



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUNGOMA
CRIMINAL APPEAL CASE NO. 100 OF 2012

ELKANA OCHOLA OYUNDI..... APPELLANT

VERSUS

REPUBLIC RESPONDENT

[Being an appeal from the judgment of the Webuye Senior Principal Magistrate's court [C. Cherono (PM) delivered on 18th May 2012 in Webuye SPM's criminal case no. 945 of 2010.]

JUDGMENT

1. In a judgment delivered on the 18th May 2012 in CMCC no. 945 of 2010 the appellant herein Elkana Ochola Oyundi was convicted and sentenced for stealing by servant contrary to Section 281 of the Penal Code. He was fined Kshs.50,000/-or 2 months imprisonment. The said judgment is what gave rise to this appeal. The Appellant filed his appeal on the 29th of May 2012, based on the following grounds.

- 1. “The learned trial magistrate failed to find as he should have that it was not established by the prosecution that that alleged stolen sum of money actually existed and was in possession of the appellant.**
- 2. “The learned trial magistrate failed to find as he should have that the circumstantial evidence, if any was insufficient to support a conviction.**
- 3. “The learned trial magistrate erred in not finding that failure to call the investigating officer was fatal to the prosecution case.**
- 4. That the evidence in its totality was insufficient to support a finding of a case to answer leave alone support a conviction.**
- 5. The learned trial magistrate failed to evaluate the prosecutions evidence judiciously before reaching his verdict.**
- 6. That the learned trial magistrate erred in not considering the submissions of counsel for the appellant.**
- 7. That the learned trial magistrate wrongly interpreted the law with regard to circumstantial evidence.**
- 8. That the learned trial magistrate's judgment was based on conjective rather than on evidence.**

9. That the judgment is barred in law and has occasioned a failure of justice.

2. At the hearing of the appeal Mr. Omukunda for the appellant argued that the prosecution failed to prove the alleged money was indeed in the safe that there was no prove either of how much money if any was in the safe; no books of accounts were produced to show sales; circumstantial evidence adduced did not support the charge before court.; the evidence did not point at the appellant, There was no direct evidence linking the appellant to the crime and the court misdirected itself when it took issue with the appellant's silence.

3. In opposition Miss Koech submitted although no books of accounts were produced, the petrol station did sales , accused did not doubt to the charge sheet in the trial court; that the appellant failed to raise alarm when there was an attack and the court having heard evidence arrived at the conclusion that theft was by the employee. Further the court relied on the C.I.D report and all in all arrived at a proper finding. Counsel prayed for the conviction and sentence to be confirmed.

4. The appellant alongside 1st accused (at trial) were employees of Petro Oil Company, the complainant in the case. The appellant was a petrol attendant.

5. **Oscar Lugosi** PW1 gave evidence to the effect that the 1st accused was assigned to guard Petro Petrol Station within Webuye by Petro Security Company limited. On the night of 20.7.10 the first accused reported an attack. The witness went to the scene of crime replaced 1st accused with another guard and proceeded to report the matter to the police. He stated further that 1st accused informed him the attackers found him in a car and took him behind the petrol station where they tied him where other staff were. The witnesses gave general observations of the scene of crime including that the one Padlock to one door was cut, the grill squeezed, padlock to a second door was missing and the safe was open. He could not tell whether the safe had been broken or not.

6. PW2 **Mawere Akinyi Orika** Regional Manager Petro Oil Company Western Region testified that on 2nd June, 2010 she received a call from Nairobi regarding a robbery at their Webuye Station from a colleague one Robert Oluoch and her boss Irene Muchemi. She learnt that the said station had been robbed of Kshs. 700,000/=. She visited the scene and found one Amos Odhiambo who took her round where she found the entrance open and glass broken, A 2nd door leading to the safe broken where and the safe open and no money inside. She observed that the safe had not been broken. It was also her evidence that the safe had two keys; One kept by the station manager and the other by G4S. She identified 2nd accused as a petrol attendant at the Webuye Station. It was her testimony that on the fateful day The station manager according to her was away off duty at the time of crime.

7. PW3 **Zablon Juma Kerry** is a controller who doubles up as a radio contractor and at times an assistant crew commandant at G4S, his evidence mainly touched on the operations on 18.6.10 where he accompanied the appellant to collect and bank money. It was his evidence that on the said day the station manager and the appellant entered the safe and brought money to the counting store room, where the money was counted and receipted. Before they leaving the station the appellant and the station manager went back to close the safe. As regards 2nd of June, 2010 the office of G4S received a report of a robbery and in the company of 4th accused and a supervisor they visited the scene of crime where they found a door and the safe broken. It was his evidence also that safe was locked by his colleague, the appellant and the station manager. After the exercise the key in the G4S custody is usually returned to incharge of cash safe one Everlyne Wanamue. He confirmed that on the 21 .6.10 the 4th accused returned the key.

8. PW4 **PC. Mulongo Tali** forces no. 61384 who testified that he visited scene of crime and examined the same and made the following observation.

a. The window pane to the entry door was shattered though lock was intact.

b. The padlock holder to the strong room was twisted and padlock was missing.

- c. The safe appeared to have been opened carefully not broken into.
- d. The inside of the shop appeared ransacked.
- e. There were no suitable finger prints..

This is the first appellate court and it is charged with the duty of studying the evidence afresh, evaluating and analyzing the same in order to arrive at an independent conclusion while bearing in mind that the trial court had an opportunity to listen and to see the witnesses.

9. Having considered the record it is evident that there was a robbery at Petrol Oil Company limited Webuye on the 20th of June, 2010, although the prosecution did not produce evidence of the actual amount stolen. At the time of robbery the appellant and 2 others were present and on duty. According to the evidence before court several things stand out;

1. The keys to the safe are in custody of the station manager and the G4S group;
2. The manager was off duty and nothing is said regarding the key in his custody and where it was on the material day;
3. The second key is said to have been returned back to the officer in charge of G4S after the collection on 18th of June, 2010.

11. The station manager did not testify and therefore there is no information regarding the whereabouts of his keys . Secondly Evelyn of G4S was not a witness either as she would have shed light as to the whereabouts of the G4S keys on the date of the theft. The circumstantial evidence adduced in court raises several questions that remained answered. The prosecution in my view did not do a good job. They left information that was crucial to this case. The gaps left created doubt. The 1st and 2nd accused and the appellant were at the scene of crime, however it is not clear whether they had the key to the safe or not as the safe was said to have been opened and not broken.

The doubts stated above remain unresolved and the benefit of doubt ought to go to the benefit of the appellant in any event. In the circumstances, I find that the prosecution failed to prove its case beyond reasonable doubt and I therefore give the benefit of the same to the appellant.

The sentence and conviction are hereby set aside. The Appellant is set free unless otherwise lawfully held.

Dated at Bungoma this 17th day of March 2015.

ALI-ARONI

JUDGE.