REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL DIVISION

CRIMINAL APPEAL NUMBER 103 OF 2018

BETWEEN

BAGDAD SHARIFF SAID.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from original conviction and sentence by Hon. P. M. Wechuli, Resident Magistrate dated 20.8.2018 in Tigania PMC Criminal Case No. 1581 of 2013)

CORAM: LADY JUSTICE RUTH N. SITATI

JUDGMENT

Introduction

1. The appellant herein, Bagdad Shariff Said was arraigned before the Principal Magistrate's Court at Tigania ***section 275 of the Penal Code***, the particulars being that on diverse dates between 15th July 2013 and 24th October 2013 at Uuru Village, Miathene Location in Tigania West District within Meru County stole 1286 poles valued at Kshs.200,000/- the property of Mohammed Hussein Muhammad. The appellant denied the charge and thereby caused the case to go to full trial.

2. The prosecution called five (5) witnesses in support of its case against the appellant. At the close of the prosecution case, the appellant was found to have a case to answer and accordingly put on his defence. He gave sworn evidence but did not call any witnesses.

Trial Court's Judgment

3. After carefully considering the evidence on record, the learned trial court was satisfied that the prosecution had proved the case against the appellant beyond reasonable doubt and proceeded to find the appellant guilty as charged and convicted him accordingly. The appellant was sentenced to a fine of Kshs.200,000/- in default to serve 2 years imprisonment.

The Appeal

4. Being aggrieved by both conviction and sentence, the appellant brought this appeal which is premised on 6 grounds set out in the petition of appeal. The appellant alleges that his trial was not fair, that he did not understand the language of the court, that the learned trial court failed to consider the appellant's defence; that the sentence meted out to the appellant was harsh in the circumstances of the case and finally that the learned trial court failed to consider the appellant's mitigation before passing sentence. The appellant therefore prays that his appeal be allowed so that he is released forthwith or in the alternative, the appellant prays that the sentence be revised downwards.

5. This is a first appeal, and that being the case, this court has to reconsider and evaluate the evidence afresh with a view to reaching its own conclusions in the matter. The court has however to remember that it does not have the opportunity of seeing and hearing the witnesses and to make an allowance for the same. Generally see ***Okeno versus Republic [1972]EA 32.***

The Prosecution Case

6. The case for the prosecution is brief. PW1, Mohammed Hussein Muhammad is a businessman in Garrisa and used to supply poles to UNHCR.

7. Between 15th July 2013 and 24th October 2013, he was in Mikinduri cutting trees for poles. He managed to get 1286 poles and on 15th July 2013 he left the poles at Uuru Mosque under the appellant's custody. Some two weeks later, the appellant phoned PW1 and informed him that there was need to move the 1286 poles from the Uuru Mosque compound because some construction work was being undertaken there. The appellant asked for Kshs.1,500/- so he could move the poles. PW1 sent the money to the appellant through mobile number 0725773351.

8. Two weeks later, PW1 sent Shariff Osman, PW3 to go to Uuru Mosque and collect the poles but on arrival at the Mosque, PW3 did not find any of the 1286 poles. The appellant who was present at the Mosque told PW3 that he had moved the poles to another place to facilitate construction at Uuru Mosque and that PW3 should not worry. For two months the appellant kept changing his story as to where the poles were. PW3 duly informed PW1 of the dilemma in which he (PW3) was finding himself with the appellant. PW1 then made arrangements for the purchase of fresh trees, as he also pursued the issue of the whereabouts of the 1286 poles he had left with the appellant at Uuru Mosque.

9. Eventually, the matter was reported first to the DC's office Meru and later to Mikinduri Police Station. The appellant was arrested but no recoveries were made. PW1 produced the Safaricom MPESA transaction to the appellant on 2nd August 2013 as P exhibit 1.

10. The appellant did not put any questions to either PW1 or PW3 when he was given a chance to cross examine them.

11. PW2 was Joshua Kaberia, who worked as a night watchman at Uuru Mosque. He testified that a few days after the poles had been left in the hands of the appellant at Uuru Mosque, he found the same missing when he came to work in the morning. He also testified that the appellant was the person who ran the mosque at Uuru. The appellant did not put any questions to PW2 either.

12. PW4, Ibrahim Kanake testified that the appellant used to work at the Uuru Mosque which was within Hanifa Children's Home in Tigania East as caretaker cum watchman and at some point in time (PW4 did not say when) he saw some poles at the centre and when he asked the appellant about the same, the appellant told him the poles belonged to his friends. PW4 could not say how many poles there were, but he remembered that when the owners sent a vehicle to pick the poles, the poles could not be traced. PW4 also testified that the poles had come to the centre through the appellant. After the incident, the appellant was sacked. The appellant did not put any questions to PW4.

13. The last witness was number 73683 CPL Mosoti of Olkalao Police Station. He is the one who investigated the case. He testified that while he was on duty at the Tigania Police Station on 25th October 2013, PW1 went to the police station with a report that between 15th July 2013 and 24th October 2013, the appellant who had been left to guard 1286 poles worth Kshs.200,000/- and to keep watch over them until they were collected by PW1, had stolen the said poles. That the appellant kept cheating PW1 about the whereabouts of the poles until it became clear to PW1 that the appellant had disposed of the poles when PW1 did not find the poles on 25th October, 2013 when he went to collect them. PW1also reported that the appellant had gone into hiding at Meru.

14. Upon receipt of the report, the police traced the appellant to Meru and was arrested by CPL Some of CID Meru. After being arrested the appellant promised to refund the poles but never did so. No recoveries were made. The appellant was then charged.

Issues for Determination

15. For the prosecution to succeed in this case, it needed to prove the ingredients of the offence of theft as provided under ***section 275 of the Penal code*** which provides as follows:-

> **"275. any person who steals anything capable of being stolen is guilty of a felony termed theft and is liable unless owing to the circumstances of the theft or the nature of the thing stolen some other punishment is provided, to imprisonment for three years."**

16. Section 268(1) of the Penal Code defines stealing as follows:-

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

17. In Black's Law Dictionary – Tenth Edition Page 1705, theft is defined:-

> **"1. The wrongful taking and removing of another's personal property with the intent of depriving the true owner of it, larceny. 2. Broadly, any act or instance of stealing, including larcerny, burglary, embezzlement and false pretences."**

Analysis and Determination

18. After carefully gong through the evidence afresh and evaluating it myself and also after considering the submissions and the law, I am in agreement with prosecution counsel that the learned trial court cannot be faulted for having found the appellant guilty and convicting him accordingly. The prosecution evidence against the appellant is overwhelming

19. The complainant in his case clearly stated that he entrusted his 1286 poles to the appellant for safe custody while he (complainant) made

arrangements to transport them to his chosen destination. There is further evidence that the appellant was the watchman or Imam at Uuru Mosque where the complainant left his poles. PW3 was an eye witness to the fact that the complainant left his poles in the hands of the appellant for safe keeping.

20. Sometime later, the complainant sent Kshs.1500/- to the appellant as seen from P exhibit 1 to facilitate movement of the poles to another destination to await collection by PW1. PW2, PW3 and PW4 corroborated the complainants testimony which was not challenged by the appellant at all. That when PW3 went to collect the poles on behalf of PW1, the appellant could not produce them. The appellant's action of converting the complainant's poles to his own use amounted to stealing as defined by sections 268 and 275 of the Penal Code. The appellant's defence did not in any way shake the prosecution case. In fact, the appellant made attempts to settle the matter out of court and sought several adjournments to enable him resolve the issue with the complainant. The appellant did not however carry out his intention to have the matter settled out of court to its logical conclusion. The evidence on record thus proves beyond reasonable doubt that the appellant stole 1286 poles belonging to the complainant.

21. Regarding sentence, the appellant submitted that in sentencing him, the learned trial magistrate did not consider his mitigation and thus ended up imposing a harsh and excessive sentence. Prosecution counsel Mr. P. M. Namiti did not oppose reduction of the sentence on grounds that the appellant is old.

22. I must point out here that sentencing is always a matter of discretion on the part of the trial court, and the circumstances of each case must be taken into account. I note from the record that it is true the learned trial court did not consider the mitigating factors given on behalf of the appellant. In mitigation, defence counsel stated -

> **"The accused is very remorseful. Accused regrets his action. He is a family man with a line of dependants. He is an old man. We pray for a non-custodial sentence."**

23. The prosecutor thereafter sought to have the appellant's previous records availed to court. The prosecution was given 7 days within which to avail the appellant's records. When the matter came up again on 20th August 2018, the prosecutor told the court he had no known records. The court then said;-

> **"COURT: In the absence of any known records, the accused is sentenced to pay a fine of Kshs.200,000/- in default 2 years imprisonment. Right of Appeal 14 days."**

24. There is clearly no doubt in my mind that if the learned trial court had considered the mitigation it would most probably have come to a different conclusion in sentencing the appellant. I therefore find that in this case, the trial court did not judiciously exercise its discretion and I am therefore inclined to interfere with the same by quashing the default sentence of 2 years imprisonment and imposing a sentence of one (1) year imprisonment.

Conclusion

25. From all the above, I now make the following final orders in this appeal:-

a. The appellant's appeal on conviction be and is hereby dismissed.

b. The appellant's appeal on sentence partially succeeds to the extent that the sentence imposed by the trial court is quashed and in lieu therefore, the appellant is sentenced to pay a fine of Kshs.200,000/- in default 1 (one) year imprisonment with effect from 20th August 2018.

26. Right of Appeal within 14 days from the date of this judgment.

27. Orders accordingly.

Judgment written and signed at Kapenguria

RUTH N. SITATI

JUDGE

Judgment delivered, dated and countersigned in open court at Meru on this 31st day of July, 2019

F. GIKONYO

JUDGE

In the Presence of

Appellant in person

Namiti - for Respondent

Mwenda - Court Assistant