



REPUBLIC OF KENYA

High Court at Malindi

Criminal Appeal 66 of 2005

(From original conviction and in Criminal Case No. 259 of 2001 sentence of the Resident Magistrate's Court at Lamu before Hon. K.BIDALI-RM)

PETER DAVID MUNGAI.....APPELLANT

VERSUS

REPUBLICRESPONDENT

JUDGMENT

1. A brief background of this appeal is as follows: The Appellant filed two appeals viz Malindi HCCRA 29 of 2005 on 11/11/05 and Malindi HCCRA 66/05 the same year. He confused matters by referring to Malindi HCCRA 58/05 which was sought unsuccessfully. But from the records it appears that that was his 3rd appeal in the same matter, filed on 13/10/12. All three appeals arose from Lamu Criminal Case No. 239 of 2001. The Appellant filed no grounds in HCCRA 58/05. The other appeals were to be consolidated under the present Malindi HCCRA 66/05 which though filed out of time was regularised vide Miscellaneous Criminal Application No. 26 of 2006 on 15/9/06. 17 amended grounds of appeal were filed on 8/2/11 by leave of court.
2. The Appellant was charged in the Resident Magistrate's court at Lamu , with the offence of Stealing by servant contrary to section 281 of the Penal Code. The particulars of the charge were that on diverse dates between January 1999 and 4th June 2001 at unknown time at Mpeketoni Location in Lamu District within the Coast Province , being a servant to Sabir Twahir Sheikh Said of Mpeketoni Ginnery stole from the said Sabir Twahir Sheikh Said ginning machines spares and tools valued at Kshs. 739,715/-
3. He was charged also with 4 other counts as follows: On Count two he was charged with the offence of Stealing by servant contrary to section 281 of the Penal Code. The particulars of the charge were that on diverse dates between January 1999 and the 4th day of June 2001 at about 5.30 p.m at Mpeketoni Location in Lamu District within the Coast Province , being servants to Sabir Twahir Sheikh Said of Mpeketoni Ginnery, jointly stole from the said Sabir Twahir Sheikh Said forty litres of engine oil valued at Kshs. 2,500/-
4. On Count Three he was charged with the offence of being in possession of forged stamps contrary to section 352 (G) of the Penal Code. The particulars of the charge were that on the 5th day of June 2001 at Mpeketoni Location in Lamu District within the Coast Province , knowingly and without lawful excuse , had in his possession a forged stamp for TSS Grain Millers.
5. On Count Four he was charged with the offence of being in possession of forged stamps contrary to section 352 (G) of the Penal Code. The particulars of the charge were that on the 5th day of June 2001 at Mpeketoni Location in Lamu District within the Coast Province , knowingly and

without lawful excuse , had in his possession a forged stamp for Kenya Commercial Bank Mpeketoni.

6. On Count Five he was charged with the offence of being in possession of forged stamps contrary to section 352 (G) of the Penal Code. The particulars of the charge were that on the 5th day of June 2001 at Mpeketoni Location in Lamu District within the Coast Province , knowingly and without lawful excuse, had in his possession a forged stamp for National Bank of Kenya Moi Avenue. He was acquitted on this latter count.

7. At the conclusion of the trial the court found the Appellant guilty on count 1,2,3,and 4 convicted him for count 1- four years imprisonment, Count 2 -twelve months imprisonment, Count 3- two years imprisonment and Count 4- two years imprisonment. The sentences on count 2,3 and 4 were to run concurrently but consecutive to count 1. He was acquitted on count 5 . Aggrieved by the conviction and sentence he now appeals to this court.

8. As a court of first appeal I must re-evaluate the evidence and review the record of trial and make my own conclusions as laid down the landmark case of **Okeno v R 1972 EA 320**. The grounds contained in the amended Petition of appeal are as follows:-

1. *That the learned trial Magistrate erred in law and fact in not finding that the evidence of pw1, pw3, pw5 and others amounted to being inadmissible with respect to the alleged oil found hidden in the thicket.*

2. *That the trial magistrate erred in law and fact in not finding that the prosecution failed to produce essential witnesses in the alleged oil found.*

3. *The learned trial magistrate erred in law and fact by not finding that the prosecution witness pw1 failed to produce essential witnesses for the alleged spares theft valued at 739,715/=*

4. *The learned trial magistrate erred in law and fact by not finding that trial magistrate erred in law and fact identification/recognition of the alleged spare-parts(whether physical or documented)and the circumstances the evidence provided by the prosecution amounted to being inadmissible and unreliable.*

5. *The learned trial magistrate erred in law and fact in not finding that there was totally nothing to connect me with the first scene(i.e alleged oil find)*

6. *The learned trial magistrate erred in law and fact by not finding that the consignment of spare found in my residence during the search by the police belonged to me, and had nothing to do with Pw1.*

7. *The learned trial magistrate erred in law and fact by misdirecting himself and stage managing the prosecution case and putting his own theories which were never adduced before court.*

8. *The learned trial magistrate erred in law and fact in the preparations of the proceedings copy sent to appellant, by withholding and tampering with court proceedings.*

9. *The learned trial magistrate erred in law and fact by not finding that the alleged rubberstamp investigations were poorly conducted and that the witnesses had nothing to offer in the form of evidence.*

10. *The learned trial magistrate erred in law and fact when he released the consignment of the spares to pw1 even before trial was concluded.*

11. *The learned trial magistrate erred in law and fact in not finding that the prosecutions investigation into the alleged rubber stamps wee inconclusive and un-reliable. [sic]*

12. *The learned trial magistrate erred in law and fact by conducting an impromptu- court session in the absence of accused No. 1 to whom he had not served a court summon to attend court.*
13. *The learned trial magistrate erred in law and fact by not finding that the whole case (counts were never proved beyond reasonable doubt.*
14. *The learned trial magistrate erred in law and fact by not realizing that the prosecution was biased towards the accused no.1 and approached the case with a closed mind of guilty verdict on accused No. 1.*
15. *The learned trial magistrate erred in law and facts by not revealing the true contents of the submission that was tendered in by accused no.1 and thereby proving further that he was biased in passing evidence that had been adduced in court proceeding and also critical to the use of the constitutional law and international law as used by accused no.1.*
16. *The learned trial magistrate erred in law and fact by not finding that the Kenya police had no right whatsoever in confiscating my spares to which they carried out their own valuation and arrived at 739,115/= while the value is way over 3.5 million ksh. [sic]*
17. *The learned trial magistrate erred in law and fact when he signed away the property (spres) of condor enterprises and awarded it to Pw1 even though the case investigation were inconclusive.*

9. The prosecution case was that the appellant was employed as a store-man at Mpeketoni Ginnery. Pw1 stated that he found cans of oil and louvers outside the perimeter wall of the Mpeketoni Ginnery. He testified that the accused persons, including the Appellant, had been on duty and that the Appellant was the storeman. He further stated that he made a report to the police who then searched the house of the Appellant and recovered from there, spare parts worth over kshs. 700,000.00 some of which Pw1 could identify as belonging to the Mpeketoni Ginnery. Pw1 testified that the machines had missing parts which the Appellant previously always managed to obtain and supply from a shop by the name "Condo Enterprises" which shop Pw1 could not trace. He informed the court that the Appellant had told him of his plan to open his own ginnery but failed to explain to him why he kept the rubber- stamps in his possession and further that the Appellant had keys to the oil store. He stated that the fuel store was not broken into and suggested that the oil may have been removed after the door was opened.

10. Pw2 testified that that he was the purchasing officer of the TSS Grain Millers company a sister company of Mpeketoni Ginnery. He stated that he also used to purchase on behalf of Mpeketoni Ginnery. That the Appellant who was in charge of stores would requisition supplies and would travel to Mombasa to assist in the purchases. That the Appellant would suggest that they make purchases from Condo Enterprises to whom Pw2 issued cheques. He stated that a messenger from the said company once went over to pick a cheque from him and informed him that the director of Condo Enterprises was in Nairobi. Pw2 stated however that they could not trace their premises. He stated that the Stamp produced evidence was usually in his office and that the Secretary, General Manager or Chief Accountant had authority to have it and no one else. Pw3 informed Pw1 of the discovery of oil cans in an unusual place at the ginnery. That further he witnessed the recovery of many spare - parts from the Appellant's house. Pw4 testified that he observed on the material day at the store the Appellant was at the door of the workshop whilst one of the co-accused was pumping oil into a jerry-can held by the other co-accused, both of whom were fellow employees. That the jerry-cans recovered at the perimeter wall were the same cans he had seen.

11. Pw5 the Investigating officer, recovered spare-parts, cans of paint, cut-out switch in the Appellant's house which the Pw1 identified as belonging to the ginnery. That the Appellant did not have receipts for the items. He also found in his possession stamps belonging to KCB and National Banks and TSS. That the Appellant failed to give an explanation as to the reason he was in their possession. He testified that there was no company that existed by the name Condo Enterprises. Pw6 confirmed that one of the stamps was similar to the one used by Kenya Commercial Banks but that the particular one was a forgery.

12. In his defence, the Appellant testified after a search was carried out, no oil was found at his house, though ginnery machine spare-parts were found there. He testified that he was the H.O.D at Mpeketoni Ginnery. It was at his defence that he revealed that he was the Director of Condo Enterprises and alleged that the spareparts belonged to him.

13. Evidently most of the said grounds of appeal touch on adequacy of evidence and procedure at trial. In respect of Ground 12 in particular, the proceedings indicate that on 17/12/04 the case proceeded and PW5 who had traveled from Ahero to Lamu was heard. The Appellant had objected to the proceeding of the case as the hearing date had already been rescheduled to 14/1/05 on 10/12/04 and that he had not carried his documents. From the record it is clear that on 5/11/04 the hearing had been slated for 17/12/04 with a mention date given for 10/12/04. On the mention date his co-accused failed to get to court on time and a warrant of arrest was issued, and later lifted, and the hearing rescheduled to 14/1/05 as a result. The record also bears witness that on the 5/11/04 witness summons were issued to the PW5. The trial magistrate gave a ruling and considered all the aforesaid and the fact that Pw5 had been bonded to appear as a witness on 17/12/2004, that he put to mind the fact that pw5 had traveled from far and securing his presence was both difficult and expensive. The court also considered that all the accused persons, including the Appellant were present. The Appellant participated in the proceedings by posing questions during the cross-examination.

14. It is true that the court proceeded on a day other than the date rescheduled. It is also accurate that the hearing was 'impromptu' to the disadvantage of the Appellant, that is if the situation was to be considered in isolation. Hence in such a situation, the Appellant should have been allowed time to prepare as he had come for mention and he had indicated that he did not have his exhibits with him. Pw5 was a necessary and an important witness. The principle of right to fair trial should not be subjected to convenience of witnesses. He could have been summoned for the next day to enable Appellant prepare. Section 77 (1) of the repealed Constitution provided that, "if a person is charged with a criminal offence, then unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.

Section 77 (2) provides that: Every person who is charged with a criminal offence -

(c) shall be given adequate time and facilities for the preparation of his defence;

(d).....

(e) shall be afforded facilities to examine in person or by his legal representative the witnesses called by the prosecution before the court

15. The record shows that the thrust of pw5's evidence was the recovery of the 'stolen' items. The Appellant admitted freely during his defence that these were discovered at his house, but of course with a rider that they had not been stolen but belonged to him. I find that Pw5's evidence proceeding on that material date did not prejudice the Appellant's case.

16. Delving further into the proceedings they reveal that the trial commenced *denovo* upon the insistence of the Appellant despite the prosecution objecting and raising the issue of availability of witnesses. On 26/4/04, the trial court overruled the prosecution's objections and ordered that the matter commence *de novo*. Hence on the 15/10/04 the trial court allowed the prosecution to use photographs instead of physical exhibits, after the accused persons, including the Appellant, stated that they had no objection to this. It had been stated that the exhibits had been released to the Complainant before was set *de novo*. In light of all these, that is: the participation at trial, the difficulty in securing the witness and the matter having to start *de novo*, the Appellant cannot now raise the issue in ground 10 of grounds of appeal.

17. The Appellant was found guilty based on circumstantial evidence. It is to be noted that the Appellant was an employee of the Mpeketoni Ginnery working as a storeman. That some of the spare-parts that

were missing at the Mpeketoni Ginnery and a forged bank stamp was found at the his house. The Appellant was also not authorised to have any of the bank stamps found in his house and there was no proof that the said Condo Enterprises existed. Further, the recovered jerry-cans in which oil had been pumped into were identified as those Pw3 had seen the Appellant's co-accused pump oil while the Appellant stood at the door of the workshop. In addition, it was the Appellant who was in-charge of the store rooms that had the spare-parts and the oil. Finally, the Appellant would supply to the Mpeketoni Ginnery spare-parts from Condo Enterprises whose proof of existence was not established.

18. Circumstantial evidence must point towards the culpability of an accused person if it is to form the basis of a conviction. *The established principle in relying on circumstantial evidence to support the conviction of an accused person is as per Kimeu V Republic [2002] 1 KLR 756 at 763, eKLR that the evidence must point irresistibly at the accused's guilt to the exclusion of everybody else and that "before drawing the inference of the accused's guilt from circumstantial evidence the court must be sure that there are no other co-existing circumstances which would weaken or destroy the inference."* The court of appeal in Simon Muchino Thiaka V Republic [2006] eKLR held that *"The circumstances of the case were such that there could be no any other explanation than that it was the appellant who committed the offence."*

19. On Count one, the Appellant could not convincingly explain the possession of the assorted spare-parts some of which were identified as belonging to Mpeketoni Ginnery and whose genesis he was unable to justify. He was the person in-charge of the store-rooms at the ginnery and there was no proof of the existence of Condo Enterprises. What plausible explanation can be heard save that the evidence before the court indicates that the Appellant, a servant of Mpeketoni Ginnery, converted items belonging to the Mpeketoni Ginnery. The evidence on record pointed to an elaborate scheme of theft by the Appellant: who stole and pretended to procure some spares to his employer through a company he never revealed to be his until he was found in possession of spare-parts. He also admitted that he had done trade with Mpeketoni Ginnery through TSS Mombasa headquarters via Condo Enterprises. Pw2's assertion that cheques were issued to the said enterprises was therefore admitted. The learned trial magistrate did not therefore contrive his own theory as urged in ground 7 of the grounds of appeal.

20. On Count Two, pw3 testified that he had seen the Appellant's co-accused pump oil while the Appellant stood at the door. In addition, it was the Appellant who was in-charge of the store rooms that had the spare-parts and the oil. 2 twenty liter oil cans with oil were recovered at the perimeter wall of the Ginnery which Pw3 identified as the same cans he had seen the co-accused pump oil into. The Appellant was an accomplice to the offence. see the court of appeal decision in Anthony Kinyanjui Kimani V Republic [2011] eKLR where the court approved the definition of an accomplice Nasolo v Uganda [2003] 1 EA 181 where the court stated:

"On the authorities, there appears to be no one accepted formal definition of "accomplice". Only examples of who may be an accomplice are given. Whether a witness is an accomplice is, therefore, to be deduced from the facts of each case. In Davies of Director of Public Prosecutions (supra), the House of Lords said at 513:

'On the cases it would appear that the following persons, if called as witnesses for the prosecution have been treated as falling within the category: (i) on any view, persons who are participes criminis in respect of the actual crime charged, whether as principals or accessories before or after the fact (in felonies) or persons, committing, procuring or aiding and abetting (in case of misdemeanors). This is surely the natural and primary meaning of the term "accomplice....."

21. On count 3 & 4 the Appellant was found in possession of bank stamps and the stamp belonging to the sister company that only specified persons were authorised to have but not the Appellant. There was no explanation as to his being in possession thereof. The Appellant also complained that on Count 5 no plea was taken. The holding in Adan Vs Republic [1973] E.A. 445 established the principle that a plea must be unequivocal. However, as the trial court entered an acquittal on this, there is no need to be labour the point.

23. Upon re-evaluation of the evidence, I therefore find that the evidence was overwhelming in its support of the charges. The Appeal is therefore without merit and I uphold both the convictions and sentences.

Delivered and Signed this 12th November, 2012 at Malindi the presence of the Appellant, Mr. Kemo for the state, Court Clerk

C. W. Meoli

JUDGE