



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO.2 OF 2012

JAMES ONKOBA NYABANDO.....1ST APPELLANT

DAVID MUTARIMBO WAKABA.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from original conviction and sentence in Naivasha C.M.CR.C.NO.634 of 2011 by Hon. T. W. C. Wamae Chief Magistrate, dated 30th December, 2011)

JUDGMENT

INTRODUCTION

1. The appellants were both charged with the offence of **Stealing by Servant** contrary to **Section 281** of the **Penal Code**.
2. Brief particulars of the charge are that the appellants were the employees of Kanini Haraka Enterprises in charge of Migingo and Kisumu Stores.
3. On diverse dates between 1st January, 2010 and 23rd April, 2010, they stole assorted goods from the shop all valued at Kshs.897,595/=.
4. Both the Appellants were convicted and sentenced to two (2) years imprisonment each.
5. Being aggrieved by the decision of the Hon. T. W. C. Wamae, Chief Magistrate, Naivasha, delivered on the 30th day of December, 2011, the appellants preferred this appeal.
6. In their Petition of Appeal the Appellants listed seven (7) grounds of Appeal which are set out hereunder:

i) That the learned trial magistrate erred in law and in fact in failing to note that the prosecution had not called complainant.

ii) That the learned trial magistrate erred in law and in fact in failing to note that the prosecution had not proved its case beyond doubt as against the accused by convicting the accused (now the Appellants) under Section 215 of the Criminal Procedure Code Cap 75 Laws of Kenya.

iii) That the learned trial magistrate erred in law and erred in law and in fact in failing to note that the prosecution's case was notoriously shrouded in inconsistency and contradiction that was not parched up which inconsistency and contradiction ought to have made the court resolve the case in favour of the Appellants (then accused).

- iv) That the learned trial magistrate erred in law and in fact in failing to note that there was no proper documentary evidence tendered to prove the case against the appellants (the then accused persons)
- v) that the learned trial magistrate erred in law and in fact in failing to note the prosecution's case was shrouded on hearsay.
- vi) That the learned trial magistrate erred in law and in fact in failing to note the prosecution's case did not establish proper circumstantial evidence capable of implicating the Appellants (the then accused).
- vii) That the learned trial magistrate erred in law and in fact in failing to note and consider that the case for the prosecution was not direct.
7. At the hearing of the Appeal, both counsel for the Appellants, Mr. Maragia and Prosecuting Counsel for the State, Mr. Mukofu made oral submissions
 8. Counsel for the appellants grounded the appeal mainly on two (2) issues which were that of access to the stores and capacity of the prosecution witnesses.
 9. On the issue of access, counsel submitted that the evidence of the prosecution witnesses was fraught with inconsistencies.
 10. It was the evidence of the Branch Manager, one John Kimunya Warui (P.W.3) that the stores where the items were stolen from had no lockable doors and that access was through the main door and that only he (P.W.3) had the custody of the key to the main door.
 11. The evidence of Isaac Wachira Nderitu (P.W.2) was contradictory to that of P.W.3 as this witness stated that the appellants kept the keys to the stores.
 12. The evidence of Elijah Ongere Gatere (P.W.4) who was the complainant's General Manager was that it was not only the appellants who had access to the stores.
 13. Counsel submitted that it was the evidence of P.W.4 that the appellants had assistants and could appoint their colleagues to stand in for them and that all of them, therefore had access to the stores.
 14. Counsel for the appellants contended that due to the volume and quantity of the goods, it would have been impossible for the Appellants to carry out the goods without being detected.
 15. Counsel further contended that no one saw the appellants carry out the goods nor were any of the stolen properties recovered in any of the appellant's possession.
 16. Counsel submitted that the trial magistrate erred in finding that only the appellants had access to the stores.
 17. On the issue of capacity of the prosecution witnesses, counsel submitted the Audit Report was produced by a person who was incompetent, impartial and not authorised to produce it.
 18. That the Audit Report was produced by P.W.4 who was not an auditor and counsel for the Appellant invoked the provisions of **Sections 64 and 69** of the **Evidence Act** and also made reference to the case of **Maru V. Republic [1978] KLR** to support the fact that documents can only be tendered into court by competent persons.
 19. Counsel submitted that this document ought to have been produced by an External Auditor and not **P.W.4** who was an employee of the complainant and therefore was not an independent or impartial witness nor a competent witness.
 20. Counsel further submitted that the maker of the computer stock records one Enoch Masoka was not called to testify as a witness and also produce the stock documents. Instead, **P.W.2** who was a person not competent produced the documents on behalf of Enoch Masoka.
 21. Counsel urged the court to quash the convictions and set aside the sentences of the Appellants as their conviction was based on documents produced in court by persons who were incompetent and not authorised to produce them.
 22. Prosecuting Counsel for the State conceded the appeal and concurred that the conviction was premised on the Audit Report prepared by an unqualified and impartial person.
 23. Counsel further submitted that conviction was purely based on suspicion and the fact that the appellants were in-charge of the stores and therefore liable for the shortfall that had arisen.
 24. Counsel for the State conceded the appeal and stated that based on those grounds, the conviction

was unsafe.

ISSUES FOR DETERMINATION:

25. Upon hearing the submissions of both counsel, this court finds the following issues for determination.

(i) Whether the prosecution proved its case beyond reasonable doubt on the charge of stealing

(iii) The capacity of the witness who produced the documents.

ANALYSIS:

26. This being the first appellate court, it is incumbent upon it to re-evaluate and re-assess the evidence on record and arrive at its own independent conclusion. Refer to the case of **Okeno V. Republic [1972] E.A. 32.**

27. In offences of stealing property, identification of the stolen property is a crucial factor. The complainant must be able to identify the property that was stolen and must also prove that the property in this instant case, that it belonged to Kanini Haraka enterprises.

28. From the evidence adduced, it is apparent that the complainant's loss of goods was based on an Audit Report

29. The prosecution called upon **P.W.4** who was the General Manager to tender evidence on the Audit Report and to produce it as an exhibit.

30. The witness, on his academic qualifications stated that he was a holder of a CPA 2 which therefore means that he was neither a qualified Accountant nor a qualified Auditor.

31. This court makes reference to **Section 143** of the **Evidence Act** which provides that no particular number of witnesses are necessary to prove a fact unless the law so requires.

32. Nevertheless, this court opines that the prosecution ought to have called the External Auditor to produce the Report. This type of witness would have been impartial and independent.

33. Another witness who ought to have been called to establish the identity of the stolen property was a person by the name of Enock Masoka who prepared the Computer Stock records and updated the stock.

34. This court notes that **P.W.2** produced these computer generated documents on behalf of the Enock Masoka.

35. The provisions of **Sections 64-69** of the **Evidence Act** are clear and state that for such documents to be admissible, they must be produced by the person responsible for the management of the activities to which the documents relate in the ordinary course of business.

36. The prosecution failed to call Enock Masoka as a witness as required by law, therefore rendering the document inadmissible as the same was produced by non-other than the generator of the document.

37. Further, no explanation was given by the prosecution as to why this particular witness was unable to come to court to testify and to produce the document.

38. This court finds merit on the ground of appeal that the prosecution witnesses who produced critical documents lacked capacity.

39. The documents produced are thereby rendered inadmissible which then means that the prosecution failed to prove and identify the property that is alleged to have been stolen.

40. The next issue on identification relates to the Appellants as the persons who stole the property.

41. This issue of identification also goes hand in hand with the issue of access to the store where the property was stolen from.

42. Counsel for the appellants submitted that the prosecution's evidence was fraught with inconsistencies.

43. This court has examined the court record and notes that the evidence of **P.W.3** was that both Mingingo Store and Kisumu Store did not have lockable doors.

44. **P.W.3** was the manager and he confirmed that he kept the key to the main door and that the Appellants could not access the store after he (**P.W.3**) had locked the main door.

45. **P.W.2's** evidence was somehow contradictory in that he stated that the Appellants had keys to the stores but he too confirmed that the manager (**P.W.3**) had the key to the main door.
46. The evidence of **P.W.4** corroborated that of **P.W.3** in that he stated in his testimony that the stores were not lockable and that the keys to the main door was kept by **P.W.3**, the manager.
47. This witness went further to state that the Appellants had two (2) assistants and the Appellants could also appoint any of their colleagues to stand in for them, when they were absent.
48. This court notes that even though the property alleged to have been stolen was voluminous, no prosecution witness testified to having seen any of the Appellants carting away the stolen merchandise.
49. Upon re-assessing the evidence on record, this court finds that there is corroborated evidence showing that the manager (**P.W.3**), the Appellants, the Appellants' assistants and nominees, all had direct access to the stores.
50. The stores were not lockable and once the main door was open, it is apparent from the evidence that anyone could gain access to the stores.
51. This court notes that no evidence in the form of a register was produced to show that which goods went missing on the dates that the Appellants were on duty.
52. No one saw the Appellants carrying away any of the property nor was any property recovered in any of the Appellants' possession.
53. This court concurs with the submissions of Prosecuting Counsel that the Appellants were arrested and charged based on mere suspicion.
54. This court finds that the prosecution failed to prove beyond reasonable doubt that the Appellants had complete control and sole access to the stores and also failed to identify and prove that the Appellants were the persons who stole.
55. This ground of appeal is found to have merit and it is hereby allowed.
56. The Appellants' convictions were based on mere suspicion and the convictions are found to be unsafe.

FINDINGS:

57. This court finds that the prosecution failed to prove its case beyond reasonable doubt and is satisfied that the prosecution failed in identifying the property that was stolen and also failed to positively identify the Appellants as the person who stole.
58. This court further finds that the critical documents were tendered into court by persons who lacked capacity thereby rendering them as inadmissible.

CONCLUSION:

59. The appeal is found to have merit and it hereby allowed.
60. The convictions of the Appellants are hereby quashed and their respective sentences are both set aside.
61. The Appellants to be set at liberty forthwith unless otherwise lawfully held.

It is so ordered.

Dated, Signed and Delivered at Nakuru this 22nd day of January, 2014.

A. MSHILA

JUDGE