



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BOMET

CRIMINAL APPEAL NO. 2 OF 2017

RICHARD RONO.....APPELLANT

VERSUS

REPUBLIC.....REPUBLIC

(Being an appeal from the original conviction and sentence in Criminal Case No. 26 of 2015 PM's Court Bomet – Hon. Kiage RM)

JUDGMENT

Richard Rono hereinafter referred to as the appellant was convicted and sentenced to seven years imprisonment in respect to count no. 1 for stealing Contrary to Section 275 of the penal code and count no. 2 for the offence of conspiracy to commit a felony. The appellant was acquitted on the 3rd count of giving false information to a person employed in the public service Contrary to Section 129 (a) of the penal code.

The particulars in the first count are that on the 7th day of January 2015, at Kimendet area along Siongiroi – Bomet road within Bomet County, jointly, stole Kenya Shillings 2,800,000/= the property of postal corporation of Kenya.

In the second count, the particulars are that on diverse dates between 1st day of December 2014 and 7th January 2015, at Chebunyo postal office within Bomet County, jointly, conspired together to steal Ksh.2.8 million the property of Postal Corporation of Kenya.

In respect of the 3rd count of giving false information in which he was acquitted, the particulars are that on the 7th day of January 2015, at Bomet police station, within Bomet county, he informed no. 81481 PC Robert Mwaniki, a person employed in the public service as a police officer, that you had been robbed Ksh.2,800,000/= by three men who were driving in a motor vehicle white saloon car registration number KBF 645 R information you knew to be false intending thereby to cause the said PC Robert Mwaniki to use his lawful powers to the injury of the driver JAMES WATHINI KIMUNDIA.

The prosecution called a total of eleven witnesses seven of them being employees of Postal Corporation of Kenya.

This being the first appellate court, it has a duty to evaluate and consider afresh the evidence on record so as to arrive at its own conclusion but also has to take into consideration that unlike the trial court it did not have the opportunity to observe the demeanor of the witnesses – **Okeno V. R. 1972 EALR.**

Brief facts

Winrose Chepkwony (PW3) was an employee of Postal Corporation of Kenya as a Postal Assistant and was based at Chebunyo. She testified to have reported to work at 8:00 am on 7th January 2015 when the postmaster Mr. Richard Rono (the accused) informed her that he was to deliver remittances to Bomet Post Office. The accused went into the strong room and upon return told her to sign form AC 184 and put the money together with the form AC 184 into a blue bag. The money was declared in form 184 as Ksh.2.8 million. The accused thereafter left the office carrying with him the said bag and the money.

Later at about 2:00 pm a co-worker by the name Alice Bunei received a call informing her that a letter bearing her phone number had been found in an abandoned motor vehicle. This roused suspicious as to whether the accused had managed to travel to Bomet.

PC Peter Munene (PW8) of Kapkimoilwa police post was on patrol in the company of other police officers on the 7th day of January 2015 when at around 2:00 pm they received information that there was a vehicle that had been abandoned at along Kembu-Kapkimorai murrum road and the occupants had fled on foot. They proceeded to the scene and found a salon car registration number KBF 645 R Toyota Corolla.

APs and members of public emerged from the bushes having arrested two men who were handed over to them. They were later taken to

police station Bomet. At Bomet they found the 1st accused who was alleging that he had been robbed of Ksh.2.8 million which he was taking to the bank.

Henry Kegogo Barasa (PW5) is an Investigating Officer with Kenya Postal Corporation. On 7th January 2015 he received information from the Assistant sales one Mrs. Tuitoek that the post master Chebunyo one Richard Rono had been hijacked and robbed of Ksh.2.8 million. He was instructed to commence investigations. He further received information from Bomet police that Richard Rono and the Boda Boda operator were at the station to report a case of robbery. He proceeded to Bomet Police station the following day 8/1/2015. The DCIO informed him that five suspects had been arrested. He was shown a saloon car registration No. KBF 465 R. He was informed that one of the suspects was undergoing treatment at Longisa Hospital. He went to Longisa Hospital where the suspect was able to identify him as he was a former employee of the postal corporation. He was handed over Richard Rono for purposes of handing over office.

The 1st accused produced the keys to the strong room and opened the safe. Inside they found Ksh.232,060/=. At the courier they found Ksh.201,063. Total cash in the office was Ksh.523,123/=

Total stock was Ksh.99,506/=

Total money and stock was Ksh.622,629/=. They also found a copy of a form AC 184 bearing serial no. 2206. It did not show where the money was coming from and where it was going. Cash in hand was shown as Ksh.3,032,060/= and in the payment side it was indicated that Ksh.2.8 million had been dispatched.

In the cause of investigation it was discovered that Richard Rono (the Accused) was in constant communication with the 3rd accused one Benard Gichuki Njoroge on the day the money was stolen and that the two were previously working together in Nairobi. Mr. Gichuki had his services terminated before this incident.

Joshua Komen (PW6) assistant manager in charge of auditing in the Rift Valley region carried out an audit in respect to Chebunyo post office from audit report it was established that Richard Rono had been left in charge as post master.

Secondly, that the accused was indicating the daily cashier cashbook amounts exceeding the authorized ones without giving reasons.

Thirdly, Richard Rono had requested for unlimited remittance for Bomet post office when the office records show that he had sufficient cash to meet the expected payments.

Fourthly, the amount that was supposed to be in the strong room as the cashiers daily balance book was Ksh.3,032,060/= as on 7/1/2015 but when Richard Rono opened the safe the cash in the safe was Ksh.232,060/= less Kshs.2.8 Million.

The audit found that Kshs.2.8 Million was missing and the accused should be held liable.

CPL Isaac Kibet (PW10) was attached at Embu AP post at the time of this incident. He testified that on the 7/1/15 at 1.50pm he was at the post together with his colleagues APC Rono and APC Tanui when APC Rono received a call to the effect that there was a vehicle Registration No.KBF 645R make Toyota Corolla that had been abandoned at Kakimirai road in suspicious circumstances.

They proceeded there and members of public showed them the direction which the suspects had taken. They managed to arrest one James Mwathini Kimundia who upon interrogation stated of how he was the driver of the abandoned vehicle and that he had been hijacked from Nairobi and dumped by the hijackers at Embu Kakimirai Road. The suspect was handed over to the OCS who was at the scene. APC Rono called him by phone and informed him that another suspect namely Joseph Ngugi Mbarie(2nd Accused) had been arrested. The two suspects were taken to Kapkimo Police Post.

A third suspect was arrested and beaten by members of public and was taken to Longisa Hospital for treatment.

The abandoned motor vehicle was taken police station for further investigations.

PW11 C.I Patrick Mwita was the investigating officer. He interrogated the 1st accused who narrated of how he was attacked and robbed by his co-accused persons.

He interrogated the driver of Motor Vehicle Registration. No KBF 645R one Joseph Mwathini Kimundia who informed him that the 3rd accused Benard Gichuki had hired him to travel to Bomet to collect computer accessories. That they drove to Chebunyo area where he was instructed to stop and pick two persons who were on a motorbike. That the two entered into the vehicle. He also interrogated the boda boda rider and the 3rd accused.

From the interrogations he formed the opinion that there was conspiracy to steal between the 1st and 3rd accused persons and decided to get a call data from safaricom. This call data was expunged from the record by the court and it was ordered that an officer from safaricom be availed for its production.

In his defence the 1st accused testified to have decided to transfer Kshs.2.8 Million from Chebunyo post office to Bomet. On 7/1/15 he did the necessary documentation which was countersigned by PW3. He placed the money in a bag and boarded a motor cycle to Bomet. Along the way at a place called Kimenderit he noticed two motor cycles with three occupants each trailing him. The two motor cycles intercepted them and blocked the road. The strangers beat him up together with his rider and took away the bag containing the money. After they left he

raised an alarm and members of public went to the scene. He boarded another motor bike and went to report the matter to police where he was detained together with the rider. The 1st accused called a witness who corroborated his evidence.

2nd accused testified that he is a mechanic and that he had been called by a client to go and repair his car at Longisa trading Centre. They boarded a motor cycle and took a murrum road and arrived at the place where the canter lorry was at about 9.00am. He finished work at 12.00pm and decided to walk towards Longisa but on the way he noticed a group of ten motorcycles whose occupants were armed with clubs and pangas. He was beaten and fled and hid in a maize plantation. Afterwards he saw a police officer and he rushed to him for help. He was placed in a saloon car and he met a person who was saying that he was the owner of the car.

The 3rd accused testified to have gone to Kembu for purposes of purchasing a motor vehicle. He alighted at Longisa trading centre and he decided to walk towards Kembu. He met a group of youths who beat him till he was unconscious and later found himself at Longisa hospital in chains.

The learned trial magistrate at pg 11 of his judgment paragraph 2 observed that it was not in dispute that Kshs.2.8 Million went missing from Chebunyo post office and secondly, that Richard Rono in his capacity as post master was the custodian thereof at the time it went missing.

The learned trial magistrate placed reliance on the evidence of Henry Baraza (PW5) who had issues with the mode of transportation the 1st accused had decided to take while transporting the money to Bomet and the fact that he was in communication with the 3rd accused who was a former employee of Kenya Postal Corporation. He also placed reliance on the evidence of the investigating officer Chief Inspector Patrick Mwita (PW11).

Upon a careful evaluation of the evidence on record I am of the considered view that the 1st accused was charged with the wrong offence. It is not in dispute that at time of the alleged theft he was acting as post master Chebunyo post office. He was therefore a servant of the Kenya Postal Corporation. When he handled the Kshs.2.8 Million he was doing so as a servant. He should not have been lumped together with the 2nd and 3rd accused persons in the charge of stealing contrary to section 275 of the Penal Code.

It is noted that initially the prosecution had charged five accused persons on 15/1/15 prosecution made an application to have charges withdrawn against the 3rd and 5th accused persons namely James Wathini Kimundia and Benard Ng'eno Kigen for purposes of treating them as witnesses. James Wathini Kimundia was the driver of motor vehicle registration number KBF 645R.

Benard Ng'eno was said to be undergoing treatment at Longisa District Hospital.

These two important witnesses were not availed in court to testify against the accused persons.

The investigating officer chief inspector Mwita had testified to have interrogated Joseph Wathini Kimundia. He also interrogated Stanley Bernard Kipng'eno who was the boda boda rider.

At pg 61 last paragraph he states, "from the statement of the driver and the rider, I formed an opinion that there was a plot and so I went later to safaricom to request for mobile data."

The so called driver and rider from whom the investigating officer formed an opinion to charge for the offence of conspiracy were not availed to testify before the court.

The mobile data obtained from safaricom was expunged from the record and the prosecution was given time to call for an officer from safaricom. This officer was not availed.

It is apparent that the investigations by police were not properly conducted. If the 1st accused alleged that he was attacked whilst in the company of his driver of the motor bike he had boarded, that rider should have been the first to be sought for and interrogated. His evidence would throw light on the circumstances of the alleged robbery if there was any.

The first accused did take a big gamble by deciding to transport cash by way of a motor bike. It could have been a very foolish act or a clever one. He has not given reason why he did not request for transport from the corporation. This however, is a departmental issue which can be solved at that level.

I am of the considered view that this case was not proved beyond reasonable doubt as the investigations were shoddy and below per. The conviction was not safe. It is quashed and the sentence set aside.

The appellant is set at liberty unless otherwise lawfully held.

Judgment delivered dated and signed this 16th day of March, 2018 in open court and in presence of Learned Counsel for prosecution Mr. Barasa. Learned Counsel for the defence Mr. Koech. Court assistant Mr. Rotich.

M. MU YA

JUDGE

12/4/2018