



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT KISII**

**CRIMINAL APPEAL CASE NO.56 & 57 OF 2014**

*(Appeal from the judgment of Hon. Monica Munyendo (RM) dated and Delivered  
on 16<sup>th</sup> July 2014, in the original Kilgoris PM Criminal Case No.801 of 2012)*

EVANS MAKOYO BOGECHO.....1<sup>ST</sup> APPELLANT

DENNIS YOBESHI OBWOGO.....2<sup>ND</sup> APPELLANT

**VERSUS**

REPUBLIC.....RESPONDENT

**JUDGMENT**

1. The appellants herein were jointly charged with one count of stealing by servant contrary to **Section 281 of the Penal Code**. It was alleged that on the night of 16<sup>th</sup> October, 2012 at Transmara Sugar Company in Transmara District within Narok County, jointly being servants of Transmara Sugar Company, stole from the said company one injector pump valued at Kshs. 1.2 million.

The 2<sup>nd</sup> appellant was charged with an alternative count of handling stolen property contrary to **Section 322 (2) of the Penal Code**.

The particulars being that on 16<sup>th</sup> October, 2012 at Transmara Sugar Company in Transmara District within Narok County otherwise than in the course of stealing, dishonestly received or retained one injector pump knowingly or having reason to believe it to be a stolen good.

2. The two appellants were at the conclusion of the trial on 16<sup>th</sup> of July, 2014 convicted of the first count of stealing by servant contrary to **Section 281 of the Penal Code** and each sentenced to serve three (3) years imprisonment. On 29<sup>th</sup> August, 2014, the appellants were granted bail pending appeal.

3. It is the said conviction and sentence that has precipitated the instant appeal in which the appellants have set forth the following grounds of appeal:

1. **The learned trial Magistrate erred in law and fact in convicting the Appellant whereas the Prosecution had not proved its case to the required standard of beyond reasonable doubt.**

2. **That the learned Magistrate misdirected herself in law and fact in finding that the**

**Appellant was an employee of the Company whereas there was no such evidence and thereby shifting the burden of proof to the Appellants.**

**3. The learned trial Magistrate erred in law and fact in wrongfully finding and/or making false assumptions that the stolen property as per the charge sheet was an injector pump the property of the Complainant whereas there was no proper description and/or evidence in support of the same.**

4. When the appeal came up for hearing before me on 21<sup>st</sup> January, 2016, parties agreed to canvass their submissions on appeal by way of written submissions to be highlighted at a later date.

### **Appellants submissions**

5. In their written submissions filed on 3<sup>rd</sup> March, 2016 by M/s Sonye J. Ondari & Co. Advocates the appellants stated that the prosecution did not prove its case against the appellants on a balance of probabilities since the manager/directors of the Transmara Sugar Company had not been called to testify that their property was stolen or whether the alleged recovered item was an injector pump or not, its serial number or value.

6. The appellants further submitted that the particulars of the offence was not proved to the required standards and that in particular, there was no documentary proof that the appellants were employees of Transmara Sugar Company (hereinafter in this judgment referred to as the company.)

7. The appellants contended that the trial court shifted that the burden of proof to the appellants. The appellants argued that it was an error on the part of the trial court to convict the 1<sup>st</sup> appellant based on an irregular confession by the 2<sup>nd</sup> appellant made to a person not qualified to receive such a confession.

8. The appellant argued that failure by the prosecution to produce the inventory book to show that a pump was missing from the company's store also dented the credibility and strength of the prosecution's case.

9. The appellants also argued that the prosecution's case was full of contradictions as while PW1 stated that he saw the 2<sup>nd</sup> appellant carrying an injector pump, PW2 stated that he saw the 1<sup>st</sup> appellant carrying an injector pump on his right shoulder

10. The appellants prayed for the quashing of the conviction and the setting aside of the sentence.

### **Respondent's submissions**

11. The state conceded the appeal in respect to the 1<sup>st</sup> appellant while stating that the trial court, after correctly holding that it could not rely on the confession made by the 2<sup>nd</sup> appellant, erred when it went ahead to convict the 1<sup>st</sup> appellant while relying on the same confession.

12. The respondent, through Mr. Otieno learned state counsel, however submitted that the conviction and sentence of the 2<sup>nd</sup> appellant should be upheld since he was caught in broad-day light in the act of stealing the injector pump and he was clearly identified by 3 eye witnesses.

13. According to Mr. Otieno, the prosecution proved all the ingredients of the charge of stealing by servant contrary to Section 281 of the Penal Code against the 1<sup>st</sup> appellant, beyond reasonable doubt.

14. This being a first appeal, this court is enjoined to re-examine and re-evaluate the evidence tendered at the trial in order to arrive at its own findings and conclusions while bearing in mind the fact that it neither saw nor heard the witnesses testify.

**See Okeno Vs. Republic [172] EA.**

15. The prosecution called a total of 6 witnesses before the lower court as follows:

**PW 1 JOSEPH SAMEYOIT BARSAT**, the assistant Security Officer of the company testified that on 16<sup>th</sup> October, 2012 at about 7.30 p.m. while reporting on duty at the company he received a call from one Mr. Richard Langat (PW3) informing him to get to the office as there was an issue and on arriving at the office at about 7.39 a.m. he found the appellants detained there. He stated that upon interrogating the appellants, the 2<sup>nd</sup> appellant told him that he had been requested by the 1<sup>st</sup> appellant to transport for him the injector pump out of the company. PW1 stated that he recorded statements from the appellants which he later handed over to the police who were later on arrested the appellants. PW1 identified the appellants as former employees of the company before the theft incident of 12<sup>th</sup> October, 2012 that gave rise to the instant case. PW1 gave the value of the injector pump at Kshs. 1.2million. Upon cross examination, PW1 stated that he did not have any document to show that the company owned the injector pump or that it was valued at Kshs. 1.2 million. He however said that the injector pump was defective and had been removed from a tractor.

**PW2 STEPHEN MEA NAYOMA** testified that he was a security guard with Riley Falcon Security company attached to the company and that on 16<sup>th</sup> October, 2012 at about 7a.m, he saw the 2<sup>nd</sup> appellant carrying an item in a black paper bag on his shoulder and heading towards the cane yard. On stopping the 2<sup>nd</sup> appellant at the cane yard, he discovered that the item was an injector pump and the 2<sup>nd</sup> appellant informed him that he had been requested by the 1<sup>st</sup> appellant to pick the pump for him from the store. Upon being examined by the 1<sup>st</sup> appellant, PW1 said that the 1<sup>st</sup> appellant carried the injector pump on his right shoulder, but later said he did not see the 1<sup>st</sup> appellant carrying anything. Upon further cross-examination by the 2<sup>nd</sup> appellant, PW2 stated that he saw the 2<sup>nd</sup> appellant carrying a black item on his shoulder but he did not open the paper bag when he caught the 2<sup>nd</sup> appellant. He further stated that he did not know the value of the said pump or when it was purchased.

He further stated that he caught the 2<sup>nd</sup> appellant with the pump within the company's compound and that even though there is a delivery book which shows the movement of items from one section to another, the said delivery book was not produced in court.

**PW3** was **RICHARD LANGAT** a supervisor in charge of the company's security. He testified that on 16<sup>th</sup> October, 2012 at about 7 a.m. he received a call from PW2 informing him of an item, that had been seized in the hands of the 2<sup>nd</sup> appellant. He testified that when the 2<sup>nd</sup> appellant was brought to the company gate, they unwrapped the seized item and discovered that it was an injector pump and 2<sup>nd</sup> appellant informed him that the had been given the pump by the 1<sup>st</sup> appellant even though the 1<sup>st</sup> appellant, when brought to the gate appeared to be unaware of the pump.

According to PW3, the 1<sup>st</sup> appellant worked in the store where the pumps were kept while the 2<sup>nd</sup> appellant worked at the work shop.

On cross examination, PW3 stated that items that leave the store have a requisition form and that he did not have the requisition form in court. He stated that the injector pump had not left the company precincts at the time it was seized about 10 meters away from the store.

**PW4 JUSTUS MATARA KEMUMA** the in-charge of the company's store led evidence to the effect that on 16<sup>th</sup> October, 2012, the 1<sup>st</sup> appellant came to his house to inform him that there was an emergency and that he required the keys to open the company store so that he could make a report and give out oil that was urgently required. He stated that he gave the store keys to the 1<sup>st</sup> appellant and that after 15 minutes, he saw the 2<sup>nd</sup> appellant leaving the store, which was about 400 meters from his house, with a black polythene bag on his left hand whereupon he alerted PW2, a security guard to find out what the 2<sup>nd</sup> appellant was carrying and it turned out to be an injector pump. He stated that the injector pump was removed from a tractor and as the in charge of the store, he was required to authorize the removal of the injector pump.

Upon being cross examined by the 1<sup>st</sup> appellant, PW4 stated that he could not tell which injector pump was inside the store and which one was out of the store, and neither were serial numbers of injector pumps recorded in the inventory book. He also stated that the subject injector pump was used and may have been defective. He confirmed that the pump was found within the compound of the company.

**PW5 number 239876 PC WILSON NJENI** was the arresting officer in this case while **PW6 PC STEPHEN WANDERA** was the investigating officer who also produced as exhibit 1 the subject injector pump that was allegedly stolen.

16. After the close of the prosecution's case and upon being put on their defence, the 1<sup>st</sup> appellant gave a sworn testimony in which he denied committing the offence of theft by servant. He however admitted that he worked at the company's store and was on duty on the material day at work.

17. DW2- the 2<sup>nd</sup> appellant herein also gave a sworn statement in his defence in which he stated that he used to work for the company at the workshop and on the material day, he was at his house when he was called by PW2 and PW3 who told him that he was required at the company. On arrival at the company's gate, he was told to sit down and later on shown a white polythene containing a pump that he was alleged to have stolen. He denied having stolen the said pump and stated that he had been framed up.

18. Having gone through the evidence tendered before the lower court and re-evaluating the same, I now turn to the most critical part of determining whether or not the charge of stealing by servant was established against the 2<sup>nd</sup> appellant beyond reasonable doubt and whether the prosecution was justified in conceding the appeal in respect to the 1<sup>st</sup> appellant.

19. As regards the conviction of the 1<sup>st</sup> appellant, I concur with the submissions of the learned state counsel, Mr. Otieno, when he conceded to the appeal on the basis that the only evidence linking the 1<sup>st</sup> appellant to the offence was the alleged "confession" of his co-accused to PW1 that it was the 1<sup>st</sup> appellant who asked to carry the pump.

20. It is my finding that the alleged "confession" was not made in the proper manner and to the right person so as to entitle the trial court to rely on it in convicting the 1<sup>st</sup> appellant.

21. Consequently I hereby quash the 1<sup>st</sup> appellant's conviction and set aside his sentence. He shall be set free forthwith unless he is otherwise lawfully held.

22. Turning to the prosecution's case against the 2<sup>nd</sup> appellant, it was not in dispute that the 2<sup>nd</sup> appellant was an employee of the company.

23. The 2<sup>nd</sup> appellant himself stated in his sworn testimony before the trial court as follows:

**"By then, I used to work at Transmara Sugar Company. I used to work at the workshop".**

24. Having found that the 2<sup>nd</sup> appellant was indeed an employee of the company, the next question which arises is if the 2<sup>nd</sup> appellant stole the injector pump, the property of the company valued at Kshs. 1.2 million.

25. **Section 268 (I) of the Penal Code** defines stealing as follows:

**"A person who fraudulently and without any claim takes anything capable of being stolen, or fraudulently converts to the use of any person, other than the general/special owner thereof, any property, is said to steal that thing or property"**

26. In the instant case, the 2<sup>nd</sup> appellant is said to have been found and seen by PW2 and PW3 leaving the company store while carrying a black paper bag while heading towards the cane yard within the said

company's premises.

27. The question that grabs my attention at this juncture is, was the act by the 2<sup>nd</sup> appellant of carrying the injector pump within the company's premises capable of being construed to amount to the theft of the said pump? The court was not told, satisfactorily, how he 2<sup>nd</sup> appellant got the pump into his custody in the first place considering the fact that the store in which it was reportedly kept, was not broken into and was manned by a store keeper, the 1<sup>st</sup> appellant. The requisition forms that were allegedly used to move items from one department to another within the company were not produced as exhibits to assist the court to know if the movement of the said injector pump from the store to any other point within the factory was authorized or not.

28. The court was further not told if the 2<sup>nd</sup> appellant was carrying the pump at his own prompting or at the instance of any other person considering that he was an employee of the company at the time. Furthermore, at the time the 2<sup>nd</sup> appellant was allegedly found carrying the said pump, he was still inside the company's premises and was reported to be moving towards the cane yard area. The court was not told that the 2<sup>nd</sup> appellant had left the company's precincts with the pump for his own purposes and was not simply moving it from one location of the same factory to the next.

29. The above queries make me entertain a doubt in my mind as to whether the offence of stealing was proved against the 2<sup>nd</sup> appellant to the required standards, beyond reasonable doubt. There was no evidence led to the effect that the 2<sup>nd</sup> appellant acted fraudulently or was on his way out of the factory with the pump or had converted its use, if any other than that of its general owner.

30. Furthermore, I concur with the submissions of the counsel for the appellants that it was crucial for the prosecution to prove the value of the said injector pump that was alleged to be Kshs. 1.2 million. I say so, because proof of the value of the stolen item goes a long way in not only determining the kind of sentence to be meted out against an accused person in the event of a conviction, but also assists in determining whether or not the item was such that it was capable of being stolen.

31. In the instance case, the court was informed that the pumps in the company's store were used pumps that had been removed from various tractors. In this regard PW4 stated as follows upon cross examination by the 1<sup>st</sup> appellant.

***“The injector pump may have been defective.”***

The above statement brings in question not only the value of the said pump, but also the issue of its state and whether or not it was a valuable item capable of being stolen. The contention by the appellants, that there was need to bring in expert evidence to ascertain the value of the said pump was therefore merited and could not be overlooked by the trial court.

32. Having found that the offence of stealing by servant was not established against the 2<sup>nd</sup> appellant beyond reasonable doubt, I find that there is no need to belabour the other grounds of appeal raised by the 2<sup>nd</sup> appellant's counsel in the appeal.

33. In the end, the order that commends itself to me is the order to similarly quash the conviction of the 2<sup>nd</sup> appellant and set aside his sentence. He shall be set at liberty forthwith unless he is otherwise lawfully held.

34. The sureties that provided security for the appellants on their bond pending appeal shall have the securities that they surrendered to court released back to them.

35. It is so ordered.

**Dated, signed and delivered in open court this 26<sup>th</sup> day of May 2016**

**HON. W. OKWANY**

**JUDGE**

**In the presence of:**

- Mosei for the Appellant
- Otieno for Respondent
- Omwoyo court clerk