REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAKURU

Criminal Appeal 241 of 2010

PETER KAMAU…….APPELLANT

VERSUS

REPUBLIC……RESPONDENT

JUDGMENT

The Appellant was charged with the offence of stealing contrary to Section 275 of the Penal Code *(Cap. 63, Laws of Kenya).* He was convicted and sentenced to two years probation and an order to compensate the complainants in the sum of Kshs 32,685/= being the cost of goods allegedly stolen by the Appellant.

Being aggrieved both with the conviction and sentence, the appellant appealed to this court on the following six grounds -

(1) that the trial magistrate erred in law and fact in finding that the prosecution had proved a case of stealing contrary to Section 275 of the Penal Code.

(2) that the trial magistrate failed to take into consideration that the complainant testified she did not see the accused take away any items.

(3) that the trial magistrate failed to connect the theft of the stolen goods with the appellant save for the fact that he was a driver in the motor vehicle the complainant boarded.

(4) that the trial magitrate failed to take into consideration the evidence led by the accused person.

(5) that the trial magistrate misdirected himself in law and fact in finding the driver had the sole responsibility as to the safety of goods while there were other passengers seated at the back of the vehicle who had the opportunity to steal the same.

(6) that the appellant prays that the conviction herein and sentence be quashed and or set aside.

When the appeal was urged before me on 8th March 2012, Mrs Njoroge learned counsel for the appellant urged that the prosecution did not prove the case of stealing against the appellant and urged the complainant\'s loss is best be a subject of a civil action, not a criminal prosecution.

Mr. Omwega, learned Senior Principal State Counsel was of the same view and urged the court to allow the appeal.

Section 275 of the Penal Code creates both the offence of stealing, as well as the punishment therefor. The definition of stealing is however set out in Section 268 of the Penal Code. It provides that a person who fraudulently and without a claim of right takes anything capable of being stolen, or fraudulently converts to the use of any person other than the general or special owner thereof any property, is said to steal that thing or property. The fraud is proved by the intent to permanently deprive the general or special owner of the goods or thing.

In this case, the complainant (PW1) claimed and therefore the prosecution\'s evidence was that the appellant, being the driver of the motor vehicle in which he was a passenger was responsible not only for the safety of his passengers including the complainant, but also over the safety of their accompanied luggage, and since his luggage was partially lost, the appellant was responsible, and on that claim, the learned trial magistrate convicted the appellant and placed him upon a two year probation period, and ordered him to refund the value of the lost/stolen goods to the complainant.

The complainant\'s (PW1) claim was that when she boarded the Mololine motor vehicle registration number KAT 449D she placed her luggage with the driver under the seats on the passenger side, and sat 3 rows from the driver, and that other passengers boarded and no luggage was put in the boot of the vehicle, and then left Nairobi and arrived in Nakuru safely. At Nakuru when the boot was opened, the manila bag in which the complaint\'s goods were, was found slit open and goods removed. The complainant therefore charged that the appellant, being the person solely in charge of the matatu was the one to blame.

The evidence led by the prosecution however showed that before the matatu left Nairobi, it was the subject of a search at Central Police Station Nairobi. There was also evidence that passengers alighted along the route, at Naivasha, Gilgil and Kiondo BP Station in Nakuru. The loss was discovered at Mololine-Elburgon Stage when the complainant alighted - away from the main Mololine stage where she normally alights. It is at the Molo line - Elburgon Stage when the boot was opened, and she was informed that the bags were empty.

To prove that the appellant had stolen the goods, the prosecution had to show that the appellant was the person who took away the goods fraudulently in terms of Section 268(1) & (2) of the Penal Code. There was no evidence that the appellant took away the complainant\'s goods. Unlike in airlines, where a passenger\'s luggage is searched before being checked in, and put away in a conveyor belt to the aircraft, there is no such procedure in matatu vehicle. A passenger simply hands in her/his luggage to the conductor or driver *(as in this case)* who tacks it away in the boot of the vehicle or other available space under the seats of the vehicle, all the time, under the watchful eye of the passenger, and the passenger then takes the next available seat. As there are no name tags to the luggage, the passenger is usually alert whenever other passengers alight upon reaching their destinations, so that her/his luggage is not mistakenly taken away by the alighting passenger.

In this case, it was PW1\'s *(the complainant)* evidence that the boot of the vehicle *(where she had placed her luggage)* was not opened at any of the stages - Naivasha, Gilgil or Kiondo *(where other passengers alighted)* until the vehicle\'s final destination at Mololine-Elburgon Stage where she herself alighted and found some of the contents of her luggage missing.

Can the complainant say with any degree of certainty that it was the appellant who removed some of her goods? Her own evidence did not show so. The driver never opened the boot or luggage area of the vehicle until upon their arrival at Mololine - Elburgon Stage, a stage, she had never alighted at before. Could this alone show that the appellant is the person who removed her goods? Her own evidence showed that there was light in the area, and all would have witnessed the appellant remove the goods.

What I think influenced the learned trial magistrate\'s mind was the evidence of PW2, the investigating officer, who testified that the appellant came with some of the goods *(PExh. 15),* the following day, and that the complainant declined to accept them. It is unclear where these items came from, they may well have fallen from the bag when it was ripped open. Who could have ripped the bag open once placed under the seat of the matatu at the back? As the driver sits at the front of the vehicle (driving seat), he cannot be expected to steer the vehicle, and at the same time rip open the luggage at the back of the vehicle. The indication is that the bags were ripped open by those sitting close to them, and not the driver. Whatever the driver recovered may have been dropped at the back of the vehicle. It is a pity the prosecution did not explore this aspect.

It is of course correct as DW2, the appellant\'s manager testified, that in the absence of a conductor, the driver is the over-all in-charge of the vehicle, the passengers and their luggage. But that is an argument which only goes to support a civil action, not a criminal prosecution the success of which depends upon strict proof. This, the prosecution failed to do, and learned State Counsel was well advised to concede to the appeal.

In the premises therefore the appeal is allowed, the conviction is quashed and sentence set aside.

There shall be orders accordingly.

Dated, signed and delivered at Nakuru this 8th day of June, 2012

M. J. ANYARA EMUKULE
JUDGE