



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MARSABIT**

**CRIMINAL APPEAL NO.3 OF 2019**

**FELIX KIMANZI.....APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

*(Being an appeal from the original conviction and sentence by HON. B.M OMBEWA Principal Magistrate Marsabit Court in Criminal Case No.54 of 2018)*

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

The appellant was charged with one count of stealing by servant contrary to Section 281 of the Penal Code. The particulars of the offence are that the appellant on the 25<sup>th</sup> day of January 2018 at Dimtus lodge in Marsabit Central sub County within Marsabit County being a servant of AIRSPAN ENTERPRISES stole (1) two Fuji kura machines serial number 1244441 and serial number 12449, model fsam-605 (2) EXFQOTDR machine model number AX5-110 serial number 413856 (3) and a tool box containing various tools all valued at KShs.4,824,000 (four million eight hundred and twenty four thousand shillings) the property of AIRSPAN ENTERPRISES.

The appellant was also charged with a 2<sup>nd</sup> count of giving false information to a person employed in the Public Service Contrary to Section 129 (a) of the Penal Code. The particulars of the offence are that the appellant on the 25<sup>th</sup> day of January, 2018 at 1345 hours at Moyale Police station in Moyale sub county within Marsabit county informed PC Joshua Lagat a person employed in the Public Service as Police constable that he was hijacked from Marsabit town and dumped at Moyale, information he knew or believed to be false intending thereby to cause the said PC Joshua Lagat to enter into the occurrence book which he ought not to have done.

The trial Court convicted the appellant and sentenced him to serve four (4) years imprisonment for the 1<sup>st</sup> count and two (2) years for the second count. The grounds of appeal are:-

- 1. That the company brought forged receipt to the honorable law court.**
- 2. That the three (3) vital witnesses in this instant case who were caught with the pictures (machine) were all released.**
- 3. That PW2 was not a hotel attendant as he claimed.**
- 4. That PW1 knows he was not the owner of the company but an employee too.**
- 5. That the appellant brought himself to the Police station at 1345 hours, stayed there upto 1800 hours purposely to report but later was locked in Police cell.**
- 6. That the appellant suffered injustice right from Police station where he was kept in Police custody for 5 days after more than 24 hours were over contrary to Article 49(1)(f) of the constitution (2010) without any explanation.**
- 7. That the appellant was assaulted for no reason by DCIO Marsabit after being transferred from Moyale to Marsabit police station.**
- 8. That the charge sheet was changed (interfered with) from 5.2million to 4.824million which was a clear lie.**
- 9. That the investigating officer intentionally lied to the honorable lower court that the appellant conspired from December 2018.**

The appellant submitted that the date of arrest of 25.3.2018 on the charge sheet is not true. The appellant was arrested on 28.1.2018. The serial number on exhibit 1 and charge sheet are different. The same applies to the model number. The appellant's defence was rejected without cogent reasons. The judgment was delivered in the absence of the 1<sup>st</sup> accused and no explanation was given. Vital witnesses were not summoned. PW5 and PW6 were freed and made to be prosecution witnesses yet the exhibit was found in their possession. A receipt which had not been produced led to the amendment of the charge. The charges against PW5 and PW6 were intentionally dropped.

It is further submitted that the prosecution evidence is contradictory and uncorroborated. The charge sheet was amended three times. The investigation officer did not obtain the complainant's call data. The appellant was assaulted by a CID officer but no action was taken by the trial Court. PW5 is the one who called the appellant as per Safaricom data but informed the Court that it is the appellant who called him. The appellant was placed in Police custody for more than 24 hours without explanation. PW1 alleged that he lost tools worth Ksh.800,000 without producing any document.

The appellant contends that he was framed. He is the one who reported to the Police. He was abducted and taken to Moyale in the bush. He asked for assistance and was taken to the Police station. The appellant was not called upon to record his statement. The receipts produced as exhibits are not genuine. Photographs were taken in March 2018 while the appellant was in remand.

The state opposed the appeal. Mr. Ochieng, Prosecution Counsel, submitted that the prosecution evidence is overwhelming. There is no contradictory evidence. The appellant was properly identified and placed on the crime scene. PW4 testified that the appellant was seen carrying the stolen items. PW5 testified that the appellant contacted him for purposes of selling the items. Investigations revealed that the appellant was not abducted. PW4 confirmed that no abduction occurred. The appellant was out on bond and was advised to report the issue of assault by a Police Officer. The appellant's defence was properly disallowed.

This is a first appeal. The court is expected to evaluate the evidence afresh before drawing its own conclusion. **PW1 Boithi Gitonga** testified that he was the project manager of the complainant company. The appellant was his workmate. Their company by the name Air Span Enterprises was given some work by a company by the name KEC International Limited to fix fiber optic cables from LogoLogo to Turbi. Their work involved joining the cables together. They came to Marsabit in January and October 2017. The instructing company assigned them a driver by the name Halkano Guyo who was the 1<sup>st</sup> accused before the trial court. In January 2018 they completed the work and they were to test the cables. He was to collect a machine to be used to test the cables from Isiolo as it had been sent through Wells Fargo. He was staying at Dimtus lodge. The machine arrived in Isiolo on 24<sup>th</sup> January 2018. He called the appellant to his room and gave him his keys. He left the appellant with two machines namely Fugi Kura FSM 60S/S/NO. 12441 and 12449 and XFQ0TDR model 110 and a tool box. There was also an FO power meter machine, a laptop and a bag.

PW1 went to Isiolo and picked the machine. On his way back his boss called from Mombasa and informed him that the appellant had been abducted by two armed men and brought to Moyale. He could not believe the news and called KEC company to inquire whether the appellant had reported on duty and he was told he had not. He arrived in Marsabit and went to the hotel. The caretaker told him that no hijacking incident had occurred at the hotel. He then reported at the Marsabit police station. When he went to the hotel he found all the items he had left with the appellant missing except the bag which had a lap top and a power meter. He asked the driver about the appellant and the driver told him that he was out of town and he had not seen the appellant.

On 27<sup>th</sup> January 2018, he saw an advert on the OLX website and noted that a Furgi Kura FSM60S machine was being sold. He reported the matter to the Investigating Officer PC Obira who told him that the photograph on the website was taken from the room at Dimtus hotel. He remembered that the appellant had at one time taken a photograph of the machine. The police laid a trap and the machine seller was arrested. The seller told them that it was one Halkano Wario Doyo who sent them the photograph. That person was arrested and told them that it was Halkano Guyo the driver who had approached them for a market. It is PW1's evidence that he identified the machines on the OLX website as those belonging to their company. One machine was bought for Kshs. 1,624,000/= while the second machine was bought for Kshs. 2.4million. The driver and the appellant were arrested. The appellant was arrested at Moyale police station while making a report. He produced receipts showing the purchase of the machines. His stolen tools were worth Kshs 800,000/= but had no receipt for them.

**PW2 WAKO YATTANI ROBA** works for Dimtus lodge. On 13<sup>th</sup> January 2018 PW1 became their customer. The appellant used to go to the hotel in the morning and together with PW1 they would carry some equipment. PW1 stayed at the hotel from 13<sup>th</sup> January to 25<sup>th</sup> January 2018.

**PW3 GUYO MALICHA** is the caretaker of Dimtus lodge. PW1 was their customer having rented room number 23. The appellant would visit PW1 every morning and leave together for work. On 25<sup>th</sup> January 2018 the appellant went to the lodge and asked for tissue paper. He then went to the toilet and went to PW1's room. He did not see the appellant carrying anything. PW3 left at 7am and returned at 7.30 am. He handed over and left.

**PW4 MOHAMED ABDUBA** testified that he came to Marsabit from Moyale on 24<sup>th</sup> of January 2018. He rented room number 2 at Dimtus lodge. In the morning of 25<sup>th</sup> January 2018 he saw two people in front of room number 23. PW3 told him to stand in for him shortly as he was taking his child to school. One of two men was short while the other one was tall. They walked out. Shortly the short man returned to room 23 and walked out with two yellow boxes. One box was big and the other one was small. PW3 returned and he went to the county offices. He later returned to the hotel in the evening. Police officers went to the hotel and told him that there was theft. He explained to the police how he saw the short man walk out with two yellow boxes. The short person was the appellant. The tall man was not the appellants co-accused. The appellant passed him at the TV room and went to the rooms. The appellant had a jacket and a big cap. He was a regular customer at the lodge.

**PW5 HALKANO WARIO DOYO** was a field Technician with Broadcom Limited. He knew the appellant's. The appellant once called him on the phone. He was also arrested and found the appellant in remand. On 24<sup>th</sup> January 2018 at about 8.00 pm he received a phone call from a new number. The caller introduced himself as Kiminzi. He told him that he was the owner of the machine they had talked about in December 2017 and asked him to look for a market. In early December 2017 Halkano Guyo called him on phone and told him that they had

a machine. The machine owner was FELIX KIMINZI. Felix Kiminzi paused as the owner of the machine. They agreed at a price of Kshs. 550,000/=. The machine is referred to as "Splicing Machine" and he had experience in telecommunication. Halkano Guyo sent him a photograph of the machine on WhatsApp. He sent the photos to a WhatsApp group that was for his former classmates.

In March 2018 one **JOSEPH LENGAKI** called to enquire whether he had the machine he had advertised. He confirmed that the machine was available. They agreed at the price of Kshs. 550,000/=. He forwarded the photograph of the machine to Lengaki through WhatsApp. Later Halkano told him that the machine could not be availed as there was a police case. He told Lengaki that the machine had been sold. He was also arrested on 25<sup>th</sup> of March 2018. He had initially talked to the appellant through Halkano Guyo's phone and on 24<sup>th</sup> January 2018 he had talked to the appellant on his phone. He had not known the appellant before. The appellant told him that he had gotten his phone number from Halkano Guyo. He denied telling the appellant that he works for Safaricom.

**PW6 JOSEPH MWANZIA LENGAKI** is a technician. On 5<sup>th</sup> December 2017 he got a WhatsApp from Nicodemus Nzioka who was a school mate at NYS Engineering Institute. He was told that someone was selling a splicing kit. He made inquiries through their WhatsApp group. He was told the machine was selling at Kshs. 900,000/= and did not agree on the price. On 20<sup>th</sup> December 2017 he was told that the price had gone down to Kshs. 600,000/=. He was later told that the machine had been sold. On 9<sup>th</sup> of March 2018 he talked to Nicodemus Nzioka about the machine, they agreed to meet at a hotel in Ngara. He went to the hotel and found Nzioka with police officers. He was arrested.

**PW7 MOHAME ABDI KADIR PC** was stationed at Marsabit police station. He investigated the case. On 25<sup>th</sup> January 2018 at about 5pm PW1 reported that he had left the appellant at Dimtus lodge with two machines and a tool box containing various tools. The total costs of the lost machines was given at Kshs. 4,824,000/=. PW1 had gone to Isiolo and was informed that the appellant was abducted and abandoned in Moyale. He obtained the appellant's mobile data for his phone number 0727730902 registered under the name of FELIX KIO. They established that the appellant was talking to his co-accused Halkano Jillo. Investigations revealed that the appellant had taken photograph of the machine and posted it on OLX in December 2017. They asked PW1 to pause as a buyer. They managed to get response from **PW6 JOSEPH MWANZIA** who had posted the photo. They managed to arrest PW6. PW6 told them that he had received the photograph of the machine from Halkano Doyo Wario. They traced that person and he informed them that he was sent to look for a market. Halkano Wario Doyo told them that he knew the appellant.

PW1 was the son of the owner of the company. The appellant was charged in court on 30<sup>th</sup> January 2018. The machines had been bought on 14<sup>th</sup> January 2013 and 27<sup>th</sup> May 2014 respectively.

The appellant gave sworn evidence. He stated that he was working with Airspan enterprises. PW1 was his workmate. On 25<sup>th</sup> of January 2018 PW1 told him that he wanted to go to Isiolo. It was about 630 am and he went to his room. PW1 left him with three machines and a toolbox.

He also gave him Kshs.500 for lunch. He was told to wait for the driver by the name Maina. PW1 left for Isiolo and he went back to the lodging room. After about 15 minutes two people entered the room. They asked for the tall guy. He told them that he had left. He was ordered to take one box and they took the other two boxes. They walked out of the hotel room and was put in a Prado and sandwiched. He thought they were going to the police station. He was later abandoned near Moyale. He got a boda boda rider who took him to Moyale Police station where he reported the incident. He was told to wait for DCI officers to take him to the scene. He waited until 5.00pm when he led them to the scene. While at the police station he called Wilson Mbau his employer, and told him what had happened. His employer sent him Kshs.5,000/=. He was told to call PW1. PW1 told the Police to detain him as he was a thief. He was detained for 3 days and brought to Marsabit where he was also detained for two days. He was attacked by a CID officer and his teeth were knocked out. Halkano Jillo was their driver in 2017 was also arrested. PW5 and PW6 were also arrested. It was his evidence that those who went to his room at the hotel were in Police uniform. His OB number for the incident was 35/25/1/2018 reported at 1345hours. the abductors took the machines as well as the tool box. They also took his phone.

The issue for determination is whether the prosecution proved its case beyond reasonable doubt. The second count indicate that the appellant gave false information to PC Joshua Lagat. That witness did not testify. The prosecution evidence does not deal with this charge. It is only the appellant in his defence who mentioned the OB number. The charge also relate to Moyale Police station and no one testified from that station. I do find that the trial Court erred in finding that the prosecution had proved its case on the second count. The appeal on that count is allowed.

With respect to the first count, it is the prosecution evidence that PW1 left the machines with the appellant. He went to Isiolo and on his way back got information that the appellant had been abducted. The appellant in his defence confirms that he was left with the machines by PW1 who left at around 6.00am for Isiolo. He was abducted by two people who drove him in a Prado all the way to Moyale. He was dropped in the bush and reported to the Police station at Moyale.

The appellant has raised several issues which are not very relevant. He confirms that he was left with the machines. The issue of genuine or fake receipts does not arise. It was proved that the machines belonged to the complainant. Whether the receipts on the charge sheet and the ones produced are similar or not cannot be an issue. The value of the tools lost should also not be an issue. The appellant admit that he was left with the tools. Similarly, the issue as to who between the appellant and PW5 called the other first cannot be found to be contradictory evidence. PW5 testified that the appellant called him first through his co-accused's phone. He later called him and said he had been given his number by his co-accused. The conviction is not based on PW5's evidence. In any case the stolen machines were not found.

The question is whether the appellant was indeed abducted and the machines stolen as per the appellant's evidence and strong position. According to PW3 he left PW4 at the Dimtus lodge and took his child to school. He was away for about 30 minutes only. PW4 was a long time customer. PW4 saw the appellant and another person at the door of PW1's room. PW1 had left the appellant at his room at 6.00am. The appellant admits that he was at the hotel at 6.00am and was even given Ksh.500 by PW1 for lunch. Whether PW1 is the owner of the company or an employee does not matter. The machines had been entrusted to PW1 by the company.

PW4 was at the hotel. He saw the appellant with another person. PW4 did not see two other people entering the room where the machines were. He testified that the appellant passed him at the TV room and went to room number 23. PW4 also saw the appellant carrying the boxes and walking out. PW4 was not questioned by the appellant about a Prado vehicle or other men having abducted the appellant. The evidence proves that it is the appellant who took the machines. PW4 was in the hotel and if it is true that the appellant was abducted, how comes he did not even scream. The appellant does not claim that he was beaten or handcuffed. He does not alledge that the abductors were armed. He was not injured during the robbery incident. The appellant's story does not add up. There are quite a number of road blocks from Marsabit to Moyale manned by Police officers. How comes the appellant did not scream to the Police. In most cases those manning the road blocks open the vehicles. I do find that the appellant's evidence is a total lie and does not disprove the prosecution case. The only logical conclusion is that he stole the machines. He had planned to steal the machines since December, 2017 when he posted them on the OLYX website. He knew their value. He was employed by the complainant. The appellant's contention that he had worked for the complainant for seven years and that he even dealt with the machines is nothing but crocodile tears. His greed and temptation led him to steal the machines. It is proved that there was no robbery or abduction at Dimtus lodge. The appellant simply walked out with the machines. There is no requirement that PW4 must have been an employee of Dimtus lodge for him to testify. He was at the hotel and saw the appellant walk out with the machines.

The appellant also raised the issue of variation of bond terms. The charge sheet was amended and this called for the imposition of the bond terms. The trial cannot be faulted as a result of increase in the amount of bond. There is also the issue of PW5 and PW6. It is true they were also arrested. There is no evidence that the two had stolen the machines. All what the two did was to deal with photographs of the machines on whatsapp. PW5 had talked to the appellant and it is his evidence that the appellant posed as the owner of the machines on the photos sent on whatsapp. The prosecution correctly removed these two people from being accused persons.

I am satisfied that the Prosecution proved its case beyond reasonable doubt. The trial Court sentenced the appellant to four years imprisonment. Section 281 of the Penal Code provides for seven years imprisonment. I do find the sentence to be fair.

The upshot is that the appeal lacks merit and is hereby disallowed.

**DATED, SIGNED AND DELIVERED AT MARSABIT THIS 30<sup>TH</sup> DAY OF OCTOBER, 2019**

**S. CHITEMBWE**

**JUDGE**