



REPUBLIC OF KENYA
IN THE HIGH OF KENYA
AT NYERI
CRIMINAL APPEAL NO. 290 OF 2007
CONSOLIDATED WITH CR. APPEAL No. 294 of 2007
MESHACK MUGO MUCHIRI
FRANCIS KARANI NJOGU.....APPELLANTS
VERSUS
REPUBLIC.....RESPONDENT
(Appeal from the conviction and sentence of the Resident Magistrate's
Court at Karatina (Hon.B.Kimemia) delivered on the 13th July, 2007
in Criminal Case No.1477 of 2004)

JUDGMENT

1. **Meshack Mugo Muchiri and Francis Karani Njogu** the appellants herein were charged with the offences of stealing by servant contrary to **Section 281** of the **Penal Code**. The particulars of offence were that between the nights of 9th and 10th day of September, 2004 at Ndimba Tea Factory in Nyeri County they jointly stole two alternators, two starter motors and two chloride oxide batteries from motor vehicles reg.no. KAQ 285U and KAQ 286U all valued at Kshs.421,721/- the property of Ndimba Tea Factory.
2. The alternate charge was that of Failing to Prevent a Felony contrary to Section 392 of the Penal Code; the particulars of the offence were that on the same date and at the same factory the appellants being watchmen guarding the motor vehicle parking yard of the said factory failed to use all reasonable means to prevent the commission of a felony namely stealing.
3. The prosecution called a total of six (6) witnesses to prove its case and after the trial the appellants were acquitted on the main charge but were found guilty on the alternate charge; the trial court proceeded to convict them and the sentence meted out was eighteen (18) months imprisonment.
4. Being aggrieved by the conviction and sentence, the Appellants filed their respective Petitions of Appeal and the grounds of appeal are summarized as follows;
 - (i) The prosecution failed to prove its case to the desired threshold;

(ii) The trial court rejected the appellants defence without giving good reasons.

5. At the hearing of the appeal the appellants were unrepresented and relied on their written submissions; whereas Mrs Gicheha was the Prosecuting Counsel for the State who made oral submissions.

APPELLANTS' SUBMISSIONS

6. The appellants submit that they were not on the same shift but on different shifts;

RESPONDENT'S SUBMISSIONS

7. In response counsel started by stating that the appellants were convicted on the alternate count and sentenced to eighteen (18) months imprisonment and they had served their terms;

8. The appellants were employed as watchmen by KTDA at Ndima Tea Factory; on the material date that is 9/09/2004 the 2nd appellant Francis Karani reported for duty at 2.00pm with his shift ending at 10.00pm; that his evidence was that when he took over he inspected the property and found no anomalies;

9. The 1st appellant took over from the 2nd appellant at 10.00pm and left at 6.00am; his evidence was that he inspected the compound and the motor vehicles before taking over;

10. **PW2** a mechanic was informed by one of the drivers who had noticed something dangling from the motor vehicle; he checked all the motor vehicles in the compound and discovered missing parts from two motor vehicles; his evidence was that on the previous day he left work at 5.10pm and that all the vehicles were intact when he left duty; that the theft occurred between 6.00am and 6.00pm and the two appellants were on duty between those hours; the stolen parts were worth Kshs.450,000/-;; the stolen parts were worth Kshs.450,000/-;; the stolen parts were worth Kshs.450,000/-;; he reported this to the management;

11. On further inspection a hole in the fence was discovered; the hole was 50 metres from where the watchmen sat; the factory rested on half an acre and was not too vast to notice any movement and activities taking place; that every shift was manned by one watchman for eight (8) hours each;

12. That the appellants could not say that they did not notice the hole in the fence which was their duty to report and to also protect and guard the factory; and to prevent theft of the factory's property which they failed to do;

13. Their failure to account shows that they slept on the job and are therefore culpable for the theft that occurred; they failed in the duty they were employed to do and exposed the factory;

14. Counsel prayed that the appeal be dismissed.

ISSUES FOR DETERMINATION;

15. After reading the appellant written submissions and hearing the Respondents oral submissions we have framed the following issues for determination;

(i) Whether the prosecution proved its case to the desired threshold;

(ii) Whether the trial court had good reason to reject the appellants defences;

ANALYSIS

16. This court being the first appellate court it is enjoined to consider the entire evidence on record, re-evaluate and re-assess it and arrive at an independent conclusion bearing in mind at all times that this court did not have the opportunity or benefit of hearing and seeing the witnesses as they testified. Refer to the case of **Okeno vs Republic (1972) EA 32.**

Whether the prosecution proved its case to the desired threshold;

Whether the trial court had good reason to reject the appellants defences;

FINDINGS

17. In the light of the forgoing this court makes the following findings;

- (i) The prosecution proved its case to the desired threshold;
- (ii) Whether the trial court had good reason to reject the appellants defences

DETERMINATION

18. The appeals are found to be meritorious and are hereby allowed.

19. The convictions are hereby quashed and the sentences set aside.

It is so Ordered.

Dated, Signed and Delivered at Nyeri this 11th day of January, 2018.

HON.A.MSHILA

JUDGE