



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI

CRIMINAL APPEAL CASE NO. 208 OF 2009

ZACHARY MONARI MACDONER.....APPELLANT

VS

REPUBLIC RESPONDENT

(ARISING FROM NANYUKI P.M. CR. CASE NO. 860 OF 2005)

JUDGMENT

Zachary Monari Macdoner, the appellant herein and three others were tried on a charge of two counts. In the first count, they faced a charge of store breaking and committing a felony contrary to section 306 (a) of the Penal Code. In count 2, the duo i.e the appellant and another faced a charge of failing to prevent a felony contrary to S. 392 of the Penal Code. After undergoing a trial the quartet were convicted in count I and were sentenced to serve 36 months in prison. Being dissatisfied the appellant preferred this appeal.

On appeal, the appellant put forward the following grounds in his petition:

- 1. The Learned Senior Principal Magistrate erred in law and in fact in convicting and sentencing the appellant when the charge against the appellant was not proved beyond reasonable doubt.***
- 2. The Learned Senior Principal Magistrate erred in law and in fact in convicting and sentencing the appellant when the circumstances of the offence did not specifically point to the appellant and none else.***
- 3. The Learned Senior Principal Magistrate erred in law and in fact in convicting and sentencing the appellant on contradictory evidence by the prosecution.***
- 4. The Learned Senior Principal Magistrate erred in law and in fact in failing to properly analyse the evidence of witnesses and arrived at a wrong conclusion.***
- 5. The Learned Senior Principal Magistrate erred in law and in fact in shifting the burden of proof on the appellant.***
- 6. The Learned Senior Principal Magistrate erred in failing to consider the evidence of the appellant and in totally disregarding the accused Exhibit 1 which was very crucial to the case.***
- 7. The judgment of the learned Senior Principal Magistrate is against the weight of law and evidence.***

8. *The sentence imposed on the Learned Senior Principal Magistrate is harsh and excessive.*

9. *The Learned Principal Magistrate totally disregarded the evidence of the appellant.*

The case that was before the trial court was short and straightforward. The prosecution's case was supported by the evidence of six (6) witnesses. Christopher Otieno (P.W.1) told the trial court that on 22nd April 2005 he received a report of theft of farm produce having taken place at Homegrown Ibis Farm. P.W.1 said he mobilized the farm security to carry out a search at Kibera slums. It is said that at 2.00 p.m. motor vehicle registration No. KSD 408 passed the gate opened by one Eliud Ndunge (2nd accused) while in company of David Mucheke (4th accused). P.W.1 said he proceeded to close the gate from outside and took the keys and mobile from David Mucheke. P.W.1 inspected the aforesaid motor vehicle and on it he found 33 crates of runner beans. P.W.1 and his colleagues arrested Patrick Mugendi while one Kimotho fled. P.W.1 found out that 77 crates of runner beans had been removed from cold house i.e. 33 were already loaded on the aforesaid motor vehicle and 44 crates were placed next to it. Patrick Mugendi is said to have been employed to wash the beans and his duties were to end at 10.00 p.m. There was evidence that the door to the cold room had been opened to gain entry. It is said that Accused 2 i.e. Eliud Ndunge had opened the gate for the aforesaid motor vehicle while Zachary Monari (the appellant herein) was on duty at the Pack House. It is said that the appellant and his fellow watchmen were on guard duties on the night of 23rd April 2005 and were not allowed to authorize access of any motor vehicle into the compound. It is said they allowed motor vehicle registration No. KSD 408 into the compound. Gregory Musembi (P.W.2) said that his investigations had revealed that the appellant and his fellow guards who were in charge of security that night had colluded to steal the farm produce. The appellant is said to have been guarding the Pack House but he left and came back in the morning. The runner beans had been removed from the cold store in the Pack House without authority. The duty roster shows that the appellant was to guard Pack House from 6.00 p.m to 6.00 a.m. Anne Wanjira (P.W.3) told the trial court that she reported on duty on 23rd April 2005 where upon she found motor vehicle KSD 408 parked outside Pack House loaded with export runner beans. She confirmed that the appellant was one of the security guards during the night of 22nd April 2005. P.C. Benson Mungau (P.W.4), a police officer attached to Timau police station stated that he arrested the appellant on 23rd April 2005. P.W.4 stated that the appellant was one of those guards who guarded the store on the fateful night. P.W.4 formed the opinion that Patrick Mugendi Muchemi (1st accused) could not have gained access to the store without the knowledge of the appellant and his fellow guards. The investigation of P.W.4 revealed that no vehicle was allowed to gain access to the Pack House without prior permission from the manager.

When placed on his defence, the appellant told the trial court that he was employed to guard the Pack House. He further told the court that at 2.00 a.m. on 23rd April 2005 motor vehicle registration No. KSD 408 came into the Pack House with one Muriuki and three others. It is said they told him that they wanted to reject the produce. The appellant said P.W.1 arrived while they were loading those reject produce on the aforesaid motor vehicle and alleged that the runner beans had been stolen. He said he left for patrol and when he came back he found P.W.1 had left. He claimed he was implicated as a suspect for the theft the next day. He claimed the Pack House was closed and locked, hence there was no breakage.

Having set out in brief the history of this appeal, let me now determine the merits of the appeal. Though the appellant put forward a total of nine (9) grounds in his petition, the same may be summarized to four grounds namely:

- (i) *That the prosecution did not establish its case beyond reasonable doubt.***
- (ii) *That the trial magistrate shifted the burden of proof to the appellant.***
- (iii) *That trial magistrate did consider the appellant's defence.***
- (iv) *That the sentence is harsh and excessive.***

I propose to consider the aforesaid grounds separately. On the first ground it is alleged that the prosecution's case was not proved beyond reasonable doubt. It is the submission of Mr. Makura, learned Senior State Counsel that there was overwhelming evidence to sustain a conviction. I have re-evaluated the evidence. I have also considered the rival submissions. It should be noted that the appellant was convicted for the offence of store breaking and committing a felony contrary to section 306(a) of the Penal Code. The offences allegedly committed therein are store breaking and theft. There was evidence that the door to the store where the appellant guarded had a seal. It was found out that the seal to the main entrance was intact. It is said that the seal and locks were interfered with that night. It is alleged that the main door was under a seal but the inner imports door had been opened to gain entry into the cold store. The question is whether or not the store was broken into. There is evidence that the seal and locks were interfered with that night. The truth is that there was no breaking but the door was intentionally left open by the 1st accused yet he was supposed to have closed the same upon leaving duty at 6.00 p.m. The definition of the offence of breaking and entering is given under S. 303(1) of the Penal Code as follows:

“A person who breaks any part, whether external or internal, of a building or opens by unlocking pulling, pushing, lifting or any other means whatever any door, window, shutter cellar flap or other thing intended to close or cover an opening in a building, or an opening giving passage from one part of a building to another, is deemed to break the building.”

The evidence tendered shows that the appellant's co-accused left open the door leading to the cold store for easy access for purposes of removing the runner beans. There was evidence that the imports door had been opened to gain entry into the cold store. I am convinced the offence of breaking and entry as defined under S. 303 (1) was committed in this case. The appellant confirms in his defence that he participated in loading reject runner beans on motor vehicle registration No. KSD 408. The appellant claimed he allowed the aforesaid motor vehicle into the Pack House outside office hours because it had a delivery note. He admitted that under no circumstances was he allowed to allow any motor vehicle into the Pack House after working hours. I am satisfied that the appellant's conduct of allowing a motor entry into the pack house outside the office working hours and without the authority of the manager, meant he had intention of committing the offence of theft. He participated in removing the runner beans from the cold store and loaded the same on motor vehicle registration No. KSD 408. Were it not for the timely action by P.W.1, the aforesaid farm produce could have left the pack house compound. I am convinced the offence was proved to the required standard of beyond reasonable doubt. I will dismiss this ground.

The appellant has complained that the trial magistrate has shifted the burden of proof to the appellant. I have carefully considered the recorded evidence and I am unable to trace any iota of evidence indicating that the trial magistrate shifted the burden of proof to the appellant.

The third ground is to the effect that the trial magistrate did not consider the appellant's defence. To be fair to the trial magistrate, I think she took into consideration the appellant's defence but she did not believe the same. In law she was entitled to disbelieve the appellant's defence for good reasons which in this case she gave.

The last ground of appeal is to the effect that the sentence was harsh and excessive. The appellant was sentenced to five (5) years imprisonment. The nature of the charge denotes two offences. In the first limb, the offence of breaking and gaining entry into a store attracts a maximum sentence of seven years under S. 306(a) of the Penal Code. The second limb is theft. That offence attracts a maximum sentence of 3 years imprisonment under S. 275 of the Penal Code. If the sentences are directed to run concurrently then the appellant would have been required to serve 7 years. It has been stated that the appellant was a first offender. It was a bit too harsh to pronounce a sentence of 5 years for a first offender. I am convinced that the appellant's last ground must succeed.

In the end I see no merit in the appeal as against conviction. I am satisfied that the appellant was properly convicted on sound evidence. However the appeal as against sentence succeeds. Consequently

the appeal against conviction is dismissed. The appeal against sentence is allowed in that the sentence of five (5) years is set aside and is substituted with a sentence of 3 years for breaking and entry into a store and two (2) years for stealing. The sentences to run concurrently – from the date of sentence.

Dated and delivered this 11th Day of March 2011.

J.K. SERGON
JUDGE

In open court in the presence of the Appellant and Mr. Makura for the state.

J.K. SERGON
JUDGE