



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT KITALE.

CRIMINAL CASE NO. 1 OF 2014.

SILAS MANGENI CHEPKENDA.....APPELLANT.

VERSUS

REPUBLIC.....RESPONDENT.

(Being an appeal from the original conviction and sentence of R.M. Washika – AG.PM in Criminal Case No. 848 of 2013 delivered on 10th December, 2013 at Kapenguria.)

J U D G M E N T.

The appellant, **Silas Mangeni Chepkenda**, appeared before the Principal Magistrate at Kapenguria charged with stealing by servant contrary to section 281 of the penal code, in that, on the night of the 9th and 10th August, 2013 at Siyoi West Pokot County, being a servant to Judith Soita, stole from the said Judith Soita, a radio make sonitec, hundred (100 kgs) bags of beans, twenty (20kgs) of peas, satchets of tomato seed and kale seeds and a 24 inch solar panel, all valued at Ksh. 38,200/=.

After a full trial, the appellant was convicted and sentenced to serve eighteen (18) months imprisonment.

Being dissatisfied with the conviction and sentence, the appellant preferred the present appeal on the basis of the grounds contained in his petition of appeal dated 3rd January, 2014.

The learned Counsel, **Mr. Magal**, represented the appellant at the hearing of the appeal and essentially argued that the evidence led by the prosecution against the appellant was insufficient and did not prove the charge beyond reasonable doubt. That, the learned trial magistrate failed to take into consideration the defence raised by the appellant.

Learned Counsel, argued further that the evidence by PW1, PW2 and PW3 merely showed that the appellant lived with PW1 but left on the 10th August, 2013, on which date the complainant allegedly lost her items. That, the evidence by the prosecution was insufficient even to have the appellant placed on his defence. That, there was no prove that the alleged theft occurred and that the appellant was responsible. That, no direct evidence existed against the appellant nor did the circumstances of the offence raise any presumption of guilt against him.

Learned Counsel, urged this court to allow the appeal for reasons aforementioned.

The state/respondent conceded the appeal through the Learned Prosecution Counsel, **M/s. Limo**, who submitted that there were doubts and contradictions as to whether the alleged stolen items belonged to the complainant and whether they were actually stolen from her. That, PW2, did not properly state the circumstances under which she saw the appellant with a radio in that she did not say whether it was before or after the alleged theft. That, the conviction of the appellant by the trial court was not safe.

For all those reasons, the learned prosecution counsel conceded the appeal.

Having heard and considered the submissions by both sides, the duty of this court was to re-visit the evidence and draw its own conclusions bearing in mind that the trial court had the advantage of seeing and hearing the witnesses.

In that regard, the prosecution case was briefly that the complainant Judy Nekesa Soita (PW1), was living with the appellant as her worker. She was to pay the balance of his wage on the following day but he left her home on that date. She later found that her beans, peas, seeds, radio and solar panel were missing.

Winrose Naliaka (PW2), indicated that she saw the appellant listening to the radio stolen from the complainant and after receiving the necessary report, **P.C. Flora Dandon (PW3)**, of Kapenguria police station investigated the matter and concluded that the appellant was the only person living with the complainant at the material time. She (PW3) therefore arrested and charged him with the present offence.

In his defence, the appellant indicated that he had gone to assist the complainant after her worker disappeared but when he decided to return to his home she (complainant) became difficult. She paid him a wage in the sum of Ksh. 1,200/= after which he left her home without her explanation.

He was later arrested.

The learned trial magistrate considered all the evidence placed before her and arrived at the conclusion that the prosecution had proved its case beyond any reasonable doubt.

This court's view is that the prosecution evidence was insufficient in establishing the existence of the alleged stolen property and the complainant's ownership thereof.

It was not enough for the complainant to simply say that her property went missing yet she did not first and foremost establish that the said property existed in the first place and that it belonged to her to the exclusion of any other person including the appellant.

Nothing was recovered from the appellant and linked to the alleged theft of the complainant's property and the radio allegedly seen with the appellant by Naliaka (PW2), was not proved to have been that allegedly stolen from the complainant.

She (PW2) was not in a position to state with certainty that the radio that the accused was allegedly listening to belonged to the complainant and that it was stolen from her.

The investigating officer (PW3) did not carry out sufficient and credible investigations thereby ending in having the appellant charged with the present offence on the basis of mere suspicion. There was no direct evidence against the appellant and the indirect evidence that might have existed was not sufficient enough to justify the charge against the appellant.

The burden to prove the case against the appellant lay with the prosecution. It was not the appellant's duty to establish his innocence.

Herein, the prosecution apparently failed to discharge its burden of proof for a sound conviction of the appellant by the trial court.

It would therefore follow, and this court agrees with the learned prosecution counsel, that the appellant's conviction by the trial court was unsafe.

Consequently, this appeal is well merited and is hereby allowed to the extent that the appellant's conviction is quashed and the sentence of eighteen (18) months imprisonment imposed upon him by the trial court is set aside. He shall forthwith be set at liberty unless otherwise lawfully held.

[Delivered and signed this 30th day of May, 2014.]

J.R. KARANJA.

JUDGE.