



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CRIMINAL APPEAL NO. 187 OF 2009

EPHANTUS WACHIRA NGANGA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal arising from the original conviction and sentence by J. Wambilyanga Resident Magistrate in the Nyeri Chief Magistrate's Criminal Case No. 116 of 2009 delivered on 10th September 2009 at Nanyuki)

JUDGMENT

EPHANTUS WACHIRA NG'ANG'A, the appellant herein, with two others namely: Samuel Kinoti Muga and Mutie Kisei, were jointly, tried on a charge of stealing by servant contrary to *Section 281* of the Penal Code. The trio also faced the alternative charge of neglecting to prevent commission of a felony contrary to *Section 391* of the Penal code. At the end of the trial, the trio were acquitted on the main count but convicted on the alternative count. They were each sentenced to pay a fine of Ksh.20,000/= in default to serve six(6) months imprisonment. Being dissatisfied, the Appellant filed this appeal.

On appeal, the Appellant put forward the following grounds on appeal:

- 1. That the trial magistrate erred in law by convicting me under section 215 of C.P.C. which does not create any offence and therefore the conviction is a nullity.***
- 2. That the trial magistrate erred in law by not finding that the main charge having been dismissed, the evidence on record could not sustain the alternative charge under section 392 of the Penal Code.***
- 3. That the trial magistrate erred in fact and in law by failing to find that the prosecution had not produced any evidence to prove that I knew that an offence was being committed and that I failed to take all reasonable steps to prevent it.***
- 4. That the prosecution failed to know why the 3rd night watchman and coffee storekeeper deed a plan to sack us and that is why they are not charged.***
- 5. That investigator erred by not proving where the 3rd night watchman and storekeeper and they are the ones who take over on 2nd February, 2009.***

Let me set out in brief the case that was before the trial court. It is the prosecution's case that on 3rd February 2009, **Julius Mwangi Macharia** (P.W.1), received a phone call from the factory supervisor

of Kirimara Farm that some coffee from Bin No. 3 had been stolen. P.W. 1 is said to have proceeded to the aforesaid factory where he found the Appellant and his co-accuseds. The Appellant with Samuel Kinoti Mugo were the night watchmen. Upon carrying out inspection P.W.1 said he discovered 5 bags of 50Kgs each were missing. A report was made to Nyeri Police Station. The Appellant and his co-accuseds being watchmen who guarded the factory at the material time were arrested as suspects. P.W.1 told the trial magistrate on cross-examination that he had no evidence as to how the handing over by the guards was done. **Lewi Ngugi Muchoki** (P.W.2) corroborated the evidence of P.W.1. he said that he visited the homes of the Appellant and Samuel Kinoti where he found them asleep. **Richard Thairu** (P.W.3 said he reported to work at 7.00 a.m. and found P.W.2 on 3rd February 2009 standing outside holding bin No. 3. P.W.2 informed P.W.3 of the loss of 5 bags of 50Kg each from the aforesaid bin. P.W.3 said that he left his place of work at 3.00 p.m. having locked the store. It is P.W.3's evidence that the theft took place after he left.

When placed on his defence, the Appellant stated that he reported to his place of work at 6.00 p.m. on 2nd February 2009 and was handed over when everything was okay. He said that he and Samuel Kinoti handed over to Mutie Kisei, the day watchman at 6.00 a.m. on 3rd February 2009 when everything was okay. The Appellant said that P.W.2 visited his house at 9.00 a.m. whereupon he learnt that some coffee had been stolen. He denied committing the offence. Upon considering the evidence, the learned Resident Magistrate came to the conclusion that the Appellant and his co-accused being the complainant's employees, were on duty at the time the offence was committed. The trial Magistrate also concluded that there was theft of coffee but there was no cogent evidence as to who stole the coffee. She found the Appellant and his co-accused guilty of the alternative charge.

When the appeal came up for hearing, Miss Ngalyuka, learned Senior State Counsel, conceded the appeal on the basis that there was no cogent evidence to sustain the conviction. I have re-evaluated the evidence on record. The main charge is that of stealing by servant contrary to *Section 281* of the Penal Code. The trial magistrate found that theft took place but did not attribute the same to the Appellant and his co-accuseds. In the second count the Appellant and his co-accused were found guilty of neglecting to prevent the commission of a felony contrary to *Section 392* of the Penal Code. The particulars of the offence are that on the nights of 2nd and 3rd February 2009, at Gamerock area in Nyeri District within Central Province being watchmen at Kirimara Coffee Factory and knowing that an offence of stealing was taking place, failed to use all reasonable means to prevent the commission of a felony namely stealing at the said Kirimara Coffee Factory. The question which must be answered is whether the evidence tendered established the particulars of the offence. After a careful re-consideration of the case, it is obvious that there was no evidence showing that the Appellant and his co-accused knew that theft was taking place. If they did not know that theft was taking place, then there is no way it can be said they failed to use reasonable means to prevent the felony. There was no evidence to show how the handing over took place between the day and night watchmen. It was difficult to pinpoint the time when the theft took place. I am convinced there was doubt which the trial magistrate should have been given in favour of the Appellant. I must state that Miss Ngalyuka rightly conceded the appeal. I will allow this appeal on the basis of grounds 2 and 3. The end result is that the appeal is allowed. The conviction is quashed and the sentence is set aside. If any fine had been paid, the same should be refunded to the Appellant forthwith and if the Appellant is serving a default sentence he should be released forthwith.

Dated and delivered at Nyeri this 1st day of April 2011.

J. K. SERGON
JUDGE

In open court in the presence of Makura for the State and the Appellant in person.

J.K. SERGON
JUDGE