



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NUMBER 130 of 2017

ELIJAH MBUGUA KIMEMIA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal from the original conviction and sentence in the Chief Magistrate's Court at Makadara Cr. Case No. 2654 of 2010 delivered by of Hon. Suter, SRM on 28th July, 2017).

JUDGMENT

Background

1. The Appellant herein was charged with the offence of stealing by servant contrary to Section 281 of the Penal Code. The particulars of the offence were that on diverse dates between 1st April, 2010 and 30th April, 2010 at Nanyuki Road in Industrial Area within Nairobi Area Province, being a servant to Nairobi City Council, stole 54 culverts and 153 slabs all valued at Kshs. 474,755.90/- the property of the said Nairobi City Council which came to his possession by virtue of his employment.

2. The Appellant was found guilty, convicted and sentenced to pay a fine of Kshs. 150,000/- in default serve one year and six months imprisonment He was dissatisfied with the trial court's decision against which he has lodged the present appeal. His grounds of appeal are out in a Petition of Appeal filed on 26th September, 2017. They are; (i)that the learned trial magistrate erred in finding that the prosecution had proved its case to the required standard, (ii)that the learned magistrate erred by convicting the Appellant on contradictory and unreliable evidence, (iii)that the trial magistrate erred in dismissing the Appellant's defence, (iv)that the learned magistrate failed to correctly apply the law to the facts of the case hence arriving at the wrong decision, and (v)that the trial court incorrectly failed to find that there was a failure to produce essential witnesses and documents which was fatal to the prosecution's case.

Submissions.

3. The Appellant was represented by Mr. Njiraini whilst Ms. Akunja acted for the Respondent. Both parties filed written submissions, on 16th March and 4th March, 2018 respectively which they highlighted on 11th April, 2018.

4. Counsel for the Appellant underscored the cardinal principle in a criminal trial that the burden of proof always lay with the prosecution. He submitted that in the present case the prosecution did not discharge its burden. He submitted that the Appellant was convicted based purely on circumstantial evidence which unfortunately did not meet the threshold of proof of the case that would sustain a conviction. He questioned the reliance on the evidence of PW2 who was an accomplice in the commission of the offence. He urged the court to disregard his evidence. He relied on **Karanja & anor v. Republic[1990] KLR** to buttress this submission.

5. Counsel took issue with the trial court's failure to consider the Appellant's defence as plausible. In this regard, he submitted that the Appellant had established that the goods he was found in possession of were his. He added that the court had disregarded the Appellant's defence that the missing goods belonging to the complainant were issued by a clerk who the prosecution did not call as a witness. Instead, the court relied on the evidence of PW6 who did not prove that the Appellant had stolen the goods. He cited the case of **Said Awadh Mubarak v. Republic[JeKLR]** to buttress the submission that the failure to call a crucial witness was fatal to the prosecution case. He also cited the case of **Republic v. Geoffrey Mwangi Watuku[2006] eKLR** to buttress the submission that prosecution did not discharge its burden to the required standard.

6. Counsel further urged the court to note that the Respondent had admitted that the prosecution case was weak. He pointed to its concession that the investigating officer did not complete his testimony and therefore crucial documents necessary for proof of the case were not produced.

7. Ms. Akunja opposed the appeal. She submitted that it was not in dispute that the Appellant was an employee of the complainant, working in the road construction department. Further that it was not in dispute that 54 culverts and 153 slabs belonging to the complainant were recovered at PW2's premises. She submitted that although no documents were produced to show that the goods belonged to the complainant it was obvious that the complainant dealt in culverts and slabs in road construction. Further, that although no documentation was provided to show that the Appellant collected the goods there was sufficient evidence that he had the capacity and opportunity to steal, being an employee of the complainant at the depot where the theft took place.

8. With respect to the Appellant's defence, counsel submitted that the same exhibited discrepancies related only to the monetary value of the goods and not the fact that the goods were stolen from the complainant. She submitted that the Appellant failed to offer a plausible explanation how he came to be in possession of the materials he sold to PW2. It was her case that the prosecution had proved their case to the required standard and urged that the appeal be dismissed.

Evidence.

9. The prosecution's case was that the Appellant while under the employment of the complainant obtained certain items in the course of his duties which he diverted for sale. **PW1**, James Mbugua Nganga, an engineer with the Nairobi City Council testified that at the material time he was in charge of the highways depot. He recalled being called on 25th June, 2010 by the City Engineer who informed him that some stolen items were recovered at Dagoreti. He proceeded to the location where he found the goods had been recovered from a compound. He could not recall the quantity of the goods but they loaded them onto lorries and took them away. He identified the goods as belonging to the City Council by their physical appearance. He testified that they were kept at the Nanyuki Road depot where the Appellant worked. It was his evidence that the Appellant had access to them as he was a fundi (technician) employed by the complainant.

10. **PW2, Kenneth Kariuki Mwaura**, who owned a hardware store at Kwangware recalled that in April, 2010 he was approached by a man who offered to sell to him some culverts and slabs. The man returned in four days with 27 culverts which were all genuine and they agreed on a price of Kshs. 15,000/- After about one and a half months the man returned with 27 more culverts which he again purchased for Kshs. 15,000/-. Three months later he was approached by an investigator from the Nairobi City Council who wanted to know how he came into possession of the goods. He gave his account about how he purchased them. They were repossessed. He identified the Appellant as the man who sold the goods to him.

11. **PW3, Emmanuel Wafula Wanata** worked with investigations department of the City Council of Nairobi. He entirely corroborated the evidence of PW1. He also participated in the recovery of the goods. **PW4, John Kipketer A. Tanui** worked at the Investigation and Information Analysis department of the Nairobi City Council as a deputy director. He recalled being informed by PW3 of the incident. He equally corroborated the testimonies of PW1 and 3.

12. **PW5, CPL Livingston Hyhanda** of Industrial Area Police Station took the photographs of the stolen goods on 28th June, 2010 and produced them in court. **PW6, CPL Galmal Arero** investigated the case. He found the Appellant culpable and charged him accordingly.

13. In his unsworn defence, the Appellant confirmed that he worked for the complainant as a road constructor. That during his arrest on 13th July, 2010 he was not arrested with anything as he was at work when he was summoned to City Annex where he was arrested for stealing the culverts and paving slabs. He denied stealing the culverts and slabs indicating that there was a procedure in place at the depot relating to how the materials could be removed from the store. He produced records showing how he undertook his duties on 1st April, 2010. He added that his job did not entail the use of slabs as a result of which he could not have come by the stolen materials.

Determination

14. It is now the duty of this court to reevaluate and reanalyse the evidence afresh before arriving at its own independent finding. See **Pandyav Republic (1957) E.A.336, Kariuki Karanja v Republic (1986) KLR109**.

15. I have accordingly considered the evidence on record and the respective rival submissions. I have concluded that the issues arising for determination are whether the prosecution proved the case beyond a reasonable doubt and whether PW2 was the Appellant's accomplice.

16. Under Section 281 of the Penal Code the prosecution was enjoined to prove that the Appellant was in the employment of the complainant. It is an undisputed fact as the Appellant testified in his defence that he was employed by the complainant as a road constructor. He therefore clearly fell within the definition of a servant as per **Black's Law Dictionary, 9th Edition**, namely, a "**person who is employed by another to do work under the control and direction of the employer**".

17. The next issue is proof that the goods stolen were the property of the Appellant's employer or came into his possession courtesy of his employment. The prosecution's case was that the goods were stolen from the complainant's Nanyuki Road depot where they were kept after being acquired. According to PW1 they used to send the employees who had been assigned duties to the depot to pick them up. He testified that the items must have been removed over a period of time. The prosecution's theory as set out by Ms. Akunja in her submissions was that the Appellant took the items from the depot and upon completion of his duties he would retain the remaining materials which he sold to third parties.

18. It is the view of the court that the prosecution needed to establish that the Appellant did obtain the culverts and paving slabs from the Nanyuki depot. This was however never proved. The prosecution also failed to prove that the property belonged to the complainant. PW1 testified that the goods were not marked but "resembled the ones they were using". Ms. Akunja submitted that although "no documents were produced to show that the goods belonged to Nairobi City Council (NCC), it was "obvious that NCC dealt with culverts and slabs in road construction". The court cannot acquiesce to such a submission as the ownership of the property was a crucial factor. The failure to adduce positive evidence in this regard fatally dealt the prosecution case. It implied therefore that the evidence adduced did not support the charge. Furthermore, it is common sense that the use of culverts or concrete slabs is not restricted to the complainant solely as many other entities are

in the construction business. And therefore whatever was exhibited needed be established beyond all reasonable doubt that it belonged to the complainant.

19. I now consider whether the Appellant stole the property in question. The evidence available is purely circumstantial. This is informed by the evidence of PW2 that the Appellant sold him the goods. The court is therefore under a duty to ascertain the veracity of the evidence adduced by PW2. The Appellant submits that the evidence should be dispensed with as it was unreliable in light of the fact that the witness was an accomplice in the commission of the offence. The Court of Appeal in **Antony Kinyanjui Kimani v. Republic**[2011]eKLR, as quoted in **Republic v. Charles Mwaura & anor**[2016] eKLR, held that:

***“What constitutes an accomplice is not defined in our statutes but section 20 of the Penal Code makes every person who counsels or procures or aids or abets the commission of an offence, a principal offender. Section 396 of the Penal Code also defines an accessory after the fact but it does not cover a person who merely fails to report a crime. In the case of Watete v Uganda [2000] 2EA 559, the supreme court held that “in a criminal trial a witness is said to be an accomplice if, inter alia, he participated as a principal or an accessory in the commission of the offence, the subject of the trial”...*”**

20. Strictly speaking, PW2 could not fall within the broad definition above as there was no proof that he counseled, aided or abetted the commission of the offence. Further, there was no evidence that he procured the Appellant to commit the offence. I make this finding notwithstanding his testimony particularly regarding the initial meeting with the Appellant where an agreement was reached for the purchase of the culverts, subject to inspection of a sample and the subsequent purchase of 27 culverts at the consequent meeting. The same would only amount to a suspicion, which is no evidence at all.

21. The witness did not also fall within the definition of an accessory after the fact as provided in Section 396 of the Penal Code. He was excluded from being a prototypical accomplice. At best he could only be charged with receiving or handling stolen goods. The evidentiary value of the evidence against PW2 is therefore called into question.

22. The witness, PW2, needed to exonerate himself and was therefore bound to testify against the Appellant. In the absence of any other corroborative evidence, it was dangerous to convict the Appellant. I have found in abundance that the prosecution failed to establish the ownership of the goods and so no link of the Appellant to them. As such, the conviction of the Appellant was not safe.

23. I accordingly allow the appeal. I quash the conviction, set aside the sentence and order that the Appellant be forthwith set free. It is so ordered.

DATED and DELIVERED this 24th day of **May, 2018**.

G.W. NGENYE-MACHARIA

JUDGE

In the presence of:

1. *Appellant present in person.*
2. *Miss Atina for the Respondent*