**REPUBLIC OF KENYA**

**IN THE HIGH OF KENYA AT NAKURU**

**Criminal Appeal 50 of 2010**

**STEPHEN MWANGI NJERI.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

(Being an appeal from original conviction and sentence in Criminal case No. 2068/2009 by Hon. Mulwa PM, Naivasha dated 26th January, 2010)

**JUDGMENT**

The appellant herein, Stephen Mwangi Njeri, was charged with eight (8) counts of the offence of **theft of motor vehicle parts** contrary to **Section 279 (g)** of the **Penal Code** and a ninth count of **malicious damage to property** contrary to **Section 339 (1)** of the **Penal Code**. The appellant also faced an alternative charge of **neglect to prevent the commission of a felony** contrary to **Section 392** as read with **Section 36** of the **Penal Code.**

The trial court after considering the evidence before it found the appellant guilty of counts 1, 2, 3, 4 5 and 6 (theft of motor vehicle parts) convicted and sentenced him to seven years imprisonment in each of the six (6) counts.

Aggrieved by both the conviction and sentence, the appellant preferred an appeal to this court on eleven (11) grounds which can be reduced to six (6), as follows:

1. that the learned trial magistrate erred both in law and fact by convicting him on insufficient evidence;

2. that the learned trial magistrate erred in law and fact by failing to appreciate that he (appellant) was not properly identified;

3. that the learned trial magistrate erred in law by failing to consider the evidence adduced before it in its entirety;

4. that the learned trial magistrate erred both in law and fact by failing to consider the appellant\'s defence;

5. that the trial court erred both in law and fact by taking into account extraneous matters;

6. that the trial court erred in law by failing to consider the appellant\'s mitigation hence passing a harsh sentence in the circumstances.

In arguing the appeal, learned counsel for the appellant submitted that the circumstantial evidence

adduced before the trial court did not lead to the conclusion that the appellant was the thief. He contended that there was no evidence that at the time the appellant reported for duty the parts were in the premises and that there was no evidence to link the appellant to the recovered cap and the footprints. He also submitted that the trial court\'s theory of an elaborate plan had no basis and that the sentence passed by the trial court was excessive.

Learned counsel for the respondent conceded that the evidence did not irresistably point to the appellant as either having been involved in the theft or being the thief. He, however, submitted that the evidence was enough to prove the alternative charge of neglect to prevent a felony. He wondered how six (6) trucks could be vandalized without the appellant noticing.

This being a first appeal, it is the duty of this court to consider and re-evaluate the evidence presented before the lower court in order to arrive at its own independent conclusion, bearing in mind that it neither heard nor saw the witnesses.

A total of seven (7) prosecution witnesses testified in the case before the lower court to the effect that when PW1, Iftkhar Ahmed, arrived at his place of work at about 8.30 a.m on 8th August 2009, he noticed that some motor vehicles had being tampered with and some of their parts notably computer plates, tyres and batteries were missing. He also noticed that part of the perimeter fence had been cut. He reported the matter at Gilgil Police Station. He identified the appellant as the guard on duty on the night of the theft.

On that day, P.W.3, Margaret Wambui Mwangi, found a cap that resembled the ones worn by security guards. near the fence of a neighbour\'s shamba. She collected it and took it to the security men at the gate. She, however, did not know whose it was. The drivers of the affected motor vehicles described the stolen parts. P.W.7, PC Marcos Mulwa Mbithi, commenced investigations by interogating the appellant as he suspected that he had been involved in the theft, for he did not raise alarm and also because he had no cap. There were shoe solemarks at the scene of crime made by boots resembling those worn by the appellant.

In his defence the appellant denied committing the offence and stated that he had been promised by his area manager that other guards would be sent to assist him but the said guards were never sent; that he was guarding the premises alone that night; that there was a black-out from 10pm to 3 am and that he did not hear anything unusual.

Upon evaluation of this evidence, I find as a fact that there was theft of motor vehicle parts at the complainant\'s premises; that the theft occured at night when the appellant was the guard on duty. The only issue for determination is whether there was sufficient evidence to prove that the appellant was indeed the person who committed the offence.

From the evidence before the trial court, it is clear that there was no eye witness to the offence. It is also clear that none of the stolen parts of the motor vehicles was found with the appellant. The prosecution evidence was based on circumstantial evidence to the effect that the appellant was guarding the premises when the items in question were stolen; that marks suspected to have been made by boots like those worn by him were seen around the area where the theft occurred and finally that a cap suspected to be his was also recovered.

It is now settled that a conviction can be based on circumstantial evidence if the evidence irresistably points to the guilty of the accused person and when there are no co-existing factors to weaken or destroy the inference of that guilt. See **Republic** V. **Kipkering Arap Koske & Another** (1949) 1 EACA 135 and **Simeon Musoke** V. **Republic** (1958) EA 715.

Although the appellant was on duty when the items were stolen, that *per se* does not make him culpable. The burden was throughout on the prosecution to prove that the appellant commtted the offence.

There is evidence that it was the appellant\'s first time to work at the premises. There is also evidence that

guards who had previously worked at the premises had been dismissed before the appellant was deployed. The premises occupied nearly 1-1½ acres. The appellant was being assisted by a turn boy, an employee of the complainant company, called Chacha, who was not called by the prosecution. It is also important to note that the appellant did not disappear following the theft.

From these factors and circumstances, it cannot be said that the evidence irresistably pointed to the guilt of the appellant. The evidence also disclose the presence of co-existing factors which show that there was opportunity for third parties to commit the offence, namely the gurard who had been dismissed, Chacha and the power block-out. Nothing special was shown about the bootmarks or the cap. Theyt were not conclusively linked with the appellant.

I therefore find that there was no sufficient evidence to prove the offence of theft as against the appellant. Consequently, I allow the appeal, quash the conviction in respect of the six (6) counts. The sentences in respect thereof are set aside.

Regarding the alternative charge of neglect to prevent commission of felony contrary to **Section 392** of the **Penal Code** as read with **Section 36** of the **Penal Code**, I am satisfied that the appellant was not alert and vigilant, although the area was vast. The only reasonable explanation for his failure to notice or detect the theft is that he either left the premises unguarded or slept on the job. This in my view, is enough to establish the offence of neglect to prevent commission of felony. Consequently, I find the appellant guilty, convict him of that offence and sentence him to serve two (2) years imprisonment the period so far served being taken into account.

**Dated, Signed and Delivered at Nakuru this 3rd day of August, 2012.**

**W. OUKO**
**JUDGE**