



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CRIMINAL APPEAL NO. 288 OF 2013**

**LEONARD MATU WANJAU.....APPELLANT**

**VERSUS**

**REPUBLIC.....STATE**

***(Appeal from the Sentence of the Chief Magistrate's Court at Nyahururu Hon. D. K. Mikoyan- Ag. Senior Principal Magistrate delivered on the 18<sup>th</sup> October, 2013 in CMCR Case No. 935 of 2010)***

**JUDGEMENT**

The appellant **LEONARD MATU WANJAU** has filed this appeal challenging his conviction and sentence by the learned Ag. Senior Resident Magistrate sitting at the Nyahururu Law Courts. The appellant had been arraigned before the trial court on 15/4/2010 facing a charge of **STEALING BY SERVANT CONTRARY TO SECTION 281 OF THE PENAL CODE**. The particulars of the charge were given as follows

***“On diverse days between 14<sup>th</sup> day of August 2009 and 18<sup>th</sup> day of September, 2009 at Ngano Trading Centre in Nyandarua District being servants to Pyrethrum Board of Kenya stole from the said Pyrethrum board of Kenya 279 Cypress trees and 40 Pine trees all valued at Ksh 832,729/= which came into his possession by virtue of [his] employment”***

The appellant pleaded ‘**Not Guilty**’ to the charge. His trial commenced on 15/4/2010. The prosecution led by **CHIEF INSPECTOR RUTTO** called a total of six (6) witnesses in support of their case. The brief facts of the prosecution case are as follows-

The appellant was at the material time a manager employed by the Pyrethrum Board of Kenya (hereinafter referred to as the Board) at the Oljororok Farm. The appellant took over from one ‘**Mr Harman Makau**’ in September, 2009.

**PW1 KENNEDY AYIEKO MIHESO** told the court that he was at the material time employed by the Board as a Crop Assessment Officer in Nakuru. On 19/9/2009 **PW1** received a call from the CEO of the Board informing him about the illegal cutting of trees at the Oljororok Farm. On 20/9/2009 **PW1** visited the farm in question. He found several cypress off-cuts. On going near the dam **PW1** found 152 freshly cut Cypress Stumps. He also saw 108 logs and 30 Camphor logs. **PW1** saw 60 cuts trees and one blue gum tree cut down. A short distance away he saw a heap of saw dust. Pine trees had also been haphazardly cut.

**PW1** decided to report the matter to police. He went to Oljororok Police Station and made his report. The accused was later arrested. **PW1** identified the photographs of the cut trees which he saw. Upon completion of police investigations the appellant was arrested and charged with the offence of stealing.

At the close of prosecution case the appellant was found to have a case to answer and was placed onto his defence. He gave a sworn defence in which he denied having cut any trees at the Oljororok Farm. On 18/10/2013 the learned trial magistrate delivered his judgment in which he convicted the appellant for the offence of stealing by servant and thereafter sentenced him to serve a period of two (2) years on probation. Being aggrieved by both his conviction and sentence the appellant filed this appeal.

Being a first appeal this court is obliged to re-examine the evidence on record and draw its own conclusions on the same. In the case of **AJODE Vs REPUBLIC [2004] 2KLR 81**, the Court of Appeal held thus

*“In law it is the duty of the first appellate court to weigh the same conflicting evidence and make its own inferences and conclusions but bearing in mind always that it has neither seen nor heard the witness and make allowance of that”*

Similarly in the case of **MWANGI Vs REPUBLIC [2004] 2KLR 28** it was held that

*“The first appellate court must itself weigh the conflicting evidence and draw its own conclusions”*

**MR. OMBATI** learned Counsel argued the appeal on behalf of the appellant whilst **MS OUNDO** for the Office of the DPP opposed the appeal.

Counsel for the appellant submitted that the charge was fatally defective as the charge sheet did not give the exact location where the theft is alleged to have occurred. I have perused the charge sheet. The particulars indicate that the offence is alleged to have occurred at **‘Ngano Trading Centre in Nyandaura District within Central Province’**.

In my view this provides sufficient particulars of the location of the incident. A charge sheet is but a synopsis of the evidence to be adduced. Further particulars including the fact that the offence allegedly occurred at **‘Olojororok Farm’** emerged from the testimony of the witnesses. The charge as framed enabled the appellant to have sufficient knowledge of the charges he faced. The failure to name Oljororok Farm in the particulars of the charge did not occasion any prejudice to the appellant. I find that the failure to include the name of the farm where the theft allegedly occurred was not a fatal omission. The charge sheet as framed was not fatally defective and I therefore dismiss this ground of the appeal.

In order to prove the charge of stealing by servant, the prosecution needed to prove the following issues

1. That the appellant was a **‘servant’** of the complainant Board
2. That the theft of trees did occur at Oljororok Farm
3. That the accused either perpetrated or directed that theft.

On the first issue Counsel for the appellant submits that as a manager the appellant was not a **‘servant’** or employee of the Board. I disagree with this submission. In his defence the appellant stated that he was employed by the Pyrethrum Board of Kenya as a Farm Manager and in the year 2009 he was posted to Oljororok Farm. As a Farm Manager the appellant was answerable to the Board. He would receive instructions from the Board; he was assigned duties by the Board and received a salary from that same Board. He was not a director and/or shareholder in the Board. The appellant was an employee or a servant of the Board as the Board was his employer. I therefore dismiss this ground of the appeal.

In order to prove the offence of Stealing by Servant evidence must be tendered to prove that items (in this

case trees) were actually stolen from Oljororok Farm as is alleged. **PW1** who at the time was a Crop Assessment Officer told the court that he received a report from the Board's CEO that trees were being cut without authority from the Oljororok Farm. **PW1** personally went to the Farm to verify these reports. In his evidence he stated that he found 152 Cyprus Stumps, 108 freshly cut Cyprus trees, 30 Camphor logs. Cut Pine trees, and 1 blue gum tree cut down. **PW1** also confirmed that he found a pile of saw dust. The witness identified photographs of the cut trees **P. Exb 1**.

**PW2 NAOMI MWANGI** who worked as a casual labourer in Oljororok Farm and **PW3 JAMES NJOROGI WAMAI** a guard employed at the farm both testify that during the material time they heard the sound of a power saw being used in the Farm. The court takes judicial notice of the fact that a power saw is the machine ordinarily used to cut down trees. **PW4 GEORGE MUGAMBI** also a guard at Oljororok Farm confirmed that on 19/9/2009 he too heard the sound of a power saw being utilized in the farm. About the same time, **PW4** saw a lorry being driving out of the farm. He attempted to stop the lorry but was not able to catch it.

**PW6 MWIRIRI KAMITI** a Forestry Officer corroborates the evidence of **PW1**. He told the court that he was engaged by the Board to carry out an assessment on their farm. He went to the Oljororok farm and saw the following trees having been cut down.

- 279 Cyprus trees
- 40 Pine trees

**PW6** valued the cut trees at Ksh 831,724/=. He prepared his report which he produced in court as an exhibit **P. Exb 2**.

It is important to note that the fact of cutting down trees for sale would not be an offence. The witnesses have all told the court that on occasion trees would be cut down in the farm but only on the authority of the Board. There is no evidence that any authority was sought and/or obtained by any person to permit the cutting down of trees in September, 2009. **PW6** told the court that he did not see any certificate of cutting. This is an indication that the trees were being cut down without the authority of the Board.

**PW6** also told the court that he noted that the trees were being converted into timber. This would explain the pile of sawdust which **PW1** saw at the site. It is clear that whoever was cutting down the trees was doing so with the intention of selling them off as timber to make a profit. All this was being done without the consent of the Board. I am satisfied that the evidence shows that trees were being cut down and the timber stolen from the Oljororok farm.

The next and more pertinent question is whether it was the appellant who was either cutting down those trees or whether the theft of the trees and timber was being done at the instance of and under the direction of the appellant.

It is not in dispute indeed the appellant readily concedes that he was at the material time the Farm Manager at the Oljororok Farm. Thus if any trees were to be cut down the appellant ought to have been aware and ought to have given authorization for the exercise. The appellant in his defence denied that it was he who cut down the trees and also denied having given any person authority to do so.

However there is no single witness who saw the appellant cutting down or indeed supervising the cutting down of any trees. **PW1** only arrived at the farm after the fact to find the trees already cut. **PW2, PW3** and **PW4** only told the court that they heard the sound of a power saw being used on the farm. None of them bothered to go and investigate to find out who was utilizing the power saw. Thus they are unable to identify the appellant as the one who was cutting down the trees.

**PW4** told the court that in the third week of September, he saw a lorry ferrying timber out of the farm. **PW4** said he tried to stop the lorry but failed to catch up with it. Surprising he **PW4** who was a guard at the farm did not bother to report this incident to any authority.

**PW1** in his evidence claimed that the appellant admitted to him that it was he who cut the trees. **PW1** further claimed that the appellant later wrote a text message seeking forgiveness. Firstly that text message was not produced as an exhibit. **PW1** merely made mention of it. The trial magistrate apparently did not see that text message. In short there is no confirmation that such a text message actually existed.

Secondly if the appellant did admit the theft to **PW1** then this would amount to a confession. The law on admissibility of confession is clearly stated in Section 25A of the Evidence Act. This so called confession was not made to a police officer above the rank of Inspector and the appellant was not cautioned beforehand. Thus any such statement is not admissible as proof of the appellants guilt.

The prosecution sought to rely on circumstantial evidence to link the appellant with the theft of the trees. However in order for circumstantial evidence to suffice it must point squarely at the accused alone as the perpetrator of the offence. In **Willson Circumstantial Evidence** 6<sup>th</sup> Edition P. 311 it was stated as follows

***“In order to justify the inference of guilt the exculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than of his guilt”.***

There is no doubt that the appellant was the farm manager at the material time. He therefore played a supervisory role and was responsible to ensure that the Board’s property including trees were secure. He also had a duty to prevent the theft of trees.

The witnesses confirm that the Oljororok Farm was vast and it was not fenced. There is also evidence that squatters had invaded the farm. Under cross-examination **PW1** says

***“The land is fenced and [the] fence was vandalised. Anyone can get access to the land. There are squatters on the land and through them we learnt that trees were cut”***

**PW3** confirms this when he states

***“The land is too big and is not fenced. There were many squatters who were staying in the land belonging to the Board and were allowed to cultivate”.***

It would appear that the farm was accessible to anyone and the squatters who had access could very well have cut down those trees. The police have not excluded these squatters as the culprits.

There is also clear evidence that the manager from whom the appellant took over would have been the one who cut down the trees and stole the timber. This man whose name was given as ‘**Mr. Makau**’ was said to have been involved in illegal logging on the farm. **PW6 CHIEF INSPECTOR SILENGO** the investigating officer stated under cross examination that

***“According to reports Mr. Makau had verbally ordered cutting down of trees ..... I found in [the] inquiry that Makau was logging even after he was sacked.....”***

The said Makau apparently absconded and could not be traced by police. The fact that this man absconded is evidence of a guilty mind on his part. There is no evidence that police have excluded him as a suspect in the matter.

In his judgement the trial magistrate observed that

***“The witness [PW3] also recalled an incident where a former manager who by the time of this incident had a lorry loaded with timber”***

It is surprising that having noted the implication of this former manager in the theft the trial magistrate would still proceed to convict the appellant. There was no evidence to suggest that the two were acting

together.

I find that the circumstantial evidence does not establish the guilt of the appellant. This is because it is shown that several other parties had access to the farm including the squatters. Secondly the former manager who was clearly named as a suspect and was not cleared by the police. The appellant is not shown to have had exclusive access to the trees in question.

Based on the foregoing I find that the appellant's conviction was erroneous. I hereby quash the conviction. I also set aside the sentence of two (2) years probation imposed on the appellant. This appeal succeeds. The appellant is to be set at liberty forthwith unless he is otherwise lawfully held.

**Dated in Nakuru this 31<sup>st</sup> day of March, 2017**

Mr. Gai holding brief for Mr. Nderitu

Mr. Motende for State

**Maureen A. Odero**

**Judge**