



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUNGOMA

HCRA NO. 117 OF 2014

[Being judgment by Hon. M.A. Nanzushi Ag. SRM in Kimilili criminal case no. 211 of 2014 on 22nd September, 2014].

TOM ANTHONY KITANY APPELLANT

VERSUS

REPUBLIC RESPONDENT

JUDGMENT

1. The appellant herein had been charged alongside 2 other persons with two counts; 1st count stealing by a person employed in the Public Service contrary to Section 280 of the Penal Code.

The particulars of the said offence were that on the 21st day of June, 2010 at Kapsokwony Township within Mt. Elgon District of Western Province, being persons employed in the Public Service as chief, assistant chief and chairman of relief food, jointly stole a consignment comprising of 60 bags of maize, 16 bags of rice, 13 cartons of cooking oil and 29 bags of beans all valued at Kshs. 195,000/=; the property of Government of Kenya which came into possession by virtue of their employment.

The appellant and one other also faced a second count of abuse of office contrary to Section 99 of the Penal Code. The particulars thereof being that on the 21st of June 2010, at Kapsokwony township in Mt. Elgon District within Western Province being charged by virtue of their employment with administrative duties as chief and assistant chief respectively in Emia location and Chepkurkur sub-location, and having acquired directly and indirectly private interest in relief food commodities; used undue pressure and influence and unlawfully sold the said food commodities comprising of 60 bags of maize, 16 bags of rice, 13 cartons of cooking oil and 29 bags of beans all valued at kshs. 195,000/= which commodity was destined for distribution to the needy people in Emia location.

2. The matter went for full trial. The applicant and his co-accused were placed on their defence. The appellant and one of the accused persons were found guilty, convicted and sentenced.

The trial court did not specify on what count it found them guilty and they were to serve 12 months of suspended sentence.

3. The appellant being aggrieved by the conviction and sentence has appealed to this court on grounds that; the trial court had misdirected itself on the evidence, the evidence before court was contradictory, the trial court did not consider the defence, the trial court convicted on hearsay evidence and the court failed to consider the defence alibi.

4. At the hearing the applicants counsel Mr. Onyando submitted that the evidence of PW1, 2 & 3 did not connect the appellant to the alleged offence. Further that accused 1 & 3 at the trial admitted and informed court on how the food was sold. PW4 further testified that accused 1 is the one who sold the food.

5. The State through Mr. Kamau State counsel objected to the appeal. He argued that the evidence before court connected the accused to the offence. He admitted that the main culprit had been acquitted.

6. This is the first appellate court and it is charged with the duty of considering and evaluating the evidence afresh in order to arrive at an independent decision **See Okeno Vs. Republic [1973] E.A. 322.**

7. The prosecution's evidence in brief is that relief food had been given to the 1st and 3rd accused persons who were the chief and chairman of of Emia location for distribution to members of public. Accused 1 being the chief called accused 2 an assistant chief to assist in the distribution. Accused persons are in agreement that the items given were 60 bags of maize, 29 bags of beans, 35 bags of rice and 23 cartons of cooking oil. They also admit the above listed items did not all reach their intended destination with several of the items missing which items were said to have been sold at Chwele market. The accused persons also admitted that 23 bags of maize were paid to the lorry that picked the consignment from cereal board.

8. From my analysis of the evidence on record all the three namely the chief, the assistant chief and the chairman knew where the consignment went. The chief ought not to have been set free. There is no appeal against him and I will dwell no more on the issue.

9. I do not agree with the defence that the appellant herein was not implicated. By his own admission he joined the chief and the chairman relief for purposes of distribution of the relief food.

PW5 APC Nathan Kibet maintained in his evidence that the appellant the assistant chief was among those who went to him on 22.6.2010 to pick the relief food for distribution. PW9 also named him as having been with those who transported the goods to Kipsigon.

10. All the three accused persons failed to account for items in their custody for purposes of distribution. I agree with the trial court to the extent that the 2nd and 3rd accused were found culpable. My view is that all the 3 were culpable as stated earlier in this judgment.

11. I further find that the prosecution had proved its case beyond reasonable doubt. The appeal is not meritorious. It is dismissed.

Dated at Bungoma this 27th day of October, 2016.

ALI-ARONI

JUDGE.