



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 84 & 86 BOTH OF 2010

(From original conviction and sentence in Criminal Case No. 873 of 2009 of the Senior Resident Magistrate’s Court at Narok – W. N. NJAGE, SPM)

GERALD KIRIMA KIRIGIA.....1ST APPELLANT
STANLEY KARIUKI MURIITHI.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

Gerald Kirima Kirigia, Edwin Muriithi Maina, Stanley Kariuki Muriithi, Caroline Muthoni Nkanatha and Maurice Muthuri Josam (Accused 1-5) were charged before the Narok Senior Principal Magistrate’s Court in Criminal Case No. 873 of 2009 for the offences of theft and issuing bad cheques.

In Counts I and II, the five were charged that on 18th and 20th August 2009 at Narok Township they stole 257 bags of wheat worth Kshs.642,500 from **Moses Nchoe** and 194 bags of wheat worth Kshs.465,600 from **John Rakita Koini**. In the 3rd and 4th counts, Gerald Kirima Kirigia was charged alone for issuing a bad cheque to Saiyiale Ole Nkoyo and another to Benedict Saiyale Ole Nkoyo.

Gerald Kirima Kirigia and **Stanley Kariuki Muriithi** (Accused 1 and 3), the 1st and 2nd Appellants herein, were convicted of the offences of theft contrary to **Section 275 of the Penal Code**. On Count I, each was fined Kshs.500,000 in default 5 years imprisonment. On Count II, they were discharged under **Section 35(1) of the Penal Code** to be of good conduct for 12 months after completion of the sentence on Count I. The other three accused persons were acquitted of all the offences. The 1st Appellant was also acquitted of counts 3 and 4.

The appellants are aggrieved by both the conviction and sentence, and Gerald Kirima Kirigia filed **Criminal Appeal No. 86 of 2010**, while Stanley Kariuki filed **Criminal Appeal No. 84 of 2009**. The two appeals were consolidated to proceed as **Criminal Appeal No. 84 of 2009** with Gerald Kirigia as the 1st Appellant while Stanley Kariuki is the 2nd Appellant. The appellants filed grounds, supplementary grounds of appeal and written submissions in support of their appeal. The grounds can be summarized as follows:

- (1) That the charge sheet was defective;**

- (2) **The convictions were based on contradictory and insufficient evidence;**
- (3) **The Magistrate ignored the fact that the wheat was recovered from the store where it was delivered and further ignored the agreement with the complainant (PW3);**
- (4) **The Magistrate failed to consider the appellants' defences and failed to give reasons for the court's decision;**
- (5) **The sentence is severe and harsh and not commensurate with the offences committed;**
- (6) **That the court erred in releasing the recovered monies without establishing the owner;**
- (7) **That the court failed to take into account the fact that the appellants' constitutional rights under section 77 and 198 were breached, when since the hearing commenced on 9th September, 2009.**

Mr. Omutelema, counsel appearing for the state opposed the appeals on conviction. Counsel submitted that as per the evidence of PW1 (**Koini**) and 2 (**Nchoe**), the two appellants procured wheat from them but failed to pay for it. They deceived the owner of the wheat and fled from Narok but they were arrested at Limuru on their way to Nairobi. He submitted that the transactions of PW1 and 2 were supported by that of pW7 who was with PW1 at the time of the transaction. They met two appellants at the Tropical Hotel. On the sentence, Mr. Omutelema urged that the same is illegal because the maximum sentence under **Section 275 of the Penal Code** is 3 years but the Appellants were sentenced to Kshs.500,000 in default 5 years. Counsel considered the sentence to be excessive bearing in mind that the value of the stolen wheat was about Kshs.200,000/=.

The complainants in this case are **John Rakita Koini (PW1)** and **Moses Nchoe Pariken (PW2)**. Both the complainants are wheat farmers in Narok. They had wheat for sale. On 19/8/2009, some three people unknown to PW1 approached him to buy wheat. They took the wheat for weighing at National Cereals and Produce Board (**NCPB**) on 20.8.2009. The wheat was weighed and offloaded at a place called Total. A total of 194 bags weighing worth Kshs.2400/= each, were weighed and a total valued was Kshs.468,000 and kept in a store. PW1 had agreed to meet the 1st Appellant at National Bank as the money would be credited to the account within 30 minutes for payment. The Appellants pretended to be going to get more wheat, later failed to pick the phones and that is when PW1 noticed that he had been cornered. He went back to the store and found the wheat being loaded. It is **PW4 Benson Mwaniki** who had bought the wheat and they went to report to police with Nchoe (**PW2**). According to PW1, the two appellants were always together during the sale transactions. **PW2 Moses Nchoe Parisen** had taken his wheat to National Cereals and Produce Board, i.e. 73 bags but it was found to have high moisture. When he put it out to dry somebody, a broker introduced him to 1st Appellant as an interested buyer. The 1st Appellant then issued a cheque for Kshs.182,500 in the name of **Benedict Saiyale Nkoyo**, a brother to his employer. It was banked but was dishonoured for lack of funds. PW2 got more wheat for which the 1st Appellant who issued another cheque of Kshs.285,000 at National Bank. They went to Equity where the 1st Appellant told PW2 to wait as he attended to wheat being offloaded. The appellants walked away in a hurry. PW2 followed them, and saw them board two motor cycles and leave and he also boarded motor cycle and followed. He lost them and reported to the owner **Alex Nkoyo**.

PW2 went back to the store and found PW1 at the store also demanding payment. Police were called and they guarded the wheat at the stores as the Appellants were sought. He sold 257 bags of wheat with Kshs.642,500 but the cheques that were issued were both dishonoured. PW4 recalled that on 19.8.2009, the 2nd Appellant called him and claimed to have wheat for sale. He brought the wheat in company of other accused and PW2. He paid Kshs.257,000 for 112 bags. On 20/8/2009, the 2nd Appellant again offered 69 bags of wheat for which he paid. A lorry came with 191 bags of wheat and he paid Kshs.439,000 to the 2nd appellant. Thereafter, PW1 and 2 arrived alleging they had not been paid by the Appellants. Police chased the Appellants who were arrested on a road block in Limuru. **PW6 Simon Mwaniki** who worked as a storekeeper with PW4 corroborated PW4's evidence and said he witnessed PW4 pay the appellants but that later, some farmers came to claim payment.

Upon arrest, the applicants were found with Kshs.469,000. PW5 Cpl. Stephen Muleti in company of **PW3 PC Nzungi** arrested the applicants and recovered Kshs.467,000 (**469,000**) in a maroon jacket pocket and Kshs.11,000 in a pocket of one of the suspects. The 1st appellant admitted to having been found in possession that sum of money.

The first appellant gave a sworn statement in his defence in which he contended that he trades in buying and selling wheat amongst other businesses. He claimed to have met PW1 and 2 on 17/8/2009, who agreed to sell to him wheat and he was to pay by cheque. He issued 2 cheques on 18.8.2009 and 19.8.2009. He deposited the wheat with one Mwaniki who was to pay him on 23.8.2009. He got some Kshs.475,000 from **Nicholas Mureithi** in Nairobi but PW2 refused to collect the money and he promised to look for the whole sum. On his way to Nairobi, he was stopped at a road block at Mutarakwa and arrested. He denied that Mwaniki ever paid for the wheat he delivered to him and that the money recovered from him was his, which he got from one Nicholas Muriithi.

The 2nd Appellant also gave a sworn statement in which he claimed to be a broker in Cereals and on 17.8.2009, he met the first appellant who had wheat for sale and he took him to Mwaniki (**PW4**). PW4 and another 69 bags which made 112 bags. He was asked to go to Mwaniki's store with Accused 4 – Catherine to receive the money but Mwaniki had no say. Mwaniki acknowledged receipt of the wheat. He left with 1st Appellant for Nairobi to follow the person who had gone away with the 1st appellant's money. I have viewed and analysed the evidence on record.

I have summarized and evaluated both the prosecution and defence cases, submissions made by both sides. The 2nd Appellant alleged that his constitutional rights under Section 77 of the Constitution were violated in that the court did not state the language in which it conducted proceedings, and lastly that he was denied a right to call a witness. I have perused the court record and I noted that the fresh charges in the substituted charge were read to the appellants on 8.9.2009 and it is clearly indicated that the language of the court was Kiswahili. I do concede that on the next day, the court did not indicate the language it conducted the proceedings in. I believe that the appellants would have raised that issue with the court but there is no record of complaint by the Appellants. I do not believe that the court proceeded in a language that the appellants did not understand. They cross examined witnesses and gave sworn defences on which they were cross examined. It means they understood and took part in the court proceedings. In any event, the mere failure by the court to record the language of the court would not vitiate the whole proceedings or the decision of the court.

As regards the calling of witnesses, I have seen the record of 30.10.2009 when the court ruled that the appellants had a case to answer and they were called upon to defend themselves. The 1st Appellant indicated that he had no witness to call, but the 2nd Appellant indicated that he would call one **Charity Nyaguthi**. However, on 10.2.2010, when he was called upon to make his defence, he indicated that he had no witness to call. His allegation that he was denied his right to call a witness is untrue and unfounded.

It is common ground that the appellants were in Narok area as from about 17th to 20th August, 2009 involved in buying and selling of wheat. The appellants did concede to having received wheat from the two applicants and did not pay for it. They in turn sold it to **PW4 Benson Mwaniki Kamande** who claims to have paid the appellants for the wheat in cash. I have considered the evidence of both PW1 and 7 regarding the conduct of the appellants. After wheat was delivered at the store in Total, PW1 and 7 were told to meet the 1st Appellant at the National Bank, then the 1st Appellant excused himself to go and see his wife. Later, the 2nd Appellant left to call the 1st Appellant and he behaved like the Biblical crow of Noah's days, and did not return. Later, the complainant's calls to the 1st Appellant's mobile phone went unanswered and on PW1 going back to the store, the wheat had already been sold to PW4. The Appellants fled Narok and were intercepted in Limuru. The appellants' conduct speaks volumes. They tricked PW1 and 7 to give them wheat, they sold the wheat to PW4 and fled away from Narok. I do not believe their defences that they had sold the wheat to Mwaniki who had not paid them. Mwaniki had not had any interaction with PW1 and 7 over the wheat.

The same fate befell PW2. After delivering his wheat to the appellants, he was issued with a cheque that was dishonoured. The 1st Appellant issued another cheque but PW2 demanded cash. The Appellants excused themselves pretending to be going to offload wheat elsewhere but PW2 saw them walk away, board motor cycles and leave. He gave chase but lost them. It took police to intercept the appellants in Limuru. The appellants' conduct was not consistent with genuine businessmen dealing in buying and selling of wheat. PW4 was not involved in any deal with PW1 and 2 and they cannot blame PW4 for not paying them. The appellants received wheat, sold it and fled to Narok without paying for it..

I find, on the evidence on record that, the trial Magistrate correctly found that the Appellants stole wheat from PW1 and 2, sold it and fled. In his defence, the 1st appellant claimed that the money recovered on him was his own, having been sent to him by one Nicholas Muriithi. That defence came as an afterthought. Besides, he had not paid PW1 and 2 so why would he have been leaving Narok with that amount of money instead of paying the complainants? The 2nd appellant's defence too, was a mere denial and did not shake the plaintiff's case in any way. I have already considered his conduct earlier in this judgment. There were no contradictions in the prosecution case as alleged in the grounds of appeal and this court is satisfied that the conviction is sound and there is no good reason to interfere with it.

The appellants were convicted on Count I for the offence of theft. They were fined Kshs.500,000 in default 5 years imprisonment. The maximum sentence allowed under Section 275 is three years. The sentence meted out on the Appellants on Count I is therefore illegal and is hereby quashed and set aside. The court takes into account the fact that the wheat that was recovered was sold, all proceeds paid to the complainants and it is only the 4th witness who suffered some loss of about Kshs.200,000/=. The applicants have so far served one year and two months from 8th March 2010. The court notes that they had got a soft landing on Count II where the court discharged them under **Section 35(1) of the Penal Code**. In my judgment, the appeal succeeds on sentence and I sentence each appellant to pay a fine of Kshs.100,000 in default 15 months imprisonment. The sentence to run from the date of conviction, that is, 8th March 2010.

DATED and DELIVERED this 13th day of May, 2011.

R.P.V. WENDOH
JUDGE

PRESENT:

In person for Appellants
Mr. Omutelema for the State.
Kennedy – Court Clerk.