REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NANYUKI

HCCRA. NO. 26 OF 2015

AHMED MOHAMED……APPELLANT

-VERSUS—

REPUBLIC …….. RESPONDENT

(Being an appeal from the original conviction and sentence by **Hon. B M KIMTAI** - Resident Magistrate dated 16th July 2012 in Nanyuki Chief Magistrate's **Court Criminal Case No. 485 of 2011**)

JUDGMENT

1. AHMED MOHAMMED is the appellant herein. He was convicted before Nanyuki Chief Magistrate court for the offence of Stealing Contrary **to Section 275 of the Penal Code Cap 75.** It was in the particulars of the offence that appellant on 20th day of April 2008 at Medina Mosque in Naromoru stole 200 plastic chairs, the property of Medina Mosque.

2. After his conviction appellant was sentenced by the trial court to pay a fine of Ksh. 16,000/= and in default to serve five months imprisonment. He was aggrieved by both conviction and sentence and has accordingly filed this appeal.

3. By his petition the appellant has faulted his conviction by presenting grounds of appeal that present the following issues for determination.

a. *Did the prosecution prove its case on required criminal standard,*
b. *Did prosecution fail to call vital witnesses; and*
c. *Did the trial court convict on extraneous matters.*

4. It is important to state that this appeal was not opposed by Mr. Tanui Principal Prosecution Counsel.

5. The appellant, in accordance with the prosecution's evidence, was until 18th December, 2010, the Chairman of Medina Mosque which is at Naromoru. Although the prosecution did not produce documentary evidence to show there were fresh elections for the office holders at Medina Mosque, its witnesses testified that on 18th December, 2010 there were elections by which appellant was removed from the office of the Chairman. Abdi Duda (P W 1) was voted in as the vice chair of the mosque; Saidi Gaita (P W 2) was voted in as the Secretary of the Mosque, and Soyo Huko (P W 6) was voted in as a committee member.

6. P W 1, 2, 4, 5, and 6 all gave similar evidence that after the election the new office holders requested the appellant to unlock the door of the school being run at the mosque by one John Kamau. According to those witnesses appellant declined to unlock the door and it was not until the chief ordered him to do so that he did so. On opening the door witnesses stated that 180 plastic chairs that were in the class room were missing. On making inquiry they said that they found 60 chairs had been sold by appellant to a K A G church based in Naromoru in April, 2008.

7. Despite that evidence to the effect that appellant had stolen those plastic chairs that belonged to Medina Mosque, P W 1 on being cross –examined stated;

> *"The chairs belong to John Kamau who leased (sic) mosque."*

8. What is clear from the prosecution's evidence is that Median Mosque had leased rooms to John Kamau for him to run a school thereof. John Kamau failed to pay rent for those premises. That accordingly John Kamau lost ownership of the chairs which he left at the mosque and were to cover for his rent arrears. Indeed P W 6 stated:

> *"The seats belong to the mosque after the lease defaulted (sic) payment of rent we took possession of the seats."*

9. If the evidence of prosecution is to be believed I then wholly agree with the submissions made by Mr. J M Mwangi Learned advocate for the appellant that prosecution's evidence failed to reach the criminal standard of proof of theft.

10. Appellant was charged with the offence of theft contrary to Section 275 of the penal code cap 63. Theft or stealing is defined in Section 268 of Cap 63 as the taking of a thing capable of being stolen with intent to permanently deprive the general or special owner.

11. Was Medina Mosque the general or special owner of the plastic chairs? The simple answer is that the prosecution did not prove the chairs belonged to the entity referred to as median mosque. Prosecution's own witnesses confirmed the chairs belonged to John Kamau. Prosecution did not prove that the ownership of those chairs had passed from John Kamau to Medina Mosque. Indeed the provisions of the Distress for Rent Act Cap 293 only permit the Landlord who is owed rent to distress for that rent arrears and the goods the subject of such distress of rent arrear ought to be sold in an auction to recover the rent arrears. The Act, Cap 293, does not permit the Landlord to convert the ownership of the distressed items into his own property.

12. Appellant in his sworn defence stated that John Kamau, a tenant at the Median Mosque fell into rent arrears and appellant as the chairperson of Median Mosque instructed Green Bell auctioneers to distress for rent over John Kamau's property. On or about 21st April, 2008 the auctioneer took possession of the chairs which were later sold in an auction. Appellant stated that he informed the Mosque committee of the action he had taken which action the committee approved.

13. Appellant called the auctioneer, Wilson Kimani to testify, in his evidence Mr. Kimani stated that appellant in the company of P W 4, Aden Wako instructed him to distress for rent over the property of the tenant and because the tenant failed to clear the rent arrears within fourteen days of that attachment the auctioneer proceeded with the sale of 60 chairs which chairs were sold to a church.

14. Hassan Adan Abdi the Secretary of Medina Mosque similar stated in appellant's defence evidence that the chairs were sold in auction to cover rent arrears.

15. Considering the inconsistencies in the prosecution's evidence and also considering the appellant's defence it become clear that there was no basis of convicting the appellant of the offence of theft. There was no proof that the chairs belonged to Medina Mosque and there was therefore no proof of theft.

16. It was, with respect, surprising that in view of the above the trial court convicted the appellant. The trial court rightly noted that there was leadership wrangle in the Median Mosque and despite making that finding the trial court convicted the appellant. It is correct to state that there was an apparent leadership wrangle and it was not clear whether those who testified on behalf of prosecution were indeed legitimate officials of the Mosque. The trial court erred to have found as follows:

> *"I find that the prosecution witnesses were credible, consistent and their version well corroborated."*

17. My response to that finding is that it is far from being the true position. The prosecution's evidence was inconsistent and could not support the charge against the appellant.

18. On the second issue, that is whether the prosecution faied to call vital witnesses, I wish to remind myself the general rule on the calling of witnesses. That general rule was discussed in the case **HALKANO MATA BAGAJA – V- REPUBLIC [2015] eKLR** where Justice R P V. Wendoh stated:

> *" Generally the prosecution has the discretion to call whoever they wish to call as a witness and it is not for the defence to determine that issue for the prosecution. However, the prosecution should not fail to call relevant witnesses for ulterior motives, for example, if they know that the evidence would be adverse to their case. The prosecution has a duty to call all witnesses relevant to their case whether or not the evidence is adverse to their case, provided the witness will assist in the just resolution of the case. In* ***BUKENYA & OTHERS – V- REPUBLIC [1972] EA549,*** the court said at page 551:
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> " **while the Director is not required to call a superfluity of witnesses, if he calls evidence which is barely adequate and it appears that there were other witnesses available, who were not called the court is entitled under the general Law of evidence, to draw an inference that the evidence of these witnesses, if called would have tended to be adverse to the prosecution."**

19. I am inclined to agree with the submissions of the appellant that the prosecution needed to recall Bakari Hussein (the original P W 1). I refer to him as the original P W 1 because, he was sworn, introduced himself and gave no further evidence. The record of the trial court unfortunately does not give a clear picture of what transpired and what led to the prosecution standing him down. The proceeding record as follow:

> *"Court prosecutor – the witness (Bakari Hussein seems to have a problem in giving evidence. He came late and has not refreshed his mind. I pray that I be allowed to step him down."*

20. That witness was, with the leave of the trial court, stood down but however was not recalled upto the close of the prosecution's case. It does raise the question, whey was he not recalled, is it because he was giving adverse evidence against prosecution's case. The inference that I draw is that indeed his evidence was adverse to the prosecution's evidence. I am tempted to conclude as Justice R P Wendoh did in the case of **HALKANO (supra)** that the prosecution in failing to call that witness was holding back evidence that may have been adverse to its case.

21. On the last issue, that is, whether the trial court convicted on extraneous evidence. I do so find. The court had no basis of convicting the appellant in view of what is stated above.

22. It is because of the above findings that I find and hold that the appellant's appeal against conviction and sentence is merited. **Accordingly the conviction of the appellant is hereby quashed and the sentence is hereby set aside. I order the appellant to be refunded the fine he paid.**

Dated and Delivered at Nanyuki this 25th February, 2016

MARY KASANGO

JUDGE

Coram

Before Justice Mary Kasango

Court Assistant – Kiruja

For state ……

For Appellant ……

Appellant …….

COURT

Judgment delivered in open court

MARY KASANGO

JUDGE