



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT BUSIA**

**CRIMINAL APPEAL 29 OF 2012**

**JAMES GITHAIGA .....APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

**(Arising out of the conviction of W.N. Nyarima C.M. and the sentence of B.A. Ojoo P.M. delivered on 23<sup>rd</sup> March 2012 in Busia S.P.M. C.Cr. Case No.18 of 2009)**

**J U D G M E N T**

James Githaiga, the appellant herein was charged, with another, with the offence of **stealing goods on transit** contrary to **section 279 (c)** of the **Penal Code**. The particulars of the offence were that on diverse dates between 21<sup>st</sup> and 26<sup>th</sup> December 2008, the appellant stole 350 bags of dry beans each weighing 120kgs valued at kshs.2.1 million, the property of Alice Ikolomi Thurania from Mercedes Benz Actros bearing registration No.KAZ 801C and Trailer No.ZC 5256 while the goods were on transit from Busia to Nairobi. The appellant was further charged with the offence of **destroying evidence** contrary to **Section 116** of the **Penal Code**. The particulars of the offence were that on 21<sup>st</sup> January 2009 at Embakasi in Nairobi, the appellant knowing that truck registration No.KBB 236F was required as evidence in judicial proceedings, willfully changed its colour to make it incapable of identification with the intent of preventing it from being used in evidence. The appellant pleaded not guilty to the charges. After full trial, the appellant was convicted of both counts. In respect of the first count, he was fined kshs.500,000/= or in default he was to serve one(1) year imprisonment. In respect of the second count, he was fined kshs.100,000/= or in default he was to serve one (1) year imprisonment. The appellant was aggrieved by his conviction and sentence and duly filed an appeal to this court.

In his petition of appeal, the appellant raised six (6) grounds of appeal challenging the decision of the trial magistrate to convict him. He was aggrieved that he had been convicted on the basis of the evidence adduced by the prosecution that did not prove his guilt to the required standard of proof. He faulted the trial magistrate for failing to take into account all the relevant facts and evidence before arriving at the said decision. He took issue with the fact that the trial magistrate had based his decision on inadmissible evidence. He was aggrieved that the trial magistrate had shifted the burden of proof contrary to the law and thereby found the appellant guilty. He faulted the trial magistrate for sentencing him to serve an illegal sentence. For the above reasons, the appellant urged the court to allow the appeal, quash his conviction and set aside the sentence that was imposed on him.

During the hearing of the appeal, this court heard oral rival submission made by Mr. Ocharo for the appellant and by Mr. Obiri for the State. Whereas Mr. Ocharo made submission urging this court to find that the prosecution had failed to establish its case to the required standard of proof, Mr. Obiri submitted that the prosecution had adduced evidence which established the guilt of the appellant on the two charges

under the **Penal Code**.

This court will review the arguments made after briefly setting out the facts of the case. The appellant was at the material time the managing director of a transport company known as Kianjambaa transporters limited. The company owned several prime movers, including a lorry registration No.KBB 236F make Mercedes Benz Actros, red in colour. The lorry hauled a trailer registration No.ZC 7887 (hereinafter referred to as the suit lorry). The complainant, Alice Ikolomi Thurania is a businesswoman dealing in the sale of cereals in Kenya and the neighbouring countries of Uganda and Tanzania. On 19<sup>th</sup> December 2008, the complainant obtained an order to supply 350 bags of beans to a customer in Nairobi. The complainant activated her contacts in Uganda, and was able to secure the said bags of beans. The complainant testified that she paid the sum of Kshs.2.1 million for the said bags of beans. She requested her agent by the name Aboo, then residing in Busia Uganda to secure a motor vehicle to transport the beans from Busia to Nairobi. The driver of the suit lorry by the name Bernard NgugiMwangi was contacted. The said driver, was the appellant's co-accused in the trial before the subordinate court. At the time, the said driver had been instructed by the appellant to transport pipes to Sotik and Keroka.

According to PW2 MarcelusKanyingi (he had been hired as a temporary turn-boy of the suit lorry by the driver), the journey from Nairobi to Sotik and Keroka was uneventful. PW2 testified that he had been hired specifically to be the turn-boy in the lorry as it transported the pipes from Nairobi to Keroka. He recalled that after they had unloaded the pipes, the driver of the lorry requested him to accompany him to Busia where he had secured work to transport goods to Nairobi. PW2 reluctantly acceded to this request. They travelled from Keroka, slept at Kisumu before they arrived at Busia on 20<sup>th</sup> December 2008. PW2 testified that the lorry was driven across the border to Uganda where 350 bags of beans were loaded on the lorry. He recalled the bags of beans were marked with letters "AD". They then crossed over to Kenya after which they commenced their journey to Nairobi. He recalled that the lorry was driven through Bungoma and then to Eldoret.

At Turbo near Eldoret, the driver stopped the lorry and offloaded 100 bags of beans. It was while they were at Turbo that PW2 noticed that the number plates of the lorry had been changed. Instead of the previous numbers, the lorry now had the registration numbers KAZ 801C. When PW2 inquired from the driver why the change of number plates, the driver warned him off and told him to mind his business. PW2 recalled that when they reached Nakuru, the driver unloaded one bag of beans and left it with his sister. At Lanet Nakuru, PW2 recalled that the driver spoke to the occupants of motor vehicle registration number KBD 339Y. This motor vehicle was established to belong to the appellant by other prosecution witnesses and the appellant himself in his defence. PW2 was dropped at Uthiru and was paid the agreed fees of Kshs.5,000/=. PW2 recalled that at the time the lorry was carrying 249 bags of beans.

Meanwhile, between the 21<sup>st</sup> and 23<sup>rd</sup> December 2008, the complainant was communicating with the driver of the lorry with a view to establishing his whereabouts. The complainant testified that after a while, the driver of the lorry stopped communicating with him and switched off his mobile phone. The bags of beans were not delivered to its destination. The complainant became apprehensive and made a report to the police. This led to the arrest of, among others, the appellant, the driver of the lorry and the broker who introduced the agent of the complainant to the driver of the lorry. During investigations, the complainant met with the appellant at the Central police station in Nairobi. At first, the appellant was willing to assist the complainant recover the stolen bags of beans. However, after a while, it became apparent to the complainant that the appellant was unwilling to offer any help to her.

On investigation, the police were able to trace the lorry at a garage in Embakasi owned by a company called Super Fabricators Ltd.PW18 Peter MwangiWanjohi was at the material time the managing director of the company. According to PW18, he had known the appellant for a period of more than six (6) years prior to the material date. He recalled that on 21<sup>st</sup> January 2009, the appellant instructed him to change the colour of the suit lorry from red to white. The appellant did not tell him the reason why he wanted the colour changed. He was only told that the motor vehicle should be painted so that the same could be made ready for inspection. It was instructive that at this particular time, the appellant had been made aware that the police had commenced investigations regarding the disappearance of the 350 bags of beans. The police were later able to trace the lorry and had it produced in evidence.

The prosecution adduced evidence which established that the driver of the lorry deliberately changed the numbers of the lorry, including its insurance cover, purposely to conceal the original registration of the lorry. The complainant testified that despite all efforts made by the police, only one (1) bag of beans was recovered. The other bags of beans were not recovered.

When the appellant was put on his defence he denied the charges facing him. In particular, he denied stealing the bags of beans. He also denied the charge that he had deliberately changed the colours of the lorry with the intention of destroying evidence. His explanation was that he wanted to paint the lorry so that he could make it ready for inspection.

This being a first appeal, this court is required to re-consider and to re-evaluate the evidence adduced before the trial court, in light of the grounds of appeal and the submission made in this appeal, and reach its own independent determination whether or not to uphold the conviction of the appellant. In doing so, this court is required to put in mind the fact that it neither saw nor heard the witnesses as they testified and therefore cannot be expected to make any determination regarding the demeanour of witnesses (see **Okeno vs. Republic [1972]KLR 32**). The issue for determination by this court is whether the prosecution established its case on the charge of theft and destruction of evidence to the required standard of proof beyond any reasonable doubt.

This court has re-evaluated the facts of this case. **Section 268** of the **Penal Code** defines what constitutes the offence of **stealing**. **Section 268 (1)** states as follows:

*“A person who fraudulently and without 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”.*

Under **Section 268 (2)**, a person is said to have fraudulently converted a property of another, if that person permanently intends to deprive the general or special owner of the thing that has been stolen. **Section 279(c)** of the **Penal Code** defines a special category of theft which includes theft of goods on transit.

In the present appeal, it was the prosecution’s case that the appellant stole the 350 bags of beans while on transit from Busia to Nairobi. The prosecution adduced evidence which established that a lorry belonging to a company, which the appellant was the managing director, was hired by the complainant to transport the 350 bags of beans from Busia to Nairobi. From the testimony of PW2, it was clear that, instead of the said bags of beans being delivered to the complainant, the same was diverted and taken elsewhere. It was in fact stolen. Although the actual theft was done by the driver of the lorry, it was apparent from the testimony of PW2 that the appellant was aware of the same. This was due to the fact that the appellant met with the driver of the lorry at Nakuru while the lorry was transporting the remainder of the beans to Nairobi.

The appellant’s behaviour after being contacted by the police clearly showed that he was intent on permanently depriving the complainant of the ownership of the said 350 bags of beans. As the owner of the lorry, the appellant did not show concern that is expected of an owner of a motor vehicle which has been involved in disappearance of goods that it was transporting. The appellant knowing that the police were looking for the lorry for the purposes of investigation, instructed PW18 to change the colour of the lorry so as to conceal its true identity from the investigators. The prosecution also established that the appellant was aware or in fact instigated the change of number plates of the lorry to conceal its true identity. This is due to the fact that the number plates which were in possession of the driver of the lorry were in fact number plates of a lorry previously owned by the company to which the appellant was the managing director which lorry had been involved in an accident and was written off.

These pieces of evidence, taken into totality, and the fact that the appellant was unwilling to co-operate with the complainant to trace the whereabouts of the stolen bags of beans, established, to the required standard of proof beyond any reasonable doubt, that the appellant participated in the theft of 350 bags of beans as an accomplice of the driver. Further, the appellant sought to conceal evidence and destroy it

when he gave instructions for the colour of the lorry to be changed from red to white. That charge too, was proved to the required standard of proof beyond any reasonable doubt. The evidence of the appellant adduced in his defence did not dent the otherwise strong evidence adduced by the prosecution against him. That evidence was meant to exonerate him from the offence which he committed. The same is not worthy of credit.

The upshot to of the above reasons is that the appeal filed by the appellant lacks merit and is hereby dismissed. The conviction of the appellant is upheld. The appellant was sentenced to serve a very lenient sentence. This is in view of the value of the property that was stolen. However, this court will not interfere with the sentence because the prosecution did not cross appeal for the said sentence to be enhanced. This court is of the view that this is one case where the court should have ordered the appellant to compensate the complainant. However, this court cannot interfere with the sentence in the circumstances. It is so ordered.

**DATED AT BUSIA THIS 27<sup>TH</sup> DAY OF JULY 2012.**

**L. KIMARU**  
**J U D G E**