



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KAKAMEGA**

**CRIMINAL APPEAL NO. 126 OF 2018**

**MOSES ANUNDA SHAMWATA.....1<sup>ST</sup> APPELLANT**

**GEOFFREY ABEL OMAMO.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

***(from the original conviction and sentence in Kakamega CMC Criminal Case No. 2787 of 2017 by E. Malesi, SRM, dated 27/8/2018)***

**JUDGMENT**

1. The two appellants convicted of a charge of stealing contrary to section 275 of the Penal Code and each of them sentenced to serve one year probation. They were aggrieved by the verdict of the lower court and filed the instant appeal. The grounds of appeal are that:-

*(1) The lower court erred in law and fact by convicting the appellants upon evidence insufficient to sustain conviction.*

*(2) The lower court erred in law and fact by basing its conviction of the appellant upon conjecture.*

2. The grounds of appeal were expounded by the written submissions of the advocates for the appellants, **K.N. Wesutsa & Co. Advocates**. The state did not make any submissions in the case. They relied on the record of the lower court.

3. The particulars of the charge against the appellants were that on diverse dates between 1<sup>st</sup> day of September, 2017 and 11<sup>th</sup> day of September, 2017 at Midland construction site along Maziwa road in kakamega Central District within Kakamega County jointly with others not before court stole deformed steel bars as per the attached sheet valued at kshs. 704,997.00/= the property of Delvish R. Kotecha.

4. The 2<sup>nd</sup> appellant faced an alternative charge of handling stolen goods contrary to Section 332 (1) (2) of the Penal Code. The particulars of the charge were that on the 11<sup>th</sup> day of September, 2017 at Midland construction site along Maziwa road in kakamega Central District within Kakamega County otherwise than in the course of stealing dishonestly received or retained specified metal rods knowing or having reason to believe the same to be stolen goods.

**Case for Prosecution -**

5. The case for the prosecution was that the complainant in the case is a contractor with Midland company Ltd. That they were constructing a building on Maziwa road in Kakamega town. That on the material day after close of business at 5 pm the complainant's brother, PW1 passed by the construction site and found a tuk tuk vehicle parked outside the construction site. It was loaded with deformed rod bars similar to the ones they were using at the site. PW1 got curious to find out where the steel bars were from. He approached the tuk tuk. The driver of the vehicle ran away. PW1 called his brother PW2 who rushed to the place. They identified the steel bars to have been stolen from their construction site. They called the police. PC Juma PW3 and a colleague went to the place. They arrested the guard on duty, the 1<sup>st</sup> appellant.

6. They received information that the stolen steel bars were being sold at a scrap metal yard nearby. They went to the yard. They found a woman and a young man at the yard. Some other steel bars were found at the yard that PW1 and PW2 identified to be from their yard. The woman and the young man were arrested. They and the guard were taken to the police station together with the steel bars recovered at the construction site and at the scrap metal yard.

7. On the following day the 2<sup>nd</sup> appellant went to the police station. He identified himself as the owner of the scrap metal yard and the husband to the woman who had been arrested. The woman and the young man were released. The 2<sup>nd</sup> appellant, a foreman at the construction site and the guard, the 1<sup>st</sup> appellant were charged with the offences. During the hearing an inventory of the steel bars found on

the tuk tuk were produced as exhibits, PEX 9. An inventory of the same found at the scrap metal yard were produced as exhibits, PEX 10. Photographs of the tuk tuk with the metal bars were produced as exhibits, PEX1. The steel bars found at the 2<sup>nd</sup> appellant's yard were produced as exhibits, PEX 2(a) - (f). Those found in the tuk tuk were also produced as exhibits.

#### **Defence Case -**

8. The 1<sup>st</sup> appellant stated in a sworn statement that in September, 2017 he was working with Bedrock Security Company Ltd as a night guard at the construction site of Midland Company on Maziwa road. He had worked there for 2 months. That on 11/9/2017 he reported for duty at 5PM. That a tuk tuk vehicle went and stood at the entrance of the construction site on Maziwa road. He approached the vehicle and asked its occupants what they wanted. They told him that they had temporarily stopped. The vehicle was loaded with metal bars. PW1 then arrived there and the occupants of the vehicle fled. PW1 asked him whether the metal bars were removed from their construction site. He answered in the negative. PW1 called the police who arrived immediately. A person to replace him on duty was called. He boarded the police vehicle and was taken to a nearby scrap metal yard. They found a woman and a worker at the yard. PW1 ordered the police to collect some metal bars from the yard that they loaded onto the police vehicle. He, the woman and the worker were taken to the police station. He came to know the 2<sup>nd</sup> appellant at the police station.

9. When placed to his defence the 1<sup>st</sup> appellant stated that in a sworn statement that he is a scrap metal dealer along Maziwa road in Kakamega town. That on 11/9/2017 he left Kakamega at 4 am and travelled to Nairobi. On getting to Nairobi he was called by his wife DW4 who told him that she had been arrested and detained at Kakamega Police station on allegations of stealing metal bars belonging to Midland Company found at their yard. He boarded a vehicle for kakamega. He arrived on the following day. He went to the police station. He was arrested and his wife and a worker released. He was shown a list of metal bars which had been carried away from his yard. He was shown the metal bars. He identified them as his. He was charged. He said that the metal bars produced in court were different from the ones found at his yard.

10. The 2<sup>nd</sup> appellant's wife, DW4 testified that she and her husband operate a scrap metal yard. That on 11/9/2017 she was at the yard when a tuk tuk vehicle went to the yard with metal bars. The driver offered to sell them to her. She checked them and realized that they were new. She declined to buy them. That on the following day policemen went to the yard with two people. They accused her of stealing metal bars. At her yard there were ordinary metal bars. She and a worker were arrested. They were taken to the police station. Her husband was in Nairobi. He came back on the following day. He was arrested and she was released.

#### **Submissions -**

11. The advocates for the appellants submitted that though the charge sheet refers to the theft having taken place between 1<sup>st</sup> and 11<sup>th</sup> September, 2017, there were evidence to support that. That the case against the 1<sup>st</sup> appellant was based on circumstantial evidence which evidence was insufficient to form the basis of a conviction.

12. That the trial court based its conviction of the 2<sup>nd</sup> appellant on the grounds that the steel bars recovered from his scrap yard were unique to the structure being put up by the complainants as they were cut and bent to specification. That there was no evidence linking the 2<sup>nd</sup> appellant to the activities of 11/9/2017 as he was in Nairobi on that day. That the trial court did not consider the said appellant's evidence that the metal bars recovered from his yard were different from those in the tuk tuk as they were of varying lengths and sizes. That the term "cut and bent to specification" was not explained to warrant the uniqueness advanced by the state. That the police did not compare the steel bars found at the scrapyard with those found at the site or in the tuk tuk to confirm its uniqueness.

#### **Analysis and Determination -**

13. This being a first appeal, the duty of the court is to analyse and re-evaluate afresh the evidence adduced at the lower court and draw its own conclusions while bearing in mind that the trial court had the advantage of seeing and hearing the witnesses testify- See **Okeno -Vs- Republic (1972) EA 32** and **Kiilu & Another -Vs- Republic (2005) 1KLR 174**.

14. The evidence against the 1<sup>st</sup> appellant was that he was a security guard for the complainant at the complainant's construction site on Maziwa road. That while on duty the appellant was found by PW1 ferrying away in a tuk tuk deformed steel bars stolen from the complainant's construction site. The 1<sup>st</sup> appellant denied that the steel bars were stolen from the construction site.

15. The case against the 1<sup>st</sup> appellant was based on circumstantial evidence that the steel bars found loaded on the tuk tuk were cut and bent to the exact size of the columns that the complainant was erecting at that construction site.

16. For the court to rely on circumstantial evidence as the basis of a conviction it has to meet three tenets as was stated in the case of **Abanga alias Onyango -Vs- Republic, Cr. Appeal No. 32 of 1990 (UR)**, that:-

***"1. The circumstances from which an interference of guilt is sought to be drawn, must be cogently and firmly established;***

***2. Those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;***

***3. The circumstances taken circumstantively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else."***

17. The 1<sup>st</sup> appellant admitted that the steel bars were found in the tuk tuk outside the entrance to the construction site. He admitted that

PW1 found him talking to the occupants of the tuk tuk. He admitted that the occupants of the tuk tuk fled when PW1 arrived there.

18. There is no coincidence that the occupants of the tuk tuk were just passing by and happened to stop outside the entrance of the construction site. PW1 and PW2 identified the steel bars that were in the tuk tuk by the fact that they were bent to the specifications of columns that they were erecting on their site. The 1<sup>st</sup> appellant was found while in the company of the occupants of the tuk tuk. All this evidence unerringly pointed to the 1<sup>st</sup> appellant's involvement in the commission of the offence. The appellant and the occupants of the tuk tuk must have stolen the steel bars from the complainant's construction site. There cannot be any truth that the 1<sup>st</sup> appellant was just questioning the occupants as to why they had stopped there. The 1<sup>st</sup> appellant and the said people were found by PW1 having packed the stolen goods into the tuk tuk and PW1 happened to arrive there in the nick of time before the thieves took off. That the occupants of the tuk tuk took off when PW1 arrived there is clear evidence that they knew that the goods were stolen from the construction site. The prosecution did thereby prove that the 1<sup>st</sup> appellant jointly stole the steel bars with the occupants of the tuk tuk.

19. The inventory of the metal bars found in the tuk tuk PEX 9 indicates the deformed metal bars found therein were 22 in number with a value of Ksh. 41,688/=. There was no evidence on the 1<sup>st</sup> appellant involvement of the metal bars found at the scrap yard. The appellant was only guilty of stealing what was found in the tuk tuk. I accordingly find the 1<sup>st</sup> appellant guilty in Count 1 of stealing 22 metal bars of the value of Ksh. 41,688/=.

20. PW1 and PW2 identified the steel bars they found at the scrap metal yard of the 2<sup>nd</sup> appellant in that they were cut and bent to the specification of the structure that they were putting up at their site. The 2<sup>nd</sup> appellant signed an inventory of the list of metal bars found at his metal yard, PEX 10. Photographs of the metal bars found at his yard were produced as exhibits. PEX2 (a) – (f). A look at their pictures shows that some of the metal bars were bent as testified by PW1 and PW2.

21. There was no coincidence for the 2<sup>nd</sup> appellant to be found in possession of the metal bars that were bent to the specification of the complainant's construction. The trial magistrate was right in his finding that the 2<sup>nd</sup> appellant was found in possession of the complainant's steel bars.

22. The charge sheet indicates that the complainant's steel bars were stolen between 1<sup>st</sup> and 11<sup>th</sup> September, 2017. The 2<sup>nd</sup> appellant was found with the stolen bars on the 11<sup>th</sup> September, 2017. The question was whether the 2<sup>nd</sup> appellant was in recent possession of stolen goods.

23. In a case depending on recent possession of stolen goods the prosecution has to prove three things, that is:-

- (i) That the property was found with suspect
- (ii) That the property is positively identified as the property of the complainant
- (iii) That the property was recently stolen from the complainant -

**See Isaac Ng'ang'a Kahiga alias Peter Ng'ang'a Kahiga –Vs– Republic, Nyeri CA criminal Appeal No. 272 of 2005.**

24. In this case the steel bars found at the scrap yard of the 2<sup>nd</sup> appellant were identified to belong to the complainant. There was sufficient proof that they were stolen from the complainant. The steel bars were new and bent to the specification of the building the complainant was putting up at their site. For the 2<sup>nd</sup> appellant to have been found in possession of such steel bars in the period of 1½ weeks from when they were stolen from the complainant was recent possession of stolen property. The fact that the steel bars were new and bent as used in a construction site gave reasons to believe that the 2<sup>nd</sup> appellant knew that the steel bars were stolen. The 2<sup>nd</sup> appellant did not give an explanation of how he came into the possession of the property.

25. There was no evidence that the 2<sup>nd</sup> appellant is the one who stole the metal bars he was found with from the complainant. The charge proved against the 2<sup>nd</sup> appellant was handling stolen goods.

26. The 2<sup>nd</sup> appellant therefore retained the steel bars knowing them to be stolen. I substitute the offence proved against the 2<sup>nd</sup> appellant to the offence of handling stolen goods contrary to section 322 (1) as read with section 322 (2) of the Penal Code.

25. The upshot is that there is not merit in the appeal save that the value of the property stolen by the 1<sup>st</sup> appellant as convicted in Count 1 is substituted to Ksh. 41,688/= while the 2<sup>nd</sup> appellant is convicted of the offence of handling stolen goods instead of the offence of stealing contrary to section 275 of the Penal Code. The sentence of one year probation imposed on the 2<sup>nd</sup> appellant is consequently to apply to the offence of handling stolen goods and the 2<sup>nd</sup> appellant is sentenced accordingly.

**Dated, signed and delivered at Kakamega this 29<sup>th</sup> day of May, 2020.**

**J. N. NJAGI**

**JUDGE**

**In the presence of:-**

**Mr. Kundu for Appellants**

**Mr. Mutua for State/Respondent**

**1<sup>st</sup> Appellant - Absent**

**2<sup>nd</sup> Appellant - Present**

**Court Assistant - Polycap**

**14 days right of appeal.**