



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CRIMINAL DIVISION**

**CRIMINAL APPEAL NO. 50, 51 & 61 OF 2011**

**JULIUS M. MWANGI..... 1<sup>st</sup> APPELLANT**

**HARUN MUHORO..... 2<sup>nd</sup> APPELLANT**

**MOSETI ONGAGA THOMAS..... 3<sup>rd</sup> APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

*(From original conviction and sentence in criminal case Number 6876 of 2006 in the Chief Magistrate's Court at Kibera – Mr. U. P. Kidula (CM) on 09/02/2011)*

**JUDGEMENT**

1. The appellants, were charged in the Chief Magistrate's court in **criminal case no. 6876 of 2006**, for the offence of stealing goods in transit contrary to **Section 279(c)** of the **Penal Code** in **count 1** and failing to prevent a felony in **count III**. The particulars of the offences were that on 4<sup>th</sup> December 2006 at Inland Container Depot (ICD) within Nairobi Province, jointly with others not before court, they stole 94 cartons containing CVD's make GLD from container number PCIV 9993860 which was on transit from China to Nairobi, valued at Kshs.752,000/= the property of Continental Logistic Network.
2. They were convicted in count 1 and the learned trial magistrate treated count number III as an alternative to count number I. They were sentenced to serve two years imprisonment, whereupon they filed appeals against both conviction and sentence. In the grounds of appeal the appellants contended that **PW1** the alleged owner of the stolen goods failed to specify the goods that were in the containers broken into. That **PW2** was unable to point out the goods that had been stolen nor the person who stole them. Further that the charge sheet speaks of 4<sup>th</sup> December 2006 while the evidence speaks of 3<sup>rd</sup> December 2006.
3. The State opposed the appeal through learned counsel, Mr. Mulati, who submitted that the prosecution proved the case against the appellant beyond reasonable doubt. He urged the court not to interfere with the conviction and sentence and dismiss the appeal.
4. The prosecution's case briefly stated, was that **PW2** P.C. Mbarak and **PW8** P.C. Maingi, were on escort duties from Mombasa Railway Station to Inland Container Depot (ICD) at Embakasi Nairobi on 3<sup>rd</sup> December 2006. That sometime during the night as they kept watch over their

cargo at ICD they noted a group of people who were stealing from the contents of one of the containers at the Depot.

5. The two officers went out to try and arrest the thieves and that is when they ran into the 1<sup>st</sup> appellant. They disarmed the appellant and made a report to **PW3** his superior that he was assisting the thieves. Subsequently the three appellants who were police officers on guard duties at ICD Embakasi on the night in question were arrested and charged as set out above.
6. The 1<sup>st</sup> appellant denied the offence testifying on oath. He confirmed that he was on duty on the material night while patrolling the depot. He came upon two officers who included **PW2**. They ordered him to stop, and they disarmed him at gunpoint. The shot in the air and when his boss arrived at the scene the two officers laid an allegation of theft against him.
7. The 2<sup>nd</sup> appellant denied that he saw anyone running away from the depot and also stated that the hole in the fence referred to in the prosecution evidence had been there since 2005 when he was transferred to the ICD. He stated that he was outside the guard room. He talked to P.C. Moseti, the 3<sup>rd</sup> appellant and together they decided to go and see their colleagues at the Eastern gate to try and find out where the gun shot had originated from. At the Eastern gate A, were P.C. Mwangi, the 1<sup>st</sup> appellant and P.C. Dekow **PW6**. On the way they met duty officers Sergeant Cheruiyot, **PW3**, in the company of the 1<sup>st</sup> appellant, **PW6** and two other officers whom he later came to know were Railway Police Officers. **PW3** instructed that they should go to the Western gate to the thieves. He had not seen any thieves.
8. The 3<sup>rd</sup> appellant recalled that the last day he was on duty was on 2<sup>nd</sup> December 2006 to 3<sup>rd</sup> December 2006. He reported on duty at 11 p.m. in the company of the 2<sup>nd</sup> appellant, and were allocated duties at the Western gate, by the duty officer. At about 4 a.m. on 3<sup>rd</sup> December 2006, he heard a gunshot while he was in the sentry box at Western gate, with the 2<sup>nd</sup> appellant.
9. They came out of the sentry box and he went to the left side, as the 2<sup>nd</sup> appellant went to the right. They headed towards the Eastern gate. He was in the open ground while the 2<sup>nd</sup> appellant walked among the containers on the way to the Western gate. They met their duty officer, Sergeant Johnson Cheruiyot, together with two other officers and he told them to return to the Western gate to pursue some thieves, who had been seen sneaking off from the yard through the Western gate. They conducted a thorough search under the supervision of the duty officers to establish whether there was break-in. They searched the containers, but did not find any that had been broken into nor did they find any thieves in the yard.
10. I have subjected the evidence adduced before the trial court to fresh analysis and re-evaluation bearing in mind that I neither saw nor heard any of the witnesses as they testified, and giving due consideration in line with the case of **GABRIEL KAMAU NJOROGE VS. REPUBLIC (1982-88) 1KAR 1134.**
11. After a careful analysis of the evidence on record, I have noted several things. From the evidence all the witnesses confirmed that on 3<sup>rd</sup> December 2006, at 4.a.m. an inspection was done in the yard of the depot after the alarm was raised. No container was found to have been broken into. No container was produced or photographs of any such container in evidence as having been breached, as stated in the charge sheet. Infact, it is not clear which container was broken into since different container registration numbers were cited in the charge sheet and in the evidence.
12. The witnesses also differed on dates of the incident. **PW9** talked about 4<sup>th</sup> December 2006 while the other witnesses talked of 3<sup>rd</sup> December 2006. Four containers were mentioned in the evidence. According to **PW9**, containers number ZCSU 81888770 and number GLDU 083331 which were thought to have been breached were found to contain cereals and nothing was missing therefrom. **PW1**, **PW4** and **PW9** testified about Container number PCIU 9993860 while

container number PCIV 9993860 was the one referred to in the charge sheet.

13. **PW3**, sergeant Cheruiyot confirmed that he went to the scene after an alarm was raised but that he did not establish which container had been broken into. The two eye witnesses, **PW2** P.C. Mbaruk Juma and **PW8** P.C. Maingi did not specify the container from which they saw the cartons being removed.
14. The evidence adduced indicated the legal owner of the container specified in the charge sheet, to be AUCMA Digital Technology Africa Ltd who were the consignees. **PW1**, Mr. Musee the Clearing Agent from Continental Logistics Network Ltd testified on their behalf. No one testified from the company that was the Consignee as having imported or lost these goods. The complainant never testified.
15. **PW4**, CIP Maina said that he received a report from **PW3**, that a container had been breached and a confrontation had ensued between ICD police officers and the police officers who were on escort duties from the Railway police. The two teams of police were not in agreement on whether to pursue the thieves. The 2<sup>nd</sup> and 3<sup>rd</sup> appellants joined **PW3**, on invitation to try and pursue the thieves.
16. I noted material contradictions in the particulars of goods concerned. It was not clear from the evidence whether the goods exhibited in court, were the ones stolen in the night in question. **PW4** testified that the items exhibited in court were DVD's. **PW9**, Mr. Obeto produced exhibit 6, as goods imported by AUCMA Ltd and allegedly stolen. These were VCDs. On examination **PW9** confirmed that the goods listed in the charge sheet were not the same as the ones produced in court. That none of the VCDs recovered had serial numbers corresponding with the numbers in the charge sheet.
17. If recovered goods are materially different from the alleged stolen goods, the Court of Appeal has held that in such a situation the prosecution would have failed to prove their case and the court should acquit the accused persons. See - **Bernard Aggrey vs Republic KAR 1982-88 – IKAR 74** to which the court was referred.
18. **PW6**, P.C. Noor Dekow was on duty with the three appellants on the 3<sup>rd</sup> December 2006. The 2<sup>nd</sup> and 3<sup>rd</sup> appellants came to the scene after the incident. P.C. Dekow testified that it was the 1<sup>st</sup> appellant who alerted him to the presence of two intruders in the Depot. Both officers moved in different directions to establish what was going on. While they were moving about in this manner he heard a gunshot and took cover. He found out later that the 1<sup>st</sup> appellant had come upon **PW2** and **PW8** who were in the process of disarming him. P.C. Dekow testifying for the prosecution stated that he was not aware of anything wrong that happened that night. He did not see any thieves let alone see the 1<sup>st</sup> appellant aiding them.
19. **PW3** and **PW4** said they saw a hole in the fence which was freshly cut. **PW6** who had worked in that depot for years, and **PW9** the DCIO testified that the hole in the fence had existed for many years.
20. This being a criminal trial the onus of proof rested with the prosecution unshiftingly. It was not for any of the appellants to prove their innocence to the court. In the often quoted case of **Bhatt vs Republic 1957 East Africa 333 – Court of Appeal**, to which the defence referred, the Court held that mere suspicion was not enough to prove an accused person's guilt.
21. In summary therefore, there was not sufficient evidence before the trial court on which to found a conviction against any of the three appellants. On identification of the appellants, **PW2** the star witness stated that from where he was standing the light was not sufficient for him to identify the

persons whom he saw that night scurrying away with boxes from the ICD yard through the fence.

22. **PW2** also stated that the 1<sup>st</sup> appellant emerged from behind a container carrying a G3 rifle. It would appear that **PW2** was incensed that the ICD officers were not alert while on duty and that is why he disarmed the appellant. According to **PW2** the 1<sup>st</sup> appellant could not have failed to see the thieves. In their exchange he told the 1<sup>st</sup> appellant to do the work he had been deployed to do. It was lost on him and the court that **PW6** who was with the 1<sup>st</sup> appellant did not see the thieves either. Whereas it appears that the appellant was convicted on the suspicion that he must have seen the thieves and thereby aided or abated the offence, it is not clear at all why the 2<sup>nd</sup> and 3<sup>rd</sup> appellants were charged.

23. The court could not have found these appellants guilty even on the alternative count for the offence of failing to prevent a felony contrary to **Section 392** of the **Penal Code**, On the basis of the evidence on record, without more. The said Section provides as follows:

**“Every person who, knowing that a person designs to commit or is committing a felony, fails to use all reasonable means to prevent the commission or completion thereof is guilty of a misdemeanour”**

The issues for determination therefore, under this count would have been whether the appellants or any of them, knew of the design to commit a felony, or that a felony was in the process of being committed. Only when this question is determined in the affirmative, can the court proceed to examine the evidence to establish whether they or any of them, failed to employ all reasonable means to stop the commission, or completion of the said felony. It is not enough that they were on duty and that an offence occurred during their watch.

24. After a careful analysis of the evidence on record, I am satisfied that the evidence against the appellants amount to mere suspicion which is not sufficient to form a basis for conviction. Reasons wherefore, their respective appeals succeed. The conviction against each appellant is quashed and the resultant sentences set aside. Each appellant is set at liberty forthwith unless otherwise lawfully held.

**SIGNED DATED** and **DELIVERED** in open court this **18<sup>th</sup>** day of **September 2013**.

**L. A. ACHODE**

**JUDGE**