



REPUBLIC OF KENYA

IN THE HIGH OF KENYA

AT NYERI

CRIMINAL APPEAL NO. 143 OF 2013

ANDREW GISEMBA ONSOTI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from the decision of (Hon.W.A.Juma) the Chief Magistrate Nyeri

delivered on the 11th December, 2013 in Criminal Case No.778 of 2011)

JUDGMENT

1. **Andrew Gisemba Onsoti**, the appellant herein was charged with the offence of stealing contrary to **Section 268** of the **Penal Code**. The particulars of offence were that on diverse dates between the 10th day of February, 2011 and the 25th July, 2011 at the Kimathi University construction site within Nyeri County, with others not before the court stole the materials as listed on the Charge Sheet all valued at Kshs. 6,365,001/- being the property of K.G.Patel & Sons Company Ltd;

2. The prosecution called a total of eleven (11) witnesses to prove its case; the appellant was found guilty and was convicted and sentenced to serve one (1) year imprisonment;

3. Being dissatisfied with the conviction and sentence, the appellant preferred this appeal and advanced seven (7) grounds of appeal summarized *inter alia*:

- (i) There was inadequate evidence to support the charge;
- (ii) The trial magistrate erred in finding that the appellant committed the offence of stealing; and erred in accepting and relying on such evidence;
- (iii) The prosecution evidence was not cogent enough to support the conviction and sentence;
- (iv) The sentence of one (1) year without the option of a fine was a misapprehension in law; and the sentence was excessive in the circumstances;
- (v) The appellant's evidence was cogent, truthful and justified and the trial court erred in disregarding it;
- (vi) The trial magistrate disregarded the appellant's mitigation.

4. At the hearing hereof the appellant was represented by Learned Counsel Mr Ombongi whereas Prosecuting Counsel Mrs Gicheha represented the State; both Counsel made oral presentations; hereunder is a summary of the respective rival submissions;

APPELLANT'S SUBMISSIONS

5. The appellant was a store-man at the site and his job was limited to entering books of record on delivery of goods and movements of goods in and out of the store; the allegations arose after the appellant had sought permission from the supervisor to go attend to his injured wife;

6. The evidence of **PW2** one of the managers clearly stated the value of the goods allegedly stolen; that it was not possible for the items to

be stolen wholesome; it was only possible if the goods were stolen piecemeal; he told the court he had complete faith in the character of the appellant and trusted him; that he had no doubts at all that the appellant was upto no mischief;

7. **PW3** who was also a manager also trusted the appellant; he only raised concerns of the purportedly missing items; his evidence on illegalities was not supported in any way; that he merely stated that the appellant stole the items but tabled no evidence; on the date the appellant had sought leave to go and attend to his sick wife;

8. **PW4** who was the foreman told the court that he had worked for K.G.Patel for 25 years; that a motor vehicle christened "**K.G.Patel**" came on a Saturday, but no date was given, that it had carried away unspecified goods; he also contradicted himself by telling the court that he didn't know how the materials were carried away; he told the trial court that the appellant followed the truck in a small car; but never gave details of the occupants of the small vehicle that had followed the big truck; the evidence of **PW4** was hearsay as he relied on what the other guards had told him;

9. It was the appellant's contention that in its judgment the trial court did give any reasoning on the connection between the large truck and the small car; it made a presumption that they were working together; it ought to have disregarded such evidence;

10. His submission was that the prosecution evidence was fraught with contradictions; Simon Ngare (**PW5**) a guard on the material date told the court that the lorry was seen on 23/07/2011; whereas **PW6** testified that the lorry was seen on 25/07/2011 or 26/07/2011; he went on to state that the guards never checked the lorry to see the contents it was carrying; yet having never inspected the lorry his evidence was that it was carrying metals.

11. His testimony further contradicted that of **PW4** as he stated that the appellant was in the cabin of the lorry with three other occupants; and that the appellant was not in the second vehicle; this contradicts the evidence of **PW4**;

12. **PW6** also a security guard stated that he was on duty on the 23rd July, 2011 and that there was no second vehicle contrary to the testimonies of the other guards;

13. George Mugo Nderitu (**PW9**) a welder at the site totally contradicted the testimony of the guards **PW4** and **PW5** as he stated the truck he saw the appellant with three other persons seated inside as it headed to Mweiga was christened "**Mcheza Kasarani**"; and that the truck had no goods;

14. The evidence of **PW11** Sergeant James Juma who was the Investigating Officer was that the users of the lorry the appellant included had concealed and falsified the identity of the vehicle that was seen transporting the materials; that the registration number belonged to a small vehicle; that this was a mere allegation as there was no tangible evidence; that the prosecution failed to prove how the appellant stole the items single-handedly;

15. The trial court did not consider the defence of the appellant; his defence was that the alteration of the entries in the records on the movements of the materials was dictated to him; and that his duty was to follow instructions and this did not translate to stealing; that he was being punished for failing to be a whistle-blower; he submitted that the prosecution failed to present a prosecution witness who saw the movement of lorries moving in and out of the stores and witnessed the theft; the process could not have been carried out secretly and could not have escaped the notice of the guards; that a large truck was required and the carrying of the materials was labour intensive and also required a lot of time;

16. The trial court failed to give reasons as to why it was satisfied that the appellant stole the items; yet it confirmed this in its judgment that it was not possible or practicable for the appellant to have stolen the material due to the weight and the bulk of the subject matter;

17. The one (1) year jail term given to the appellant was excessive and is not commensurate with the circumstances;

18. The appellant prayed that the appeal be allowed and the conviction be quashed and sentence set aside.

RESPONDENT'S SUBMISSIONS

19. In response Prosecuting Counsel submitted that; the appellant was in charge of the stores for the materials on site; on the 26/07/2011 the appellant requested for leave immediately after **PW4** had reported the missing materials to **PW2**; and put in his request for leave immediately **PW2** was instructed to take stock;

20. The supervisor told the court that the appellant requested for leave to go attend to his sick wife; **PW3** discovered through the uncle who had recommended him for employment that the appellant did not have a wife; in his defence the appellant retracted this and told the court that he was going to visit his sick child; the request was put in upon realizing that the missing items would be discovered; this was evidence that the appellant was trying to run away before the discovery;

21. The appellant was given one (1) week off; the employer tried to reach him but the appellant was unavailable as his phone was switched off; the appellant never returned to work and never gave a return to work formula; the appellant was traced through the use of the details on his national identity card and with the assistance of the area chief the appellant was arrested in Soi on the 20/08/2011;

22. The action of fleeing showed that he was guilty even before he was charged;

23. The events of 23/07/2011 as reported by the guards **PW5** and **PW6** may have been contradictory on the dates; but counsel submitted that on the 25/07/2011 and 26/07/2011 the theft was discovered after the stock-taking; and that **PW5** and **PW6** reported what happened on

23/07/2011 with regard to the movement of the materials; **PW5** was on duty at Kimathi University where the site was; he reported that he took over duty at 5.00pm and found motor vehicle lorry registration number KAR 402S on site; that the lorry came to the gate at 6.00pm and he noted it was carrying metals and that it was half full; that he saw the metals as the doors were not closed at the rear; the lorry had K.G.Patel written on it; and the appellant was seated at the door on the passenger side and there were four (4) other people seated in front; upon enquiry he was told that the materials were being taken to another construction site in Isiolo; that he did not inspect the vehicle because it was one of theirs;

24. **PW6** also saw the same lorry and confirmed the sitting position of the appellant; corroborating the evidence of **PW5**; he heard the sound of metal hitting against each other as the lorry passed by; that he did not engage the occupants; the issue of the small vehicle did not feature in the evidence of **PW5** and **PW6** it was only mentioned by **PW4** who only reported what he had been told by **PW5** and **PW6**; there was no contradiction in the evidence of **PW5** and **PW6** which evidence was corroborated by **PW9**; his evidence was that he saw the same vehicle registration number KAR 402S and that one of the occupants was the appellant whom he knew very well having worked in the same company; he saw the vehicle at 3.00pm whereas the guards saw it at 6.00pm; **PW5** reported to work and found the lorry on site and didn't know when it had arrived; the lorry was seen by three people **PW5**, **PW6** and **PW9** who all testified to having seen the appellant inside the lorry; that they could not have all conspired to give false evidence against the appellant;

25. **PW11** testified that having carried out investigations on the ownership of the lorry the records show that the lorry's registration belonged to a small vehicle; the falsification of the registration must have been for illegal intent and meant to conceal the owner of the lorry;

26. The appellant only implicated the employer because he had been caught; the falsification of the book entries confirms that there were materials missing from the site; the question that arises is who stole the materials; the appellant was seen taking away the materials from the site;

27. In defence of being made to falsify the books; the appellant had the choice of declining to committing the illegalities by either reporting the matter to the employer K.G.Patel or resigning; but instead he decided to play along; the falsified documents were never produced; this defence was calculated to exonerate him.

28. The defence that loading of the materials required time and labour therefore making the circumstances of stealing difficult; but the others seen in the lorry by **PW5** and **PW6** were there to help the appellant

29. That the appellant was absent without leave shows that he was guilty; he was the one in charge of the stores; the discovery of the missing items would expose him;

30. Counsel submitted that the appeal had no merits and prayed that the findings of lower court be upheld; and that the appeal be dismissed in its entirety;

REJOINDER

31. There was foul play by **PW1** and the appellant knew about the mischief that was going on; the prosecution deemed the appellant guilty because he never reported back to work; appellant was categorical that he didn't go back because **PW2** called him and told him not to go back; the appellant was arrested in Eldoret and never got the chance to access the falsified records;

ISSUES FOR DETERMINATION

32. After taking into consideration the submissions made by both Counsel the following are the issues that this court has framed for determination;

- (i) Whether the conviction was against the weight of the evidence;
- (ii) Whether the prosecution proved its case to the desired threshold;

ANALYSIS

33. This being the first appellate court it is incumbent upon this court to reconsider and re-evaluate the evidence and arrive at its own independent conclusion always keeping in mind that it did not have an opportunity to see nor hear the witnesses. Reference is made to the case of **Okeno vs Rep (1972) EA 32**.

Whether the conviction was against the weight of the evidence; Whether the prosecution proved its case to the desired threshold;

34. The evidence to be re-evaluated relates to the prosecution witnesses evidence on the missing material and whether the conviction was against the weight of the evidence; making the conviction un-safe;

35. The evidence of **PW1** was that on the 25/07/2011 the sub-contractor told him that some goods were missing from the site; that he could only confirm that the goods were missing by determining the material delivered, the material used as per the Foundation Plan (**PExh.23**) and the material that was in the store; the difference would be the stolen items; he then ordered a physical audit to be done; he went on to state that the materials were stolen on various dates between February to July 2011 and that nothing was recovered; that the list of the missing items was prepared by the sub-contractor and submitted to the police; **PW1** went on to state that he had no direct evidence against the appellant;

36. **PW2** who was the sub-contractor told the court that on the 25/07/2011 he was told by the foreman that some items were missing from the store; that the foreman was in charge of the construction and that the appellant was the only one who received the deliveries and had the keys to the store; that the theft happened gradually between February to July, 2011; that between February to July no audit was done as he trusted the appellant; that what was lost was a lot and could not fit on one lorry; that the foreman did an audit of the material delivered; the material used and what was in the store and came out with a full list of the missing material; that the record books showing movement of stock and deliveries were kept by the appellant and were missing from the stores; that the security at Kimathi University did not check their vehicles as they entered and left the site;

37. **PW3** in his testimony told the court that the loss was detected at Phase II; that the delivery notes show the appellants name and signature, the registration number of the vehicle making deliveries and the driver; that he told the foreman to prepare an audit on the missing materials; that he strongly suspected the appellant because he disappeared on the 26/11/2011;

38. **PW4** was the foreman who stated that on the 25/07/2011 he reported to work at 8.00am; as he went round he noticed that the metals that were kept outside near the store were missing; these metals had been kept near the store and had been covered with polythene to keep the rain off; he said that the metals and tappers were less than what they had left there; that he informed his senior when he visited the site; when he informed the security guards at the gate that the items were missing; the one who had been on duty told him that a motor vehicle had come on Saturday and had carried something and left; that they didn't search or inspect the vehicle when it came and left; neither did they tell him who was in the lorry or how many persons were therein; but that the appellant followed from behind in a small vehicle; no registration number of the small vehicle was given;

39. His evidence was that the appellant was responsible for receiving material and had the keys to the store and **PW2** had the spare keys; that he didn't know whether the items were carried at once or not; he stated that it was not the duty of the appellant to oversee the materials that were outside; that they did not have a watchman at the site; that he did not interrogate other workers; and that nothing got lost from the store or office where the appellant worked;

40. The evidence of **PW5** a security guard working for Kimathi University stated that he was on duty on 23/07/2011; at about 6.00pm a six tyre lorry registration number KAR 402S white in colour which had writings K.G.Patel on the side; came from the site and that it was carrying metals and it was not full; although he did not inspect the lorry he was able to see the metals as the lorry was open; that there were four (4) people seated in the cabin one of them being the appellant who told him that they were moving the materials to another site in Isiolo; under cross examination he stated as follows;

“I was not there when the lorry had come in.

I did not find out what the lorry came for or what time”

41. The evidence of **PW6** also a security guard at Kimathi University; was that whilst on daytime shift he saw the lorry and **“heard the sound of metals hitting each other”**; that the lorry had four occupants and the appellant was one of them; he was told by the other guards that the vehicle was taking metals to Isiolo; his evidence was that he never inspected the lorry as it was not his duty to inspect the property of K.G.Patel; and under cross-examination stated that he did not know the thief; the evidence of **PW7** who was a steel fitter was that he did not know how the twisted bars got lost; and did not know how the appellant was connected to the alleged theft nor why he was charged with the offence; **PW9** a welder with the sub-contractor said he saw the lorry which was a ten tyre vehicle registration number KAR 402S at the junction of the Nanyuki- Mweiga road; he did not know where the lorry was headed; it was christened **‘Mcheza Kasarani’** and that it did not belong to K.G.Patel; that he saw the appellant seated in the cabin with three other people; that the lorry was not open as it was covered with canvas; he did not inspect that lorry yet he saw that it was not carrying anything at that time;

42. The evidence of **PW11** the Investigating Officer evidence was that he relied on the final summary of steel materials sheet showing quantity delivered to the site; quantity used on site; quantity on site and quantity missing; this list was marked as **‘PEXh.26’**; he went to the site and just interrogated the workers; thereafter he took the documents he was given to the document examiner; did a search at the Registrar of Motor vehicles on the lorry's registration number KAR 402S; and finally went out to search for and arrest the appellant; the only pit-fall is his failure to avail the week-end watch-man named Geoffrey Ombengi to testify as a witness; the said Geoffrey Ombengi was mentioned in the evidence of **PW3** as being the week-end watchman at the site; that his reporting time was 2.00pm and that on that material date he was on duty and had told **PW3** that he denied knowledge of anything; it is this court's considered view that the calling of Geoffrey Ombengi to testify as a witness was not an option; as his evidence would have shed a lot of light on the goings at the site on that material date;

43. Upon re-evaluating the evidence it is this court's considered opinion that the case against the appellant on the missing items was entirely based on nothing more than suspicion; **PW1** stated that he had no direct evidence that the property alleged to have been stolen was stolen by the appellant; **PW2** stated that the theft happened gradually between February to July, 2011; that what was lost was a lot and could not have fitted on one lorry; he opined that the materials could have been stolen in bits without anyone noticing; the crucial part of his evidence was that the security guards at the university gate did not inspect their lorries as they entered and left; this was corroborated by the evidence of **PW5** and **PW6** who confirmed that it was not their duty to inspect vehicles belonging to K.G.Patel; **PW4** testified to the missing metals being kept outside near the store and the materials had been covered with polythene to keep off the rain; and that there was no watchman on site; and it was his evidence that it was not the duty of the appellant to oversee the materials that were outside; he was also categorical that nothing got lost from the store or office where the appellant worked;

44. The evidence on the manner in which the missing materials were stored which was outside the store and covered with polythene would mean that it was accessible to all and sundry as there was no watchman at the site particularly during the week days; the prosecution evidence was that what was lost was a lot and could not have fitted onto one lorry; that the materials could have been stolen in bits between the months of February and July, 2011; one of the security guards **PW5** was not there when the lorry entered Kimathi University and therefore did not know whether it came in with any materials or came in empty or that it was leaving with the contents it had entered with meant for another site; the prosecution failed to call the watchman Geoffrey Ombengi who worked weekends and who would have shed more light on the activities of that material date; all this evidence adduced by the prosecution raises doubt in this court's mind as to when the materials were

stolen and by whom; none of the stolen material was found in the appellants possession or traced to the appellant; it is trite law that any doubts that arise should be resolved in favour of the appellant.

45. **PW3's** evidence was the icing on the cake in that he strongly suspected the appellant because he disappeared on the 26/11/2011; indeed the appellant was convicted on the mere suspicion that he had requested for leave and that his phone was off and because he couldn't be reached this made him the guilty party; in the case of **Sawe vs Republic (2003) KLR** the court held that;

“Suspicion however strong cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt.”

46. This court concurs with the appellant's counsel's submissions that the issue of identification of the vehicle that ferried the goods was not clear; the trial court in relying on the evidence of the list of missing materials prepared by **PW4** ought to have taken into consideration his evidence on the missing materials that had been placed outside the store and covered to keep off the rain; that it was not the duty of the appellant to oversee the materials that were outside; that there was no watchman on site; and that nothing got lost from the store or office where the appellant worked;

47. The latter part of the evidence of **PW4** who was the foreman in charge of construction and the person tasked with doing the audit and coming up with a comprehensive list of the missing items exonerated the appellant from any wrong doing;

48. This court is satisfied that the conviction was against the weight of the evidence and that the prosecution failed to prove its case to the desired threshold;

49. This ground of appeal is found to have merit and is hereby allowed;

FINDINGS

50. *For the forgoing reasons this court makes the following findings;*

- (i) This court finds that the conviction was against the weight of the evidence;
- (ii) The prosecution failed to prove its case to the desired threshold; thus making the conviction unsafe;

DETERMINATION

51. *The appeal is found to be meritorious and is hereby allowed;*

52. *The conviction is hereby quashed and the sentence set aside; the appellant be set at liberty forthwith unless otherwise lawfully held;*

Orders Accordingly.

Dated, Signed and Delivered at Nyeri this 25th day of October, 2018.

HON. A. MSHILA

JUDGE