted which unearthed a loss to the tune of **Kshs. 36,645,161/=** over the period between **July 2011** when the last audit was undertaken and **21 January 2012**; and that it was thereupon that the appellants were arrested and charged. **PW1** made reference to the invoice for the delivery of **13 January 2012** along with other pertinent documents to buttress his evidence.

[15] The Prosecution's second witness before the lower court was **Leonel Mwangi Karugo (PW2).** He was then working as an Internal Auditor for **Naivas Ltd** at the Head Office in Nairobi. He told the lower court that he was an "O" level Certificate holder and an undergraduate of USIU. He stated that on **19 January 2012** at about 10.00 p.m. he received a telephone call from the Chairman, **Mr. Simon Gache Mukuha,** with instructions to visit the Eldoret Branch the following morning. He accordingly proceeded to Eldoret as instructed and met **PW1** who reported to him that he suspected fraud at their **Sokoni Branch**. Before embarking on the task, they required the presence of the 1st appellant, as the Branch Manager, but he could not be reached on phone.

[16] PW2 further stated that they were constrained to go ahead with the audit exercise in the absence of the 1st appellant; and that this was after futile attempts were made to locate the 1st appellant, including posting an advert in the daily newspapers, and offering a reward of **Kshs. 50,000/=** for any information about his whereabouts. His audit exercise revealed a loss in the sum of **Kshs. 36,645,161/=,** made up as follows:

Gas	-	Kshs. 2,719,036/=
Cooking oil	-	Kshs. 2,823,292/=
Sugar	-	Kshs. 3,979,302/=
Flour	-	Kshs. 6,064,428/=
Rice	-	Kshs. 21,059,103/=

[17] PW2 produced the Audit Report, which he prepared and signed on **24 January 2012,** as the **Prosecution's Exhibit No. 6.** Regarding the delivery for **13 January 2012, PW2** testified that the audit exercise revealed that an order had been made to **Unga Ltd** for 300 bales of Exe home baking flour of 2 Kgs; and 100 bales of 24 x 1 Kg each; all worth **Kshs. 613,200/=.** His finding was that although the invoice was posted in the system, the goods were not received in the supermarket. He also mentioned that this aspect of the investigation was handled separately; and that he was not part of it.

[18] PW3 was **Leonard Mburu Njoroge**, an employee of **Unga Ltd.** He testified before the lower court on **24 September 2013**. He was then working at their Eldoret Branch, and was in charge of outbound logistics. He would receive orders and authorize the delivery and invoicing of their products. He confirmed that the Invoice No. SLS 20095537 dated **13 January 2012** originated from their company and that he signed the document. He further stated that the delivery, comprising of 300 bales of 12 x 2 Kg packets of Exe home baking flour and

100 bales of 24 x 1 Kg packets, was duly made by their driver, **Peter Nganga** in motor vehicle **Registration No. KAQ 353E** to **Naivas Sokoni Supermarket**; and that their yellow copy of that Invoice was duly signed and stamped on behalf of the consignee, **Naivas Sokoni Branch**. He later got to learn from **Hombe (PW1)** that the consignment did not reach its intended destination.

[19] Peter Nganga (PW4) also testified before the lower court and confirmed that he works for **Unga Ltd** in Eldoret as a driver; and that on **13 January 2012** he was on duty as usual when his supervisor, **Leonard Njoroge (PW3)** instructed him to deliver some goods to **Naivas Sokoni Branch.** He was then assigned **Motor Vehicle Registration No. KAQ 353E** and was entrusted with 400 bales of flour and the relevant documentation for delivery. He pointed out that, initially, the delivery was to be made by driver **Nyaga**, which explained why the delivery documents bear **Nyaga's** name. He added that, by the time the loading was done, **Nyaga** was not available. He was then asked to step in and make the delivery, accompanied by two loaders.

[20] PW4 explained that on arrival with the goods at **Naivas Sokoni Branch**, he sent one of the loaders with the Invoice to see the receiving personnel; and that the loader came back and reported that the instructions were to take the goods to another shop near **Moi Teaching and Referral Hospital** on the ground that the goods had already been bought. He accordingly complied and was directed to the shop where he made the delivery. A copy of the Invoice was duly stamped and signed by the responsible persons at **Naivas Sokoni Branch** and he returned it to their office.

[21] Samson Nyando Kagai (PW5), a casual labourer, also testified that he was working for **Unga Ltd** on **13 January 2012** when he was instructed to deliver 400 bales of flour to **Naivas Sokoni Branch** in the company of **Nganga**, the driver, and another labourer, **Fanuel Atembo**. He explained that on arrival, **Fanuel** took the Invoice to the shop but was informed that the goods had been bought and were to be delivered to another shop. The driver was redirected to the shop in question where they offloaded the goods. **PW5** confirmed that the Invoice was duly signed and stamped and that they returned the signed copy to their office.

[22] The evidence of **Martin Mureithi Nyaga (PW6)**, a driver with **Unga Ltd**, was that he was on duty on **13 January 2012**; and that, although he was assigned by his supervisor, **Leonard Njoroge (PW3),** to make a delivery using **Motor Vehicle Registration No. KAQ 353E** Isuzu Canter, after the said motor vehicle was loaded and was at the weighbridge, he got an emergency involving a personal issue. By that time the documentation had been prepared in his name. He added that he reported the emergency to his supervisor and obtained his permission to leave for the day. He later learnt that the delivery was made by his colleague, **Peter Nganga (PW4);** and that the goods were diverted from **Naivas Sokoni** to different recipient.

[23] Fanuel Atembo Odango (PW7) told the lower court that on **13 January 2012**, he was working for **Unga Ltd** as a loader; and that at about 2.00 p.m. he was on duty when **Nyaga (PW6)** asked for motor vehicle **Registration No. KAQ 353E** to be loaded. He confirmed that they proceeded to load it with 300 bales of 12 x 2 Kg packets of flour and 100 bales of 24 x 1 Kg packets of flour. He also confirmed that after loading the motor vehicle, **Nyaga** was not available; and so the delivery was made by **Nganga (PW4),** whom he accompanied for offloading purposes. It was further the evidence of **PW7** that, on arrival at **Naivas Sokoni Branch**, he alighted with the Invoice and proceeded to the receiving bay where he found the 2nd Appellant; and that the 2nd Appellant told him that the goods had already been sold and redirected them to a shop known as **Sunrise,** near **Moi Teaching and Referral Hospital**. They thereafter collected a duly stamped and signed copy of the Invoice from **Naivas Sokoni Branch** and returned with them to their office.

[24] The Investigating Officer in the matter was **Cpl. Kodheck Omari (PW8).** His testimony was that a case of theft of goods was reported to their office on **20 January 2012**; and that the allegation was that 400 bales of Exe multipurpose flour that were intended for delivery at **Naivas Sokoni Branch** were diverted and delivered to **Sunrise Wholesalers Ltd**. They investigated the matter, and thereafter arrested and charged four suspects, who were all employees of **Naivas Ltd.** He further stated that, following the incident, the management of **Naivas Ltd** carried out an audit that unearthed a loss to the tune of **Kshs. 36,645,161/=** over the period between **1 August 2011** and **13 January 2012. PW8** produced the documents that were referred to by the witnesses as exhibits in this case.

[25] The last Prosecution Witness was the Document Examiner, **C.I. Jacob Oduor (PW9)**. He testified that he received some documents on **23 February 2012** from CID Eldoret with a request to ascertain whether the signatures thereon were by the same hand. He then analyzed the documents and came to the conclusion that they were written in the same style and formation; and therefore by the same author. He produced the report he prepared as **the Prosecution's Exhibit 8(b)** before the lower court.

[26] On his part, the 1st appellant told the lower court on **25 September 2014** and conceded that he was indeed an employee of **Naivas Ltd**; and was at the material time based at **Naivas Sokoni Branch** as the Shop Manager. He testified that his work was basically administrative; and that most of the time he would to sit in his office atop the supermarket. He stated that he applied for his annual leave in **October 2011**; which leave was to commence on **13 January 2012.** It was therefore his evidence that, on **13 January 2012**, he proceeded on his annual leave as planned, having handed over his duties to his deputy. His stance therefore was that he could not have stolen or diverted the products as alleged. He added that, while at home, his phone was off due to lack of network. Thus, it was his contention that it was not until a friend of his alerted him that an advert had been placed in the newspapers requiring him to immediately report to his place of work that he got to know that he was needed at his place of work. He denied having stolen as alleged and stated that he did not have access to the system or the products while away of leave. The 1st appellant produced the Charge Sheet filed in **Eldoret Chief Magistrate's Criminal Case No. 402 of 2012** to demonstrate that he is a victim of double jeopardy, in that he was prosecuted twice for the same offence.

[27] The 2nd appellant, **Paul Thuku Gachora**, also confirmed that he was working for **Naivas Ltd** at the material time, and was based at the **Naivas Sokoni** supermarket as a storekeeper. He denied the allegations that he was the receiving clerk at **Naivas Sokoni** supermarket; or that he stole the items set out in the Charge Sheet and mentioned that the Invoice relied on by the Prosecution was the same document that was the subject of **Eldoret Chief Magistrate's Criminal Case No. 402 of 2012** wherein he was charged and convicted of the same offence of stealing. The 2nd appellant also mentioned that he was already in custody by the time the audit was carried out; and therefore posited that the Audit Report ought not to have been relied on by the lower court as the sole basis for his conviction. He accordingly prayed that his appeal be allowed.

[28] I have given careful consideration to the proceedings before the lower court and the reasons for the decision of the lower court. I have

likewise given attention to the written submissions filed herein learned Counsel for the appellants and the response made thereto by Counsel for the State. The two broad issues for determination emerging therefrom are as hereunder:

[a] Whether the appellants were subjected to double jeopardy;

[b] Whether indeed the ingredients of stealing by servant, as prescribed by **Section 281** of the **Penal Code**, were proved before the lower court to the requisite standard;

[a] On Double Jeopardy:

[29] According to **Black's Law Dictionary**, Tenth Edition, double jeopardy is defined as the fact of being prosecuted or sentenced twice for substantially the same offence. Thus, **Article 50(2)(o)** of the **Constitution** is explicit that:

> **"Every accused person has the right to a fair trial which includes the right—**
>
> **…**
>
> **(o) Not to be tried for an offence in respect of an act or omission for which the accused person has previously been either acquitted or convicted."**

[30] The right is therefore best enforced before the trial court as a defence of either *autrefois acquit* or *autrefois convict* to a subsequent prosecution based on the same facts. Indeed, **Section 207(5)** of the **Criminal Procedure Code** recognizes that:

> **"If the accused pleads—**
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> **(a) that he has been previously convicted or acquitted on the same facts of the same offence; or**
>
> **(b) that he has obtained the President's pardon for his offence, the court shall first try whether the plea is true or not, and if the court holds that the evidence adduced in support of the plea does not sustain it, or if it finds that the plea is false, the accused shall be required to plead to the charge."**

[31] It is manifest that the subject criminal cases were being prosecuted simultaneously, although it appears that **Criminal Case No. 402 of 2012** was the first to be concluded. There is also no dispute that the two appellants were found guilty and were convicted in **Criminal Case No. 402 of 2012** and accordingly sentenced. There is, however, no indication on the record that any objection was taken by the Defence to the cases being tried concurrently in different courts. To the contrary, it is manifest that Counsel for the defence was cooperative and even applied for documents produced in one case to be released for use in the other. Be that as it may, can it be said that the two prosecutions were mounted in respect of the same transaction and on the basis of the same evidence so as to attract the invocation of the plea of double jeopardy as enshrined in **Article 50(2)(o)** aforementioned?

[32] As has been pointed out herein **Criminal Case No. 402 of 2012** was in respect of one single transaction that occurred on **13 January 2012**, namely the delivery by **Unga Ltd** of 400 bales of flour to **Naivas Sokoni** Branch, which were said to have been diverted to **Sunrise Wholesalers**. The period in issue in **Criminal Case no. 401 of 2012** was set out in the particulars as between **1 August 2011** and **21 January 2012**; and whereas there was an overlap with the particulars of the charge presented in **Criminal Case No. 402 of 2012**, it is noteworthy that the particulars of the charge in **Criminal Case No. 401 of 2012**, from which this appeal arises, is in respect of products as varied as rice products, cooking oil products, sugar and cooking gas; all from different suppliers.

[33] Thus, in the persuasive decision of **R vs. Z** [2005] 3 AllER 95, it was held thus:

> **"It is obvious that this principle is infringed if the accused is on trial again for the offence of which he has been acquitted. It is also infringed if any other steps are taken by the prosecutor which may result in the punishment of the accused on some other ground for the same offence. But it is not infringed if what the prosecutor seeks to do is lead evidence which was led at the previous trial, not for the purpose of punishing the accused in any way for the offence of which he has been acquitted, but in order to prove that the defendant is guilty of a subsequent offence which was not before the court in the previous trial…"** (as quoted in **Nicholas Kipsigei Ngetich & 6 Others vs. Republic** [2016] eKLR)

[34] In the circumstances, it is manifest that the facts as presented before the lower court did not lend themselves to the plea of double jeopardy; and that, in any case, the plea ought to have been raised before the trial court as required by **Section 207(5)** of the **Criminal Procedure Code** so as to give the lower court an opportunity to try the matter. Hence, I take the view that the plea was therefore erroneously and belatedly raised on appeal.

[b] On the Offence of Theft by Servant:

[35] Section 268 of the **Penal Code** defines stealing in the following terms:

> **"A person who fraudulently and without claim of right takes anything capable of being stolen on fraudulent converts to use of any person, other than the general or special owner thereof any property, is said to steal that thing or property."**

[36] Further to the foregoing, **Section 281** of the **Penal Code**, pursuant to which the appellants were charged provides that:

> **"If the thing stolen is the property of his employer, or came into the possession of the offender on account of his employer, he is liable imprisonment of seven years."**

[37] Accordingly, the Prosecution was under obligation to prove, not only that the two appellants were employees of the complainant, **Naivas Ltd**, but also that they stole the goods listed in the particulars of the charge; and that the said goods came into their possession on account of their employer, **Naivas Ltd**. From a careful consideration of the evidence adduced before the lower court, there is no dispute that, at all material times, the appellants were employees of **Naivas Ltd**. The 1st appellant was the Branch Manager, **Naivas Sokoni Branch**; while the 2nd appellant was the Receiving Clerk. The Prosecution presented documentary evidence in this regard in the form of Letters of Appointment, Employment Forms, transfer and promotion letters in respect of both **Henry Cheruiyot Langat** (the 1st appellant) and **Paul Thuku Gachora** (the 2nd appellant). The said documents were marked the **Prosecution's Exhibits 2b, 4a, 4b and 29** before the lower court. Indeed, the appellants conceded as much in their respective statements of defence.

[38] As to whether the appellants stole goods belonging to their employer, the Prosecution relied on the evidence adduced by five employees of **Unga Ltd**, namely, **PW3, PW4, PW5, PW6** and **PW7**, to the effect that an order was placed with **Unga Ltd** by **Naivas Ltd** for 400 bales of Exe all purpose flour, which, though delivered to the **Naivas Sokoni Branch** on **13 January 2012,** were diverted to another shop in Eldoret Town, known as **Sunrise Wholesalers** with the collusion of the two appellants. The evidence of those five witnesses was augmented by the evidence of **PW1** and **PW2**, the complainant's Loss Control Manager and Auditor, respectively. The Prosecution also availed before the lower court as exhibits the Purchase Order Number 0019460, the Goods Received Note for **Kshs. 613,198.80** and the Invoice **No. SLS. 20096637** issued by **Unga Ltd** for **Kshs. 613,200/=.** They were marked the **Prosecution's Exhibits 5a, 5b,** and **5c** before the lower court.

[39] The three key documents were submitted to the DCI for analysis by a Document Examiner with a view of ascertaining whether the signature on the Invoice was that of the 2nd appellant; the position of the Prosecution being that the 2nd appellant, with the collusion of the 1st appellant, would receive goods on paper, and make entries in the computer system, but divert the same elsewhere for their personal gain. It was on the basis of the evidence aforesaid that the learned trial magistrate came to the conclusion that:

> **"…PW9 produced a forensic report P exhibit 8 of his examination of the signature on the invoice P exhibit 5c which was appended in confirmation of receipt of the 400 bales of flour at Naivas Eldoret Sokoni on 13.1.2012. From the exhibit memo P exhibit 7. The signature was suspected to be of Paul Thuku Gachoka (Accused 3). According to PW8 his examination revealed that the signatures questioned on the invoice was similar to the known signatures of the suspect which were appearing on the exhibits marked B, C, and D, which had been forwarded to him for analysis. I therefore find that Accused who was the receiving clerk at Naivas Sokoni received the goods as per the invoice P exhibit 5(a). However, Pws 4, 6 and 7 corroborated each other that they delivered the goods in question to sunrise wholesalers. The said 400 bales of Exe home baking flour were therefore received by Accused for Naivas Sokoni on Paper but delivered to a 3rd Party, at the benefit of Accused 3 who received the Unga on paper…The 3, Accused 1, Accused 2 and Accused3 all colluded to have the 400 bales of Unga delivered in that Accused received the goods on paper, Accused 2 passed on the intention that the goods had been bought while Accused 1 directed on where the goods worth 613,200/= would should be delivered. The above 3 accused therefore jointly stole the 400 bales of Unga on 13.1.12…"**

[40] From the above excerpt it is manifest that the learned trial magistrate misapprehended the issues in contest before her; for the issue of the theft of the 400 bales of flour was not the subject of the case before her. The theft of the 400 bales of flour was being handled in a separate court as **Eldoret Chief Magistrate's Criminal Case No. 402 of 2012.** The lower court record shows that this fact had been brought to the attention of the trial court on various occasions during the trial, as can be confirmed by the proceedings of **2 October 2013, 3 October 2013, 22 April 2014, 7 May 2014, 26 August 2014** and **25 September 2014**. The record of the lower court also shows that there were instances when the trial magistrate made orders for the release of the subject invoice for use in **Criminal Case No. 402 of 2012**. One such instance was on **10 June 2012**. Indeed, the 1st appellant produced a copy of the Charge Sheet filed in **Criminal Case No. 402 of 2012** as his **Defence Exhibit 3**. It was therefore a grievous misdirection for the trial magistrate to state in her judgment, as she did at page 113 of the Record of Appeal, that she had no basis for concluding that the case before her had similarities with **Criminal Case No. 402 of 2012.** And, as a result of the misdirection she placed reliance on the wrong piece of evidence to base a conviction for the charge before her.

[41] I note that in her submissions, Counsel for the State proffered the argument that the evidence as to the diversion and theft of the **Unga Ltd** products delivered on **13 January 2012** was merely to furnish the basis for the audit exercise that unearthed the loss that is the subject of the charge and the proceedings from which this appeal arose. Thus, the question to pose, is whether there is other evidence, aside from the evidence surrounding the delivery of **13 January 2012** to demonstrate that between **1 August 2011** and **21 January 2012** the complainant lost goods worth **Kshs. 36,645,161/=;** and that the loss was attributable to the appellants. In this regard, the Prosecution relied solely on the Audit Report prepared and produced by **PW2**. The said report is a one pager stating that stocks were unaccounted for the tune of **Kshs. 36,645,161/=** following the stock-taking held on **21 January 2012**. It had, attached to it, stock sheets showing that the following items were unaccounted for:

Gas	-	Kshs. 2,719,036/=
Cooking oil	-	Kshs. 2,823,292/=
Sugar	-	Kshs. 3,979,302/=
Flour	-	Kshs. 6,064,428/=
Rice	-	Kshs. 21,059,103/=

[42] No form of direct evidence was adduced to show whether the goods were indeed ordered for and delivered to Naivas Sokoni by the various suppliers. It was for this reason that in Grounds 1, 2, 4, 5 and 6 of their Petitions and their written submissions in respect thereof, the appellants took the position that no evidence was submitted to demonstrate the existence and ownership of the goods worth **Kshs. 36,645,161/=;** or to prove that the appellant was seen physically carting away goods worth **Kshs. 36,645,161/=** as charged. The appellants also contended that the mode of stealing by servant as charged was not proved as no evidence was tendered by the Prosecution to demonstrate how goods worth **Kshs. 36,645,161/=** left the custody of the heavily guarded supermarket without intervention from the security personnel on duty.

[43] It is true that there was no direct evidence of movement of goods by the appellants out of the supermarket in the course of their duty; hence the posturing that the goods must have been diverted in the same style as the 400 bales of flour that were delivered on **13 January 2012**. Hence, the learned trial magistrate conceded thus in her judgment, at pages 114 and 115 of the Record of Appeal:

> **"…As the court has already noted, it did come out from PW1 and PW5 that they had previously diverted unga to Sunset wholesalers. And as the branch manager and Assistant Manager respectively. Accused 1 and Accused 2 were at any given time bestowed with the responsibility of ensuring the safety of the branches stocks which was upon their hands by virtue of their employment by the complainant. No evidence was tendered that any other person stole the missing goods all of which have been proved to have been for the complainant, Naivas Ltd and were at the branch Naivas Sokoni. And with the evidence herein that Unga would be diverted to Sunrise Wholesalers, I find that the only culpable culprits were the accused persons herein. As such, in view of the circumstantial evidence herein, that no other person was ever caught stealing the complainant's goods, and the direct evidence that the complainant's flour would be diverted to Sunrise Wholesalers and the proof that the accused persons stole 400 bales of flour, I find that the only explanation is that it was the accused persons together with the other who is not before court, who jointly stole the complainant's goods listed in the charge sheet herein…"**

[44] From the foregoing excerpt, the trial court purportedly acted on circumstantial evidence, in respect of which it was held in **R. vs. Kipkering Arap Koske & Another [1949] 16 EACA 135,** by the Court of Appeal for Eastern Africa thus:

> ***"In order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any reasonable hypothesis of innocence is on the prosecution, and always remains with the prosecution. It is a burden which never shifts to the party accused."***

[45] Similarly, in **Joan Chebichii Sawe vs. Republic [2002] eKLR** it was held that:

> **"… the evidence in this case was entirely circumstantial. In order to justify, on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. There must be no other co-existing circumstances weakening the chain of circumstances relied on. The burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution, and always remains with the prosecution. It is a burden, which never shifts to the party accused**

[46] From the facts presented before the lower court, there was no proof of any diversion before **13 January 2012**. In the same vein, there was no evidence as to the previous stock taking exercise that was said to have been carried out at the **Sokoni Branch** in **July 2011**. **PW1** admitted that they also experienced cases of shoplifting from time to time, though on a negligible scale. No evidence was given as to such cases during the period in question. Moreover, given the overlap as to the time period in issue in the two Criminal Cases, namely, **Criminal Case No. 401 of 2012** and **Criminal Case No. 402 of 2012**, and the fact that flour was involved, it was imperative for the prosecution to demonstrate that the products that formed the subject of **Criminal Case No. 402 of 2012** were discounted from the Audit Report. This was not done.

[47] Thus, it is manifest that there were no inculpatory facts linking the appellants to the alleged loss of products worth **Kshs. 36,645,161/=;** let alone proving that they were the only culprits. It is manifest, then, that the appellants were convicted merely on the basis of suspicion and surmise that they must have been engaged in diversion of products for the period of time in issue, given the occurrence of **13 January 2012.** It is now trite that suspicion however strong, cannot found a conviction; a point made clear by the Court of Appeal in the case of **Sawe vs. Republic (supra),** thus:

In our judgment, the evidence does not satisfy the legal requirements of circumstantial evidence to warrant or justify the conviction of the appellant on the basis of the evidence on the record. We are, therefore, unable to uphold the conviction entered by the learned trial judge. We have evaluated the evidence as we are entitled to at great length and there is really nothing left to connect the appellant with the death of the deceased except mere suspicion. The suspicion may be strong but this is a game with clear and settled rules of engagement. The prosecution must prove the case against the accused beyond any reasonable doubt. As this Court made clear in the case of Mary Wanjiku Gichira v Republic (Criminal Appeal No 17 of 1998) (unreported), suspicion however strong, cannot provide a basis for inferring guilt which must be proved by evidence."

[48] For the reasons aforestated, I am far from satisfied that the Appellant's conviction was based on sound evidence. Consequently, I hereby allow the appellants' appeals and quash the convictions recorded against them. They ought to be set at liberty forthwith unless otherwise lawfully held.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 20TH DAY OF FEBRUARY, 2020

OLGA SEWE

JUDGE