REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERICHO

CRIMINAL APPEAL NO. 88 OF 2012

PAUL KIMUTAI KOSGEI ….....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal against the Conviction and Sentence by the Honourable W.N. Nyarima, Chief Magistrate at Kericho in Criminal Case No. 3008 of 2009 on 20.12.12

J U D G M E N T

1. **Paul Kimutai Kosgei,** the appellant was charged with the offence of stealing goods in transit contrary to **Section 279(c)** of the **Penal Code.**

2. The particulars in the charge sheet were that the appellant on the night of 27th October, 2009 at Kericho township in Kericho District within Rift Valley Province, jointly with others not before court, stole 1,000 jericans of 20 litres of Crisco cooking oil valued at Kshs. 1,884,100/= the property of the United Millers Limited Kisumu, from motor vehicle registration number KAP 374W Isuzu FVX lorry while the said property was in transit from Nakuru to Kisumu.

3. The appellant denied the charge and the matter was heard with the prosecution calling a total of seven(7) witnesses. The appellant was eventually convicted and sentenced to seven (7) years imprisonment.

4. Being aggrieved by the judgment he has appealed against both conviction and sentence raising the following grounds:

a. *That the learned trial magistrate erred in fact and in law in that he gave undue weight to the prosecution's case and least weight to the defence case.*
b. *That the learned trial magistrate erred in fact and in law in that relied on circumstantial evidence in absence of sufficient corroboration .*
c. *That the learned trial magistrate erred in fact and in law in that he shifted the burden of proof to the appellant and went ahead to convict the appellant in absence of proof beyond reasonable doubt.*
d. *That the learned trial magistrate erred in fact and in law in that he disregarded the appellants request to seek legal representation.*
e. *That the entire proceedings were irregular and in contravention of the appellant's rights as entrenched in the Constitution of Kenya.*
f. *That the sentencing magistrate meted out a sentence that was too harsh in view of the entire circumstances of the case.*

5. A summary of the prosecution case is that on **27th October, 2009** a lorry registration number KAP 374W driven by the appellant was loaded with one thousand twenty litre jerricans of Crisco oil from Nakuru United Millers company for delivery at Kisumu United Millers company. This was confirmed by PW3 - PW6.

6. The delivery note, Entry book, loading instruction sheet, security guard book and log book were all produced by PW7 **No. 77019 Cpl. Moses Otui** as EXB1-7.

7. It was the evidence of PW2 **Elly Okoth Eshihumo** a turn boy on this lorry that they left Nakuru on **27th October, 2009** at 5.30pm and arrived in Kericho at 9p.m. They had supper in a hotel in Kericho where the lorry was parked. PW2 was with another turn boy called **Patrick Cheruiyot** who was a brother to the appellant. Patrick disappeared after this incident and has never been traced.

8. PW2 further testified that after supper the appellant told them that they would sleep in Kericho and leave for Kisumu the next morning. He requested the appellant to give him fare so that he could go home in Kisumu and the driver would pick him from there the next day. He left the appellant and Patrick in Kericho.

9. The next day he learnt about the missing lorry after being called by a colleague and the Transport and Sales Managers.

10. PW7 **No. 77019 Cpl. Moses Otui** was the investigating officer. He told the court that the said lorry was reported missing on **28th October, 2009** by the appellant. The lorry was found later in the day at Chebara area. All the cooking oil was missing. He went to the scene with the appellant and other officers. He then charged the appellant after investigations.

11. The appellant in his defence denied the charges. He said he travelled from Nakuru and stopped in Kericho, and parked the lorry. After supper he left the turn boys behind. One of them asked for Shs. 300/= fare to Kisumu. The next morning he found the lorry missing. He reported the matter to the police station. He was arrested and informed that the lorry had been found.

12. When the appeal came up for hearing Mrs. Bett for the appellant in her submissions argued that the appellant's fundamental rights were violated when he was not given an opportunity for legal representation. She further submitted that the language of interpretation was not clearly shown as part of the proceedings were undertaken in Kiswahili and others in Kipsigis.

13. On grounds 1,2 and 3 she submitted that the evidence on record is circumstantial and did not point to the appellant's culpability.
14. The State through learned state counsel M/S Kivali conceded the appeal on the following grounds:

i. *The appellant was arrested before proper investigations were carried out.*
ii. *It was not confirmed that he had the motor vehicle keys.*
iii. *The Hotel where the appellant slept was not visited.*
iv. *No finger prints were taken when the motor vehicle was recovered.*
v. *This was a case founded on circumstantial evidence that was weak.*
vi. *The learned trial magistrate in his judgment states that the appellant deliberately stopped in Kericho. This did not come out of PW2's evidence.*

15. This is a first appeal and this court is enjoined to reevaluate and reconsider the evidence adduced before the trial court together with the grounds of appeal and arrive at its own conclusion bearing in mind that it did not see nor hear the witnesses testify. See **Okeno Vs R 1972 EA 32; Mwangi V R [2004] 2 KLR 28** and **Simiyu & Anor Vs R [2005] 1 KLR 192.**
16. I have accordingly considered the evidence before the trial court plus the grounds of appeal. I have considered the submissions by Mrs. Bett for the appellant and M/S Kivali for the State.

17. **Article 50(2) (g)** of the **Constitution** provides:

> ***" Every accused person has the right to a fair trial, which includes the right to choose, and be represented by an advocate, and to be informed of this right promptly"***

A perusal of the record shows that the issue of legal representation only arose when the appellant had already been placed on his defence.

18. Prior to this he had not sought for an opportunity to engage an advocate and was denied. After the occurrence where Mr. Maengwe purported to hold brief for Mr. Orina who was not on record for the court must have sought clarification from the appellant who responded saying;

> ***" I WILL DEFEND MYSELF BUT I AM NOT READY TO PROCEED"***

The case was fixed for defence hearing for **4th May, 2010**.

19. It is not clear why provisions of **Section 211 Criminal Procedure Code** were not explained to the appellant on 31st March, 2010 when he was placed on his defence, or on 14th April, 2010 when the matter first came for defence hearing. On 4th May, 2010 when the matter came for hearing the court complied with **Section 211 Criminal Procedure Code** and the appellant indicated in Kipsigis language that he would give a sworn statement.

20. There is nothing to show that he would call witnesses.

What follows is not indicated to be a sworn statement. And if it was, there is nothing on record to show that the prosecution had questions or no questions for him.

Out of nowhere the appellant states:

> ***" I ask the court to allow me to engage an advocate who can advise me on the defence"***

What followed is an order adjourning the case to **18th May, 2010.** There is nothing to show what the adjournment was for.

21. When the matter next came for hearing on **17th August, 2010** the record does not show that the court inquired whether the appellant had got the advocate he wanted to engage. All he says is that he did not have witnesses. The learned trial magistrate then closed the defence case.

It is clear from this that the appellant was not assisted by the court to prepare his defence in the best way possible.

Article 50(2)(c) of the **Constitution** provides;

> ***"Every accused person has the right to a fair trial which includes the right to have adequate time and facilities to prepare a defence"***

The conduct of the accused should have alerted the learned trial magistrate to the fact that there was something that the appellant was not clear about. Unfortunately he missed it.

22. I will now consolidate the remaining grounds and deal with only one issue. The issue is whether there was sufficient evidence to support a conviction. The evidence before the court was purely circumstantial evidence. The law on circumstantial evidence is that the culpatory facts must point to none other than the accused as the culprit. In the case of **Sawe V R 2003 KLR 365** the Court of Appeal stated thus:

" 1. In order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypotheses than that of his guilt.

2. Circumstantial evidence can be a basis of a conviction only if there is no other existing circumstances weakening the chain of circumstances relied on"

And in **Mwangi V R [2004] 2 KLR 32** the Court of Appeal states thus;

"In a case depending on circumstantial evidence, each link in the chain must be closely and separately examined to determined its strength before the whole chain can be put together and a conclusion drawn that the chain of evidence as proved is incapable of explanation on any other reasonable hypotheses except the hypothesis that the accessed is guilty of the charge"

23. In the circumstances of this case, it is clear that the investigating officer (PW7) did not carry out any investigations at all! There was no dispute that the appellant had been dispatched from Nakuru to Kisumu with the said goods in the motor vehicle registration number KAP 374W Isuzu FVX lorry. The issue was what happened to the lorry and the goods. Was it actually stolen as had been reported by the appellant? These were the issues to be investigated.

24. As correctly pointed out by the learned state counsel, it was never established who last handled the lorry keys. It was also not established at which Hotel this lorry had been parked. Was it ever removed from there? And if so by whom? This could only have been established if the people at that Hotel had been interrogated.

25. The recovered lorry was never dusted for finger prints. Which other persons may have handled it? It's unknown.

26. Finally did these investigations plus the evidence point to no other person besides the appellant as the culprit? He was a suspect, having been the driver of the lorry. But there were other suspects; starting with the turn boys, the woman who was given a lift and alighted at Londiani. There is no evidence that anyone at Chebara where the lorry was found was interrogated.

27. The learned trial magistrate in his judgment made some findings which were not supported by any evidence at all. For example at page 3 lines 2-8 of the judgment he states;

" It is instructive to take note of the fact that another turn boy called Patrick Cheruiyot and who stayed behind in Kericho with the accused is at large. The accused had no plausible reason to suddenly spend the night in Kericho town. Evidence adduced proves that the accused stopped at Kericho deliberately to get rid of one turn boy(PW2). His actions were clearly premeditated"

On the same page at lines 10-13 he wrote;

"The accused, in connivance with Patrick Cheruiyot deliberately and without probable cause stopped the journey at Kericho. That per se proves that they had hatched a plant to deprive the complainants of the of the goods"

These findings by the learned trial magistrate were not supported by the evidence.

28. If indeed the appellant gave a sworn statement as ought to have been the case, then the prosecution should to have cross-examined him on it if it was merely escapist as stated by the learned trial magistrate in his judgment. The fact that he was not cross-examined on it clearly shows it was not challenged.

29. After examining and analyzing the evidence on record together with the issues pointed out herein-above, I come to the conclusion that the appeal has merit. The State has rightly conceded the said appeal. The result is that the appeal is allowed. The conviction is quashed and the sentence set aside.

The appellant to be set free unless otherwise held under a separate warrant.

Dated, signed and delivered this 28th day of November, 2014

H.I. ONG'UDI

JUDGE

In the presence of

M/S Keli for State

Mrs. Bett for Appellant present

Appellant present in person

Korir – Court Assistant

Interpretation – English/Kipsigis