REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

Coram: D. K. Kemei - J

CRIMINAL APPEAL NO. 136 OF 2015

PASCAL MUSYOKA MUTUA.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(*Being an appeal from the conviction and sentence of Hon. P.O. Ooko Principal Magistrate at Mavoko PM's Court in Criminal Case No. 1103 OF 2013, Republic versus Pascal Musyoka Mutua and Andrew Okumu Makuba*)

BETWEEN

REPUBLIC.....PROSECUTOR

-VERSUS-

PASCAL MUSYOKA MUTUA.....ACCUSED

JUDGEMENT

1. **Pacal Musyoka Mutua** was jointly charged with his co-accused before the Mavoko Principal Magistrate's court with the **Offence of Stealing by Servant contrary to section 281 of the penal code.** They were jointly sentenced to a fine of Kshs 500,000/- in default to serve 2 years imprisonment**.**

2. The particulars of the offence of stealing were:

> "**Pascal Musyoki Mutua** and **Andrew Okumu Makuba:** *On diverse dates between 5th and 24th December, 2012 at Mlolongo Township in Athi River District within Machakos County, jointly with others not before court, being employees to ARAMEX COMPANY LIMITED stole 72 pieces of Samsung Mobile Phones all valued at Kshs 2,586,710/- , the property of ARAMEX COMPANY LIMITED which came into your possession by virtue of your employment."*

3. The prosecution had five (5) witnesses, **PW1** was **Faisal Asman Ndarawe**. He testified that on 5.12.12 at about 6. Pm, the appellant's co-accused came to collect some 5 boxes that he was given by the appellant and he carried them in a vehicle registration No. KBK 170R which he personally drove. He testified that the boxes were labelled fliers and that he did not see the appellant sign any delivery note and later he discovered that some cell phones were missing from the warehouse and could not tell how the same got lost. On cross-examination, he testified that he did not see the appellant stealing any cell phones from the complainant's warehouse and he could not tell if the boxes that he saw the appellant carrying were empty or loaded. He further testified that he never saw the appellant carrying cell phones on the material day and neither were the boxes that the appellant carried even checked by the security guards.

4. **PW2** was **Robert Mungai Mungara** who testified that he received a complaint that some items had disappeared from the warehouse, and being an IT manager cum security officer, he checked the CCTV camera footage having learnt that some boxes had disappeared after some power black outs and he then sent the CCTV footage to CID experts for analysis.

5. **PW3** was **P.C. Joseph Mutie**, a scene of crime officer based in Nairobi. He testified that he received the compact discs with video footages dated 5.12.2012 and 14.12.12 and he captioned the footages and printed them and prepared a report. He produced the Compact discs and the photographs as well as the report. On cross-examination, he testified that as per the CCTV footage plus photographs he saw boxes being loaded into a truck but cannot tell what was being loaded and in addition, he could not tell who was doing the loading on 14.12.2012 and in effect could not identify the persons in the photographs in each of the 32 photographs. He further testified that he could not tell

whether or not the CCTV footage was taken from Aramex Company Limited and whether or not the appellant was captured in the complainant's premises.

6. **PW4** was **John Omondi**, a security guard. He testified that on the material day he was guarding the complainant's premises and at 5.00 pm the vehicle KBK 170K was being loaded with cartons in the presence of the appellant, his co-accused and Pw1.He testified that he was not privy to the contents as he was not shown any delivery notes, and when he enquired, the appellant informed him that the boxes were being taken to someone who had left them in the premises and he believed him as he was the one in charge after which he allowed the said vehicle that was being driven by the appellant to leave. On cross-examination, he confirmed that he did not know the contents of the boxes that were being loaded. However, he noted that on the material day, it was the first time that the appellant and Pw1 remained behind. On re-examination, he testified that the CCTV footage only shows the boxes which were stolen but does not identify the people who stole them.

7. **Pw5** was **Pc John Wanyonyi** who was the investigating officer. He testified that he visited the scene and discovered that the 1st accused had the keys to the store where the cell phones had been stolen and that there had been no signs of breakage. The appellant denied knowledge of the stolen items but nevertheless he was arrested as the custodian of the key to the warehouse. On cross-examination, he testified that he never saw the importation documents of the stolen cell-phones.

8. After the court found a prima facie case had been made against the appellant, he was put on his defence. He denied stealing the phones and testified that he dispatched goods on 5.12.12 pursuant to authority to do so vide an email dated the same day. He testified that he, Pw1, the guard and a manager called Ramy had the keys to the store and the keys used to be left with Pw1. On cross-examination, he testified that if any property gets lost, then he was to be sur-charged as happened in September, 2012 thus he testified that he had been framed. He further testified that if anything was stolen, then someone must have climbed on top of the cage and accessed the goods from there.

9. The appellant testified that on the material day, he collected empty bale boxes and fliers and none of the stock in issue was stolen. On cross-examination, he testified that he checked the boxes that he was mandated to transport on the material day and he had no keys for the warehouse or the cage.

10. **The appellant** was convicted by the trial magistrate, to use the words of the trial magistrate in his judgment he stated:

> "*The demeanour of the accused persons highlighted lies…. These conduct denotes of thieves and I do find them guilty as charged."*

11. On conviction the court sentenced the appellant and his co-accused to a fine of Kshs 500,000/- and in default two years in prison and being dissatisfied with the conviction and sentence the appellant filed the instant appeal.

12. The 14 grounds of appeal presented by the appellant's counsel can be summarized as follows:

> *a. **THAT** the Learned Magistrate Erred in law and in fact by failing to hold that the prosecution had not proved its case beyond reasonable doubt and therefore the conviction was unsafe as against the weight of evidence.*

13. The appellant submitted that the prosecution had failed to prove its case beyond reasonable doubt. Counsel submitted that no evidence was adduced to prove the existence and the ownership of the alleged stolen phones. Reliance was placed on the case of **Martha Gacheri v R (2011) eKLR** that held that the prosecution has to prove ownership and in the absence of such evidence, the complainant's evidence in court was worthless. Counsel prayed that the appellant be acquitted.

14. The appeal was opposed by Mr. Machogu the Respondent. He submitted that the prosecution had proved its case in line with the provisions of section 281 of the Penal Code. He emphasized that, the fact that the appellant was an employee of the complainant was proved by the appellant's evidence; further that the fact that the property stolen was the property of the employer was established by the evidence of Pw1 who testified that he used to keep mobile phones inside a cage; on the fact of property being stolen by the appellant that came into his possession by virtue of being in employment, counsel testified that vide the evidence of Pw3 that through the help of CCTV, it was established that cartons were loaded onto a truck. In the end learned counsel submitted that the appellant has not raised sufficient reason to interfere with the discretion of the trial court and thus the appeal should be dismissed and the conviction and sentence be upheld.

15. This is the first appellate court and as such I am guided by the principles set out in the case **David Njuguna Wairimu v Republic [2010] e KLR** where the court of appeal stated:

> "*The duty of the first appellate court is to analyze and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellant court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions."*

16. The issues that arise from the appeal and submissions filed herein are as follows:

> ***a. Whether the prosecution prove its case on required standard and in particular did prosecution prove the essential ingredients of the charge of stealing by servant?***
>
> ***b. Whether the trial court made a finding that was contrary to the evidence.***

17. The element of employment is undisputed. However, with regard to the other elements of the offence, the prosecution relied upon

circumstantial evidence to secure the conviction of the appellant. In the case of ***Benson Limantees Lesimir & Ano. v Republic Criminal Appeal No. 102 &103 of 2002*** *where the Court of Appeal stated;*

> *"In the circumstances, then the evidence tendered by the prosecution does not irresistibly point to the appellants to the exclusion of all others within the meaning of* ***R. vs Kipkering Arap Koske & Another 16 EACA 135*** *where it was inter alia held that:"*

> *"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."*

18. With the above in mind I will consider the prosecution's evidence. In a nutshell the prosecution's case is that appellant on 5.12.12 at 5 p.m. loaded the stolen phones that were in boxes onto a vehicle KBK 170R and took them away from the complainant's premises. None of the phones were recovered. P W 2 confirmed that the four gaming machines were missing. The fact that the phones allegedly were missing and the appellant was at the premises and loaded boxes onto the aforementioned vehicle at the time it is alleged that they went missing is what the prosecution used to infer that the appellant was guilty.

19. Appellant in his defence denied the offence. His explanation was that the boxes he carried at the material time were empty.

20. It is well settled that in a criminal trial, the prosecution has to prove its case beyond reasonable doubt. ***Denning J*** in the case of ***Millier v Minister of Pensions [1947]*** stated:

> *"It need not reach certainty, but it must carry a high degree of probability, proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is as strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence "of course it is possible, but not in the lease probable." the case is proved beyond reasonable doubt, but nothing short of that will suffice."*

21. Section 281 of Cap 63, under which appellant was charged states:

> ***"If the offender is a clerk or servant, and 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."***

22. It is trite law, that in order to secure a conviction, the prosecution ought to prove stealing also known as animus furandi or fraudulent conversion. It must also be proven that the stolen items belonged to the employer and that the offender is a clerk or servant.

23. Stealing is defined in the Black's Law dictionary 8th Edition as:

> ***"To take (personal property) illegally with the intent to keep it unlawfully".***

24. The definition of stealing as found in section 268 of the Penal Code is*:*

> ***"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."***

25. There is doubt whether the phones existed or even whether the appellant stole them even though learned counsel for the state submitted that requirements for the offence were properly proved by the prosecution witness.

26. Bearing the above in mind I do find that the prosecution failed to prove its case beyond reasonable doubt. The evidence it presented has not produced convincing and credible evidence of theft perpetrated by the appellant or that the phones even existed. I find that the prosecution evidence is scanty as the prosecution has not established the nexus between the appellant, the stolen phones and their existence thereof and having found that the prosecution has not proved their case against appellant in respect of the charge, I shall quash the lower court's conviction.

27. I have noted that there was no complainant because PW1 who stood for the complainant was also an employee. The said Pw1 has not established that there were phones in existence or that the phones belonged to the complainant company and the totality of this drove me to the finding that there was no complainant. Pw1 did not present even a letter of authority from the complainant directing him to testify on behalf of his employer. As his evidence did not allude to the fact that he was the complainant, then it would appear that there was no complainant in the matter and this weakened the prosecution's case against the appellant.

28. On the issue whether the trial court made a finding which was contrary to the evidence, I have considered the evidence adduced and the judgment of the learned trial magistrate I determine the issue in the positive. The conclusion of the trial court reached in that judgment in my view was not in conformity with the evidence which evidence has not proved the guilt of appellant. It would appear that the trial magistrate convicted the appellant and his co-accused on the basis that he did not believe them judging from their demeanours. This was a misdirection and which led to an erroneous verdict by the trial magistrate. It was the duty of the prosecution to prove the guilt of the appellant and not for the appellant to prove his innocence. The appellant's defence evidence clearly displaced that of the prosecution and he ought in the least to have been given the benefit of doubt. The trial magistrate went into error when he shifted the burden of proof upon the appellant. The conviction arrived was therefore unsafe and which must be interfered with.

29. The upshot of the foregoing is that I find merit in the appeal. The same is allowed. The conviction is hereby quashed and the sentence set aside. The fines that had been paid by the Appellant is ordered to be refunded to the depositor.

It is so ordered.

Dated and delivered at Machakos this 25th day of November, 2020.

D. K. Kemei

Judge