



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 42 OF 2016

EVANS ANGWENYI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

CONSOLIDATED WITH

CRIMINAL APPEAL NO. 38 OF 2016

RICHARD OYONDI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

RULING OF THE COURT

1. The appellants have filed a notice of motion dated 13th March, 2017 brought under Article 50 (2) (q) of the Constitution of Kenya and section 132 of the Criminal Procedure Code. He seeks the following orders:

- a) *That the court admits his request to quash the conviction and set aside the sentence.*
- b) *That the court lifts the criminal record that has been occasioned upon the Appellant.*
- c) *That the court issues any further orders and directions that it deems fit and expedient in the circumstances of this case.*

2 The motion is premised on the grounds on its body and the supporting affidavits of the appellants. It was contended that there was a smooth handover of duties as was shown in the occurrence book. That as a matter of practice, the incoming shift is usually taken round the company and is noted. That there were no marks noticed at the door to the store that was stolen from as claimed by the prosecution witnesses. The one William Saningo was manning and guarding an area/zone called phase 4 and his place of work was not stolen from. That Kaipa Ole Kankai stated that he was on the first shift but that the appellant submitted that he was not at the same shift as the rest.

3. The motion was canvassed by way of written submissions. It was the appellants' submissions that there were material contradictions and that the prosecution had failed to prove its case beyond reasonable doubt. It was submitted that failure to prove a case beyond reasonable doubt renders a conviction wrongful. On this regard, the appellants relied on section 111 of the Evidence Act and cited **Millier v. Minister of Pensions [1947]**. The appellant further quoted Article 165 (6) and (7) of the Constitution and section 362 of the Criminal Procedure Code and submitted that the appellants have been occasioned a criminal record on their necks as a result of this case. Further citing **Joseph Ndungu Kagiri v. Republic [2016] eKLR**, it was submitted that it is in the best interest of justice for this appeal to be allowed.

4. The respondent on the other hand relied on section 392 as read with 36 of the Penal Code and submitted that the appellants were not alert and vigilant while on duty. That the only explanation for their failure to notice or detect the theft is that they either left the premises unguarded or slept on the job. That the same was enough to establish the offence of neglect to prevent commission of felony. On whether the court has the mandate to lift a criminal record, it was submitted that the appellant has a criminal record with the directorate of criminal investigation as a result of this case which is under its custody. That it is its duty to keep all offenders' records and expunge the record once an offender is acquitted. That Article 165 of the Constitution only confers upon court supervisory jurisdiction over subordinate court, tribunal and other quasi-judicial bodies, but not upon the Kenya Police or Directorate of Criminal Investigation. The respondent urged that the conviction and sentence was safe within the law and that this appeal ought to be dismissed.

5. The High Court has supervisory jurisdiction over the subordinate courts and over any person or body or authority exercising judicial or

quasi-judicial functions Under Article 165 (6) of the Constitution. Under sub-article (7), the said court may call for the record of proceedings before any subordinate court or person, body or authority referred herein and may make any order or give any directions it considers appropriate to ensure the fair administration of justice.

6. The court also has statutory jurisdiction under Section 362 and 364 (1) (b) of the Criminal Procedure Code which provide:

S. 362

“the High court may call for and examined the records of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed and as to the regularity of any proceedings of any such subordinate court.”

S. 364(1)

“In the case of a proceeding in subordinate court the record of which has been called for or which has been reported for order or which otherwise comes to its knowledge, the High Court may

(b) in the case of any other order other than an order of acquittal alter or reverse the order.”

7. In discharging the said duty, the court does not exercise appellate jurisdiction. This court has no jurisdiction to review or reweigh evidence upon which the determination was based as has been requested in the applications before this court. Having noted that the Appellants call for reviewing of the evidence is not available at this stage. I find no merit in the motion and dismiss the same. The Appellants are directed to fix the Appeal for directions on the final disposal.

Orders accordingly.

Dated and delivered at Machakos this 21st day of March, 2018.

D. K. KEMEI

JUDGE

In the presence of:

No appearance - for the Appellants

Machogu - for the Respondent

Kituva - court Assistant

Evans Angwenyi & Richard Oyondi - Appellants