



REPUBLIC OF KENYA

IN THE HIGH COURT AT HOMA BAY

CRIMINAL APPEAL NO. 16 OF 2015

BETWEEN

WYCLIFF ODHIAMBO OGARA APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in Criminal Case No. 293 of 2013 at the Senior Resident Magistrate's Court at Ndhiwa, Hon.B. Omwansa, SRM dated 9th April 2015)

JUDGMENT

1. The appellant was charged and convicted of the offence of stealing by a person employed in the public service contrary to **section 280** of the ***Penal Code (Chapter 63 of the Laws of Kenya)***. The particulars of the charge were that on 25th October 2013 at Central Kabuoch Location within Ndhiwa District, being a person employed in the public service as a clinical officer in the Ministry of Public Health and Sanitation, he stole one carton containing 48 packets of *artesanate* injection valued at Kshs. 27,755.04/- which was the property of the Government of Kenya and which came into his possession by virtue of his employment.
2. The appellant was sentenced to one year imprisonment and he now appeals against conviction and sentence. In the grounds of appeal proffered, the appellant contended that there was insufficient evidence to sustain a conviction. Mr Nyauke, counsel for the appellant, submitted that the learned magistrate had failed to appreciate that the items alleged to have been stolen had not passed from the custody of the appellant to an unauthorized 3rd party. He submitted that the prosecution did not call one Linet, who was mentioned several times by the witnesses, as the recipient of the drugs in order to deny the alleged transaction. Counsel further attacked the judgment on the ground that the learned magistrate shifted the burden of proof to the accused and ignored the evidence of the defence witness.
3. Mr Oluoch, learned counsel for the respondent, conceded the appeal on the ground that the prosecution did not call Linet, who was a material witness, to confirm the movement of the drugs. He submitted that the procedure for the movement of drugs was not proved in order to exclude the manner in which the appellant stated he had used to transfer the drugs from one health facility to another. On the whole, counsel submitted that evidence was insufficient to support a conviction of theft.
4. Although the respondent concedes this appeal, it is necessary for the court to satisfy itself that such concession is merited. The court, in doing so, is guided by the principle, re-stated many

times, that it is the duty of the first appellate court to consider the entire evidence, evaluate it and reach an independent conclusion as to whether or not to uphold the conviction bearing in mind that it neither heard nor saw the witnesses testify (see *Okeno v Republic* [1972] EA 32).

5. The prosecution case arose out of a concern that there was a persistent shortage of drugs at Magina Dispensary yet drugs were being brought to the facility. This concern was expressed by Simon Ochieng Martin (PW 2), the Assistant Chief of Kawere Sub-Location. He testified that on 25th October 2013 he received a tip off from an informer that someone had been seen leaving the facility with a carton of drugs. He called the police and they laid a trap for the person. Crispine Samuel Adang (PW 1), a motorbike rider testified that on the material day, he was called by the appellant whom he knew as “Daktari” from Magina Dispensary to go and pick him up. When he went to the appellant’s house, he had a package which he referred to as “Kunde seeds” to be taken to Ndhiwa. PW 1 and the appellant were waylaid by PW 2 and a police officer, Corporal John Ochieng’ (PW 3). When PW 2 and PW 3 inspected the carton, they found that it contained 48 boxes of *artesanate* drugs. Thereafter the appellant was arrested and charged.
6. Dr Lawrence Oteng’ (PW 4) recalled that on 25th October 2013, he was informed by Magdalene Ongazi (PW 5), the County Pharmacist, that the appellant, who was the officer in charge of Magina Dispensary, was found carrying drugs. He checked the documentation to see whether it was proper for drugs to move from Magina Dispensary to Ndhiwa District Hospital and he verified that there was no documentation to support the transfer of the drugs. PW 5 testified that on the same day she received a call Linet Wagany informing her that the appellant had been caught with drugs meant for Magina Dispensary. She stated that the procedure to be followed when drugs are taken from one facility to another is that Form S 11 is filled but on that day, it was never filled. She confirmed that if Forms S 11 are out of stock, they have to improvise although she did not confirm that Form S 11 were out of stock at Magina Dispensary. She admitted in cross-examination that she did not carry out internal inquiries as to whether drugs were being taken to Ndhiwa. PC Joseph Katumo (PW 6), the investigating officer, recorded the statements of the witnesses and took possession of the exhibits and caused the appellant to be charged.
7. When put on his defence, the appellant gave sworn testimony. He testified that on 25th October 2013 he was undertaking requisition of drugs which was routine. He called Linet Wagany and told her he was taking the drugs to Ndhiwa District Hospital. He testified that in transferring drugs, the transaction was recorded on the bin card which was left at the facility and an S11 Form which was filled and accompanied the drugs. He stated that the forms had been out of stock so they improvised using ordinary papers. He admitted that he was arrested by PW 2 as he was going to Ndhiwa. He alluded to a grudge between him and the Assistant Chief after he refused to employ his unqualified daughter.
8. Zipporah Ndumbi (DW 2) a nurse at Magina Dispensary recalled that on 25th October 2013 the appellant told her that he was passing by Ndhiwa District Hospital to take injective *artesanate*. She testified that when ordering or exchanging drugs, Form S 11 is usually used but sometimes it is out of stock and on the material day the forms were out of stock. She was aware and confirmed that the bin card had been filled and that the drugs had been removed from the dispensary.
9. After considering the evidence, the learned magistrate held that the appellant failed to explain why he did not use a plain paper or improvised Form S 11 to show the intended destination of the drugs. He concluded that;

[T]he prosecution has answered this question of the destination fully that the drugs were never intended for exchange as the accused wants us to believe but diverted for the accused’s person’s benefit to an unknown destination but not for the benefit of the community.

10. The definition of stealing is contained in **section 268 (1)** of the **Penal Code** which states, “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.” Under **section 268(2)(a)** of the *Penal Code*, 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 an intent to permanently deprive the general or special owner of the thing of it. It is the burden of the prosecution to prove these elements beyond reasonable doubt.

11. The prosecution proved that the drugs belonged to the Government of Kenya and that the appellant was in possession of them by reason of his office as a clinical officer in charge of Magina Dispensary. In order to prove that the appellant intended to deprive the Government of the drugs permanently, the prosecution had to establish the procedure used to transfer drugs from one facility to another and that drugs were not ordered by the other institution.
12. As regards the procedure, the evidence is that the proper mode of transferring drugs was through the use of Form S 11 or in the absence of such a form an improvised process to confirm the transfer. The prosecution failed to prove that the appellant had failed to use the procedure for transferring drugs from one institution to another. PW 5 confirmed that although it was necessary for Form S 11 to be used for that purpose, when the forms were out of stock they would improvise. DW 1 confirmed that the bin card had been filled and drugs had been taken from the facility. The evidence left open the possibility that procedure adopted by the appellant to transfer the drugs to Ndhiwa Hospital was correct.
13. Even without supporting documentation for the transfer of drugs, the prosecution had to prove that the drugs were not ordered from Ndhiwa Hospital to show that the accused was taking them elsewhere other than to the hospital. The critical witness who would have confirmed that indeed there was such a procedure and whether or not it was used was Linet Wagany. She was the person at Ndhiwa Hospital who was to receive the drugs and the person the appellant had communicated to. She is the one who informed PW 5 about the incident. PW 6 stated he conducted inquiries about the drugs at Ndhiwa Hospital and that he received a negative response but he did not state from whom the inquiries were made to come to such a conclusion.
14. Whereas it is not necessary for the prosecution to call all or any particular witness to prove any fact, the court is entitled to draw an inference that if a material witness is not called, his or her evidence would have been adverse to the prosecution case (see *Bukenya and Others v Uganda* [1972] EA 549). The learned trial magistrate did not consider or examine the possibility that an order for drugs had been made by Ndhiwa District Hospital in order to reach the conclusion that the appellant intended to divert the drugs for his own use. I find and hold that the evidence of Linet Wagany was material and failure to call her as a witness undermined the prosecution case.
15. I therefore find that the prosecution failed to prove its case against the appellant beyond reasonable doubt. The concession by the respondent was well taken as there were serious errors in the learned magistrate’s evaluation of the evidence.
16. I allow the appeal, quash the conviction and sentence. The appellant is set free unless he is otherwise lawfully held.

DATED and DELIVERED at HOMA BAY this 19th day of May 2015.

D.S. MAJANJA

JUDGE

Mr Nyauke instructed by Nyauke and Company Advocates for the appellant.

Mr Oluoch, Senior Assistant Director of Public Prosecutions, instructed by the Office of Director of Public Prosecutions for the respondent.