



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITUI

CRIMINAL APPEAL NO. 54 OF 2015

FESTUS MWONGELA MUTUKU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in

Mwingi Senior Resident Magistrate's Court Criminal Case

No. 584 of 2012 by Hon. V. A. Otieno Ag. S R M on 21/08/14)

J U D G M E N T

1. **Festus Mutuku Mwangela**, the Appellant, was jointly charged with another with three (3) counts of **Stealing by Servant** contrary to **Section 281** of the **Penal Code**. Particulars of the offence were stated that:

Count 1: On the diverse dates between **1st** day of **January, 2012** and the **6th** day of **October, 2012** at **Makindu Motors** in **Mwingi Town** of **Mwingi District** of the **Kitui County**, jointly, being servants of **Stephen Ngei Musyoka** he stole six motorcycles make **Skygo 125-3** Registration Numbers **KMCX 548G, KMCX 704G, KMCW 902V, KMCW 904P** and **KMCT 879D** all the of the total value of **Kshs. 420,000/=** property of the said **Stephen Ngei Musyoka** which came into his possession by virtue of employment.

Count 2: On the **6th** day of **October, 2012** at **Makindu Motors** in **Mwingi Town** of **Mwingi District** of the **Kitui County**, jointly, being servants of **Stephen Ngei Musyoka** he stole cash **Kshs. 67,500/= (Sixty Seven Thousand, Five Hundred)** property of the said **Stephen Ngei Musyoka** which came into his possession by virtue of employment.

Count 3: On the diverse dates between **1st** day of **February, 2012** and the **8th** day of **September, 2012** at **Makindu Motors** in **Mwingi Town** of **Mwingi District** of the **Kitui County**, jointly, being servants of **Stephen Ngei Musyoka** he stole cash **Kshs. 43,000/= (Forty Three Thousand)** property of the said **Stephen Ngei Musyoka** which came into his possession by virtue of employment.

2. He was tried, convicted on all the three (3) counts and sentenced to serve **five (5) years imprisonment** on each count. The sentences were to run concurrently.

3. Aggrieved by the conviction and sentence he appeals on grounds that:

- The case was not proved beyond all reasonable doubt.
- The 1st count was defective.
- He was not given an adequate opportunity to defend himself.
- The sentence passed was excessive.

4. Facts of the case were that the Appellant was in employment of **Makindu Motors Limited** as a Designated Plant Mechanic with effect from **2nd July, 2010**. An audit was carried out at the **Mwingi Branch** where the Appellant was based and six (6) motor-cycles were found to be missing. As a result the Appellant who was a manager at the branch was summarily dismissed.

5. At the hearing of the case PW1, **Stephen Ngei Musyoka** who introduced himself as the Director of Makindu Motors Ltd stated that he received a report of theft of some six (6) motorcycles.
6. PW3, **Samuel Nzuo Kimite** the Operating Manager of Makindu Motors Ltd moved to the Mwingi shop to investigate. He established that one bicycle was sold to **Peter Mutua** while two (2) of them had been sold to the Appellant. One bicycle had been sold to his co-accused while two (2) other motorcycles could not be accounted for. A total of nine (9) motorcycles were missing.
7. PW4 **Peter Mutua Kimanzi** confirmed having purchased a motorcycle from Makindu Motors, Mwingi, Registration Number **KMCX 698G** at **Kshs. 67,500/=**.
8. PW5 **John Maluki Vivi** testified that he was called to assemble some two (2) motorcycles by the co-accused of the Appellant. Later on the Appellant's wife came up with the allegations of the two (2) stolen motorcycles.
9. PW6 **John Malite Nguni** paid **Kshs. 43,000/=** to one **Mwala** at Makindu Motors Ltd but was not given the motorcycle.
10. PW7 **No. 86157 P C Phillip Otieno** recovered motorcycle Registration No. **KMCW 902B** from the Appellant.
11. PW8 **No. 230925 C I Jacob Odour**, a Forensic Examiner examined documents, cash sale receipts, delivery notes and made a report thereof.
12. PW9 **No. 40597 P C Daniel Muteshi** investigated the case and caused the Appellant to be charged. He also recovered 3 motorcycles in Mwingi and Garissa Registration Numbers **KMCX 600G, KMCX 704G Skygo** and **KMCW 905C**.
13. When put on his defence, the Appellant stated that his co-accused was the one involved in loss of three (3) motorcycles. He was allowed to buy a motorcycle per the Company Policy, therefore he bought motorcycle Registration No. **KMCW 902U** and receipts would be released upon payment of the total amount.
14. The learned trial Magistrate considered evidence adduced and reached a finding that the Appellant misappropriated his employer's property.
15. At the hearing of the Appeal Counsel for the Appellant, **Mr. Kimuli** submitted that there was no proof of employee – employer relationship. There was no evidence of incorporation of Makindu Motors to establish that it existed. That there was no proof of the association of PW1 and PW2 with Makindu Motors. He argued that a document, Contract of Service found itself on record yet it was not produced in evidence. It was not signed by the employee. No evidence was adduced that the Appellant ever received salary as proof of being a servant. Further he submitted that the locus of theft was not established beyond doubt as there was a discrepancy as to where the Appellant was based. He faulted the trial Magistrate for not resolving the fact of how many motorcycles were stolen in favour of the Appellant, there having been a discrepancy in evidence of the actual number of motorcycles stolen.
16. Further, it was submitted that when the charge was substituted, it was not indicated in which language it was read to the Appellant. When proceedings were conducted it was not indicated in which language the witnesses testified and the Appellant did not cross examine most of the witnesses. This, he stated was against the requirement of **Article 50** of the **Constitution** and **Section 198** of the **Criminal Procedure Code** and the Appellant was not allowed to submit at the close of the Prosecution's case as required by **Section 210** of the **Criminal Procedure Code**.
17. On sentence, he argued that it was punitive and excessive. That the Magistrate took into account irrelevant matters that the Appellant absconded after trial and ignored the mitigation.
18. In response, the State through learned State Counsel, **Mr. Wanjala** opposed the Appeal. He submitted that PW1 demonstrated that the Appellant was his employee by producing a letter of employment. He identified three (3) motorcycles that were recovered. Three motorcycles were sold but no money was banked. The Appellant allegedly bought two (2) motorcycles without proof of sale. He failed to account for the two (2) motorcycles that he bought. Forged documents, receipt books were adduced in evidence. The handwriting expert established that the Appellant was the author of the receipts. Six (6) motorcycles were missing but only three (3) were recovered. The Appellant sold the motorcycles but did not remit the funds; and he was arrested with the stolen motorcycles.
19. Regarding fair trial it was argued that the Appellant participated in the trial, cross-examined, conducted submissions for his defence hearing.
20. This is a first Appellate Court. My duty is to analyze and re-evaluate evidence adduced at the Lower Court and come up with my own conclusions on evidence adduced without overlooking the conclusions of the trial Court. I must also remember that I did not have the opportunity of seeing or hearing witnesses who testified. **(See Okeno vs. Republic (1972) EA 32)**.
21. The Appellant was charged with the offence of **Stealing by Servant**. The offence of **General Stealing** is defined in **Section 268** of the **Penal Code** that provides thus:

“(1) A person who fraudulently and without claim of right takes anything capable of being stolen, or fraudulently converts to the use of any person, other than the general or special owner thereof, any property, is said to steal that thing or property.

(2) A person who takes anything capable of being stolen or who converts any property is deemed to do so fraudulently if he does

so with any of the following intents, that is to say—

(a) an intent permanently to deprive the general or special owner of the thing of it;

(b) an intent to use the thing as a pledge or security;

(c) an intent to part with it on a condition as to its return which the person taking or converting it may be unable to perform;

(d) an intent to deal with it in such a manner that it cannot be returned in the condition in which it was at the time of the taking or conversion;

(e) in the case of money, an intent to use it at the will of the person who takes or converts it, although he may intend afterwards to repay the amount to the owner; and “special owner” includes any person who has any charge or lien upon the thing in question, or any right arising from or dependent upon holding possession of the thing in question.

(3) When a thing stolen is converted, it is immaterial whether it is taken for the purpose of conversion, or whether it is at the time of the conversion in the possession of the person who converts it; and it is also immaterial that the person who converts the thing in question is the holder of a power of attorney for the disposition of it, or is otherwise authorized to dispose of it.

(4) When a thing converted has been lost by the owner and found by the person who converts it, the conversion is not deemed to be fraudulent if at the time of the conversion the person taking or converting the thing does not know who is the owner, and believes on reasonable grounds that the owner cannot be discovered.

(5) A person shall not be deemed to take a thing unless he moves the thing or causes it to move.”

The charge the Appellant was charged with is recognized by **Section 281** of the **Penal Code** that provides thus:

“If the offender is a clerk or servant, and the thing stolen is the property of his employer, or came into the possession of the offender on account of his employer, he is liable to imprisonment for seven years.”

22. The Appellant was employed by Makindu Motors Limited following a successful interview conducted on the **5th May, 2010**. (See the **Letter of Employment dated 11th May, 2010**). He was dismissed summarily on the **9th October, 2012** as the Branch Manager of the Mwingi Branch. In the letter of dismissal it was stated that six (6) units of motorbikes were found missing and he could not explain how they were lost. These were serial numbers:

- LF3PC130XCB002114 – KMCT 904P
- LF3PC1300BB012486 – KMCT 847D
- LF3PC1308CB001771 – KMCW 861V

He did not explain the whereabouts of a sum realized of **Kshs. 67,500/=** that was not banked following the sale of the motorbike. Spare parts and engines were missing. This was evidence that the Appellant was employed by Makindu Motors Limited.

23. Particulars of the offence in the substituted charge sheet state that the property stolen belonged to **Stephen Ngei Musyoka**. **Section 107** of the **Evidence Act** provides thus:

“(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

In the case of **David Ruo Nyambura & 4 Others 2001 eKLR** it was stated that:

“.....It is our cardinal principle of law that in a criminal case the legal onus is always on the prosecution to prove the guilt of an accused person, and the standard of proof is proof beyond reasonable doubt. The burden of proof therefore lies on the prosecution throughout to prove the guilt of an accused.”

In his testimony PW1 introduced himself as a Director of Makindu Motors Ltd. Ordinarily a Certificate of Incorporation would be proof of existence of a company. No such evidence was adduced. Similarly no evidence was adduced to establish that the PW1 was a director of the alleged company that employed the Appellant. Consequently, there is no proof that the Appellant was an employee of the Complainant herein **Stephen Ngei Musyoka** as stated in the particulars of the offence.

24. The particulars of the offence stipulate the number of stolen motorcycles as six while evidence adduced in the letter of dismissal stipulate that six (6) motorbikes were stolen and goes on to state particulars of frame numbers of some of the stolen motorcycles. Some motorcycles were recovered. The Appellant claimed to have purchased some of them. In the case of **JMA vs. Republic (2009) KLR 971**, it was held

inter alia that:

“It was not in all cases in which a defect detected in the charge on appeal would render a conviction invalid. Section 382 of the CPC was meant to cure such an irregularity where prejudice to the appellant is not discernible.”

25. Section 382 of the Criminal Procedure Code provides thus:

“Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:

Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.”

26. The discrepancy would not prejudice the Appellant and therefore there would be no miscarriage of justice if the ingredients of stealing are established.

27. At the point of substitution of the charge on the 15th April, 2013 there was a Court Interpreter in Court who read the charges to the Appellant who responded. This is a case where from the outset no language of interpretation was indicated in proceedings, however there was a Court Interpreter throughout the proceedings. In the case of **Said Hassan Nuno vs. Republic (2010) eKLR** it was stated thus:

“We take judicial notice that one of the core duties of a court clerk is to offer interpretation services to accused or even to the court where it does not understand the language of the accused; or a witness to the case.”

28. With this case in mind it is envisaged that the Appellant who was in Court and cross-examined PW1, PW3 and PW9 understood the language in which proceedings were conducted.

29. There is a cash sale receipt issued in the name of the Appellant for a **Skygo 125-3 KMCW 902V C. Red** in the sum of **Kshs. 70,000/=** and a delivery note for the same motorcycles indicated as having been delivered to the Appellant who duly signed for it. He admitted having purchased the motorcycle and stated that he purchased it in his capacity as member of staff.

30. PW3 **Samuel Nzuo Kinute**, who described himself as the Operating Manager at Makindu Motors stated that he found three (3) motorbikes having been sold but money was not banked. On cross examination, PW9 the Investigating Officer stated that Makindu Motors produced Bank Statements that showed no money reflected on the accounts. The alluded to Bank Statements were not adduced in evidence to establish the allegation.

31. PW9 adduced in evidence as Inspection Report which was marked as Exhibit 3 in the proceedings. This document, however, does not form part of the record.

32. Due to poor investigations and framing of the charges in issue, evidence adduced fell short of proving that the Appellant took the motorcycles that he was found with fraudulently.

33. Therefore having re-evaluated evidence adduced, it is apparent that the Prosecution did not prove charges against the Appellant beyond any reasonable doubt. In the circumstances the conviction was unsafe. In the result, I quash the conviction and set aside the sentence passed on each count. The Appellant shall be released forthwith unless otherwise lawfully held.

34. It is so ordered.

Dated, Signed and Delivered at Kitui this 28th day of June, 2017.

L. N. MUTENDE

JUDGE