



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Criminal Appeal 194 of 2011

GODFREY LITARI SURA APPELLANT

VERSUS

REPUBLICRESPONDENT

(From original conviction and sentence in criminal case Number 1043 of 2010 in the Senior Principal Magistrate's Court at Limuru – Mrs. M. A. Murage (SPM) on 12/04/2011)

JUDGEMENT

1. The appellant, was convicted in the Principal Magistrate's court in **criminal case No. 1043 of 2010** by the learned Senior Principal Magistrate, Mrs. M. A. Murage; for the offence of **stealing by servant contrary to Section 281 of the Penal Code**. The particulars of the offence were that on 17th April 2010 at Loreto Girls High School Limuru in Kiambu West District within Central Province, being a servant of Loreto Girls High School six pieces of metal bars valued at Kshs.16,800/-.

2. Upon conviction he was sentenced to serve one year imprisonment without option of fine.

3. Following the conviction the appellant filed an appeal against both conviction and sentence. In the grounds of appeal he contended that there was no evidence that he stole the pipes, further that the learned trial magistrate based her conviction on imaginary findings. Lastly, that the learned trial magistrate failed to appreciate the defence statement and also ignored both his mitigation and the recommendations in the probation report, and thus sentenced him to a term of one year imprisonment without option of fine which was excessive.

4. Pursuant to the appeal the appellant filed written submissions through learned counsel Miss Kinyanjui in which he urged the court to set aside the conviction and sentence. Miss Kinyanjui called upon the court to consider whether the charge was proved beyond reasonable doubt. Further that the learned trial magistrate convicted the appellant on circumstantial and uncorroborated evidence, made imaginary findings, shifted the burden of proof, and failed to appreciate the defence of the appellant.

5. **Whether the charge was proved beyond reasonable doubt:**

Miss Kinyanjui contended that it is a key element in the definition of stealing under **Section 286(1)**, and of stealing by servant under **Section 281** both of the **Penal Code**, that the person said to have stolen something capable of being stolen, must **take** or **fraudulently** convert the thing capable of being stolen to the use of another person.

6. I note that in the instant case, the witnesses stated that the six metal bars were in the school compound near the fence where the appellant allegedly placed them, and that a certain woman took them. There is therefore, no evidence that the appellant did take or fraudulently convert to the use of any person the six metal bars which are the subject matter of this case.

7. Whether the evidence was circumstantial and uncorroborated.

Miss Kinyanjui drew the attention of the court to the case of **Ibrahim Mwita v Republic Cra. app 86 of 2004 [2004] 2 KLR**, in which it was held that it is trite law that in a case depending on circumstantial evidence, the court must before deciding upon conviction, find that the inculpatory facts are incompatible with the innocence of accused and incapable of explanation upon any other hypothesis than of guilt. I agree with the learned counsel that the evidence on record does not lead irresistibly to the conclusion that the appellant committed the crime with which he was charged.

8. Whether the learned trial magistrate made imaginary findings, shifted the burden of proof, and failed to appreciate the defence of the appellant.

I have perused the proceedings and I find that the record does not reflect that **PW3** saw the appellant taking pipes from the complainant's premises, nor that he threw them out of compound from one side of the fence, and that a certain woman received them on the other side of the fence. In the circumstances of this case the trial magistrate shifted the burden of proof when she observed that the defence did not challenge the evidence of the prosecution.

9. This being a criminal trial the prosecution must prove their case against the accused person beyond reasonable doubt and guilt does not lie with him merely because he failed to challenge the prosecution evidence. The burden of proof lies with the prosecution and not the accused. In his defence, the appellant averred that he continued to work for the complainant after the alleged theft and was only arrested two weeks later after making a labour claim. It was therefore submitted that his defence raised material issues which should have been given due considerations.

Miss Venda the learned state counsel conceded the appeal on behalf of the state. In her reasons she stated that the prosecution did not prove their case beyond reasonable doubt, and that only **PW3** stated that she saw the appellant pick the pipes and keep them near a fence while all the other witnesses relied on hearsay evidence.

10. Secondly, she stated that there were contradictions in the dates when the offence was committed and when it was reported to the school authority. From the evidence of **PW2** it seemed that the offence was reported to the school authority on 16th April 2010 before it was committed on 17th April 2010. Thirdly, that the evidence of **PW3** was contradictory as to whether she still worked at the school as a casual labourer or had stopped doing so at the time of her testimony.

11. Having perused the lower court record, the grounds of appeal and the submissions of the learned counsel, I am satisfied that the learned state counsel, Miss Venda was wise to concede the appeal, in view of the contradictions and gaps in the testimony of **PW3** the star witness. These have created a doubt whose benefit should have been given to the appellant.

12. For the foregoing reasons I find that the appeal is meritorious. I quash the conviction and set aside the sentence imposed on the appellant, and order that the appellant be and is hereby set at liberty forthwith unless otherwise lawfully held.

It is so ordered.

SIGNED DATED and DELIVERED in open court this 30th day of April 2013.

L. A. ACHODE

JUDGE