



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU
CRIMINAL APPEAL CASE NO. 259 OF 2009

MARTHA GACHERI APPELLANT

VERSUS

REPUBLIC RESPONDENT

(An appeal against the judgment of Hon. M.S.G. Khadambi in Meru Cr. Case No. 802 of 2009 delivered on 3.12.2009)

JUDGMENT

The appellant **Martha Gacheri** was convicted of one count of theft by servant contrary to Section 281 of the Penal Code. She was sentenced to 5 years imprisonment on 3rd December 2009. On the 17th December 2009, the High Court released the appellant on cash bail of Kshs. 10,000/=.

The appellant has challenged the conviction and sentence in the filed petition of appeal. There are five grounds of appeal as follows:-

- 1. That the trial magistrate erred in law and fact in convicting the appellant in a charge that had not been proved beyond reasonable doubt.***
- 2. That the trial magistrate erred in law and fact in convicting the appellant where the essential ingredients of the charge of stealing had not been proved by the prosecution.***
- 3. That the evidence on record was not sufficient to sustain a conviction.***
- 4. That the trial magistrate erred in law and fact by not considering the testimony of the defence witness which was credible.***
- 5. That without prejudice to the foregoing the sentence was exclusive.***

The facts of the case are that the complainant had four employees in his house and office. On 20th April 2009, he was not able to get his laptop. On a thorough search in his house, he discovered many other items missing including a gas cylinder Mobil/Oil Libya cylinder. A search in his employee's homes yielded results. The cylinder was recovered from the appellant's house.

The appellant denied the charge in his defence and produced a receipt of the cylinder as proof she had bought the cylinder found in her house. Mr. Kimathi urged the appeal on behalf of the appellant. He urged

that the prosecution did not prove the ownership of the cylinder produced in court. Secondly, Mr. Murithi urged that the court ignored the appellant's defence and rejected the receipt she produced as proof of purchase blaming lack of details on duplicate copy of the receipt on the appellant instead of the shopkeeper who invoiced. Counsel submitted that the sentence of 5 years imprisonment for theft of a cylinder worth Kshs. 3,600/= was on the high side. Mr. Mungai for the state opposed the appeal. Counsel urged that the prosecution proved its case on the required standard. Counsel urged that the receipt the appellant relied on had been stolen from the complainant's shop and so was fake. Further that the defence witness contradicted the appellant's defence by saying he was the one (DW5) who sold the cylinder to the appellant. Mr. Mungai urged court to find doctrine of recent possession applied to this case.

I have subjected the entire evidence adduced in this case to a fresh analysis and evaluation while having in mind that I neither saw nor heard the witnesses and giving due allowance. I am guided by **Okeno vs. Republic** which states as follows:-

“An appellant on first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination [Pandya vs. Republic (1957) EA 336] and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusion (Shantilal M. Ruwala v. Republic [1957] EA 570.) It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, (See Peters v. Sunday Post, [1958] EA 424.)”

I have considered submissions by both counsels in this case. I think that this appeal can be disposed off on the basis of one point. The burden lay on the prosecution to prove the charge against the appellant beyond any reasonable doubt. The appellant faced a charge of theft by servant contrary to Section 281 of Penal Code. The prosecution had to adduce evidence that the appellant stole the gas cylinder from the complainant. The prosecution has to prove ownership of the cylinder and taking which are two of the most important ingredients for the offence of stealing. The other ingredient is proof that the appellant was an employee of the complainant. This however is not disputed and so is not an issue.

I have considered the complainant's evidence. In regard to the identification of the gas cylinder the complainant stated:-

“I did see the recovered gas cylinder. It was mine. It is a Mobil/Oil Libya cylinder. It is before the court.”

The complainant's evidence is quite casual. It does not disclose on what basis the complainant claimed the cylinder to be his. There was no special or unique mark or identification that could have enabled the complainant to positively identify the gas cylinder as his. Merely saying, “*It was mine*” is not sufficient evidence of identification of the exhibit before the court.

The learned trial magistrate ought to have warned herself of the poor standard of identification of the gas cylinder employed by the prosecution in this case. The court could have taken judicial notice of the fact there must be thousands similar cylinders of the same type, shape, model and colour, as the one before court. Without special means of identifying the cylinder positively as the one that was stolen from the complainant, the complainant's evidence as it was presented in court was worthless. The prosecution did not prove its case against the appellant on the required standard of proof of beyond any reasonable doubt.

In the result, the appellant's appeal is allowed, conviction quashed and the sentence set aside.

I order the cash bail deposited by the appellant in satisfaction of the terms for bail pending appeal be refunded to her forthwith.

DATED, SIGNED AND DELIVERED AT MERU THIS 8TH DAY OF DECEMBER 2011.

**LESIT, J.
JUDGE**