REPUBLIC OF KENYA

High Court at Machakos

Criminal Appeal 40 of 2011

EDWARD BARASA ……..……..APPELLANT

VERSUS

REPUBLIC ……..……..…RESPONDENT

(Being an appeal from the original conviction and sentence in Kajiado Senior Principal Magistrate's Court Criminal Case No. 898/2006 by Hon. W.N. Kaberia, SRM on 11/2/2011)

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JUDGMENT

The appellant, with 2 others were in the first count charged with stealing by servant contrary to section 281 of the Penal Code. The particulars were that on diverse dates between 27th April, 2006 and 3rd May 2006 at Namanga Keopoint Petrol Station in Kajiado District within the Rift Valley Province being servants to **Godfrey Njuho Wambaa** stole from the said **Godfrey Njuho Wambaa** Kshs. 526,220/= the property of the said **Goffrey Njuho Wambaa.**

In the 2nd count, the appellant was charged with stealing by servant contrary to section 281 of the Penal Code. The particulars of the charge were that on 3rd May 2006 at Namanga Drugs House in Kajiado District within the Rift Valley Province being a servant to **Godfrey Njuho Wambaa** stole cash Kshs. 680,656/= the property of the said **Godfrey Njuho Wambaa.**

In the third count, the co-accused were charged with stealing contrary to section 275 of the Penal Code. The particulars were that on 4th May, 2006 at Namanga Keropoint Petrol Station in Kajiado, District within the Rift valley Province, they jointly stole Tshs. 980,000/= and Kshs. 2000/= respectively, the property **of Godfrey Njuho Wambaa.** In the alternative they were charged with handling stolen goods contrary to section 322(1) of the Penal Code. The particulars of the charge being that on 4th May, 2006 at Namanga Township in Kajiado District within the Rift Valley Province otherwise that in the cause of stealing, jointly and dishonestly received or retained a sum of Kshs. 142,000/= and Tshs. 709,000/= knowing or having reason to believe it to be stolen money or unlawfully obtained.

The appellant and co-accused denied both counts and they were soon thereafter tried by the Senior Resident Magistrate's Court at Kajiado.

The prosecution called a total of nine (9) witnesses. Its case was fairly straight forward. The appellant was a former employee of **Godfrey Njuho Wambaa** (PW1), the complainant, at Keropoint Petrol Station and Namanga Drugs House while the co-accused were a mother in law and wife to the appellant respectively.

On 3rd May, 2006 at around 8.00am the complainant who was in Nairobi called **Mary Waithera Nyaga** (PW4) who was his employee at Namanga Drugs House and asked her to bank all the day's collections. At around 12.00 noon the manager KCB Kajiado branch called him inquiring whether his

businesses at Namanga would be banking any money that day and he answered in the affirmative. He then called PW4 and inquired if she had sent anybody to the bank and she confirmed that she had sent the appellant with Kshs. 680,565/= to bank at KCB Kajiado branch. The reason the money was being taken to Kajiado according to the prosecution witnesses and the appellant was because there was no bank at Namanga at the time. At around 5.00pm the manager KCB Kajiado branch called the complainant and informed him that no money had been deposited that day. The complainant tried to raise the appellant on his phone but he could not get through. The following day on the 4th May, 2006 he went to Namanga to find out what had really happened. On the way he passed through Kajiado Police Station to inquire whether any incident of robbery had been reported but there wasn't any. And at around 1.00pm, PW4 called him and informed him that the appellant had called her indicating that he had been kidnapped the previous day and taken to Ngong forest during which he was robbed of Kshs. 680,565/=. He had told her that he had just found his way out of the forest. PW4 gave him the cell phone number that the appellant had used to call her but when he went through, the call was answered by a girl who indicated that she was at Kibera and the appellant had left but would be returning soon. When he called it again it had been switched off. The appellant did not report back to work and was arrested in Nairobi on 6th June, 2006 by **Sgt Damaris Ombima(**PW7).

After the theft, PW1 enlisted the services of **Karungu Thuku Kubia**(PW9) an accountant who checked the books of accounts for Keropoint Petrol Station as well as Namanga Drugs House which revealed that between 27th April, 2006 and 3rd May 2006 the appellant had not accounted for a total of Kshs. 526,220/= which was sales from both businesses.

On her part, PW4 on 3rd May, 2006 after waiting for appellant to return in vain, went to look for him in his house with **Mr. Peter Njoroge** (PW5) but the 3rd co-accused who was the wife to the appellant whom they found at home had no idea where he was. They thereafter reported the incident to Namanga Police Station at around 8.00pm.

On 4th May, 2006 acting on a tip off from pump attendants at Keropoint Petrol Station, **P.C. Charles Nderitu** went to the appellant's house where he found his wife. Upon interrogating her, she admitted that she had some money and she led him to 2nd co-accused, and a mother in law to the appellant. Her house was within the town where he recovered Tshs.709,000 and Kshs. 142,000/=. The wife and mother in law admitted in their testimonies that indeed the money had been recovered from them but alleged that it was income from their salon, generator and DSTV businesses.

The appellant in his defence admitted that he was a pump attendant at Keropoint. He had though left employment with the complainant on 2nd May, 2006 and travelled to Kitale on the 3rd May, 2006. Therefore at the time he is alleged to have stolen from the complainant he had already left employment. He was otherwise engaged in supply of generator power to customers at a fee. His wife was running a salon and that he had left her some money when he left for Kitale on 3rd May, 2006. He totally denied stealing from PW1. On her part, the wife of the appellant who was the 3rd co-accused confirmed that the appellant left her with Kshs. 142,000/= and Tshs. 709,800 on the 3rd May 2006 when he went to Bungoma and she took it to her mother, 2nd co-accused because of security concerns given that her husband was away and they had been victims of robbery on previous occasions. She also confirmed that she operated a salon but did not have a bank account because there were no banks at Namanga at that time. She said she was making savings of between 50,000/= and 60,000/= from her salon business.

The mother in law denied stealing from the complainant. She said that on the 3rd May, 2006, the wife of the appellant brought her some money for safe keeping.

The learned magistrate having considered the evidence on record from both sides acquitted the appellant and co-accused in respect of count 1. In respect of count II the appellant was found guilty. His co-accused were also found guilty of the alternative count of handling stolen goods. The learned magistrate proceeded to sentence the appellant to 4 years imprisonment while the co-accused were sentenced to 2 years suspended sentence each.

The appellant was aggrieved by the conviction and sentence. Hence he preferred the instant appeal through **Messrs Simba & Simba Advocates.** In faulting his conviction and sentence, he advanced 6 grounds to wit:-

"1. ***The Learned magistrate erred in***

fact and in law in not finding that the prosecution had failed to prove the charges against the appellant beyond reasonable doubt.

2. ***The Learned magistrate failed to consider that the prosecution's evidence was largely unsubstantiated especially regarding the question of whether the appellant ever stole from the complainant.***

3. ***The learned magistrate erred in law and fact and misdirected himself by relying on insufficient and/or uncorroborated evidence in the proceedings in reaching his findings.***

4. ***The learned magistrate erred in law and fact and misdirected himself by failing to consider the essential ingredients of the offence alleged in reaching his findings***.

5. ***The learned magistrate further erred in not appreciating the conduct and the evidence of the appellant in the proceedings.***

6. ***The learned magistrate further erred in fact and in law in applying inappropriate principles in convicting the appellants and in the sentencing of the appellant herein***.

When the appeal came before me for hearing on 28th June, 2012, the appellant surprisingly opted to abandon the appeal on conviction. Instead he opted to pursue the appeal on sentence only. The State did not object to the decision of the appellant aforesaid. Accordingly, the court ordered that the appeal be limited to sentence only.

In support of his appeal on sentence, the appellant submitted that the sentence imposed was harsh and excessive. He was remorseful. He had served 1½ years of the prison term and felt that he had been sufficiently punished.

In response, **Mr. Mukofu,** Learned State Counsel opted to leave the matter to the court's wise counsel.

It has been said time and again that an appellate court would not interfere with the discretion exercised by trial court in imposing the sentence. However, it can only do so if the sentence imposed is illegal, manifestly harsh and excessive or where it is proved to the satisfaction of the trial court that in imposing the sentence the trial court took into account extraneous matters which it ought not to have or failed to take into account relevant matters that it ought to have.

The offence for which the appellant was convicted carries a maximum sentence of 7 years yet the appellant was sentenced to 4 years imprisonment. However, the appellant was a first offender. On the face of it, the sentence is manifestly harsh and excessive. There is also the also the issue of discrimination in the sentencing. Whereas his co-accused were given a suspended sentence of 2 years upon their conviction, the appellant was nonetheless given a custodial sentence. I appreciate that the learned magistrate felt that the appellant was the brain behind the sloth. But, that *perse* could have been the reason to impose such harsh and excessive sentence.

For all the foregoing reasons, I allow the appeal on sentence to the extent that I will commute the sentence to the term so far served. Accordingly, the appellant should be set at liberty forthwith unless otherwise lawfully held.

DATED, SIGNED and **DELIVERED** at **MACHAKOS** this **28TH** day of **SEPTEMBER 2012.**

ASIKE–MAKHANDIA
JUDGE