



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CRIMINAL APPEAL NO. 266 OF 2010

(From Original Conviction and Sentence in Criminal Case No. 2440 of 2008 of the Chief Magistrate's Court at Mombasa: R. Kirui – P.M.)

DALTON MUNGA MUKOKA 1ST APPELLANT
DANCUN KUTO SIRYA..... 2ND APPELLANT

VERSUS

REPUBLIC RESPONDENT

JUDGEMENT

The two Appellants herein namely **DALTON MUNGA MUKOKA** (hereinafter referred to as the 1st Appellant) and **DUNCAN KUTO SIRYA** (hereinafter referred to as the 2nd Appellant) were jointly charged with others before the subordinate courts with the offence of **STEALING GOODS ON TRANSIT CONTRARY TO SECTION 297(c) OF THE PENAL CODE**. The particulars of the offence were that

“On the night of 4th and 5th August 2008, in Mombasa District within the Coast Province jointly with others not before court stole six hundred and forty (640) bags containing fertilizer valued at Kshs.2,000,000/- the property of MITCHELL COTTS FREIGHT LIMITED from a motor vehicle Registration No. KAE 921J Mercedes Benz while the said property was in trans from Kilindini port to Kasarani go-downs at Changamwe.”

Both Appellants entered a plea of ‘**not guilty**’ to the charge. Their trial commenced on 6th April 2009 at which trial the prosecution led by **CORPORAL KITUKU** called a total of four (4) witnesses in support of their case. **MR. ADHOCH**, Advocate represented both Appellants at this trial.

The prosecution case revolved around a consignment of 640 bags of fertilizer which was allegedly loaded onto a motor-vehicle Registration No. KAE 921J at the port which consignment was to be delivered to the Mitchell Cotts yards in Kasarani. It is alleged that the two Appellants and others diverted the fertilizer and instead delivered the same to a house in Mikindani.

At the close of the prosecution case both Appellants were ruled to have a case to answer and were placed on their defence. They both elected to give sworn statements in which each denied any involvement in the theft. On 18th May 2010 the learned trial magistrate delivered his judgement in which he convicted both Appellants of the offence of Stealing Goods in Transit and thereafter sentenced each to serve two (2) years imprisonment. Being dissatisfied with both the conviction and sentence the two Appellants filed this appeal.

MR. MAGOLO, learned counsel appeared for and argued the appeal on behalf of both Appellants whilst **MR. ONSERIO** learned State Counsel appeared for the Respondent State and urged this court to confirm both conviction and sentence as imposed by the lower court.

I have carefully perused the record of the trial before the lower court. I have also given careful consideration to the oral submissions made by both counsel. Mr. Magolo raised a few crucial points in his

submissions. Firstly counsel argued that the charge sheet as framed was fatally defective as it included an alteration made by hand which alteration had not been authenticated. On his part Mr. Onserio, whilst conceding that an alteration has been made to the charge sheet submits that this is a minor alteration which in no way affects the validity of the charge. I have looked at the charge sheet. It is a typed document in which the word **'trans'** have been added to the particulars using a black biro pen. This is clearly an alteration to the typed document. It is not clear what the term **'trans'** is supposed to mean. Mr. Onserio argues that it is an abbreviation for **'transit'**. This may well be so but no evidence of this is shown. **'trans'** can equally be an abbreviation for the words **'transport'** **'transcribe'** **'transcript'** **'transfix'** **'transfer'** or even **'transgress'**. At no time is it made clear exactly which word was intended to be added to these particulars. The court cannot assume that the intended word was **'transit'** and even if that assumption is made, there is a proper procedure for such amendments to be made which is by way of application to the court under S. 214(1) Criminal Procedure Code. No such application was made and no authority was given by the court to make this amendment. At the very least this alteration ought to have been signed or initialled to authenticate the same. As it stands we are left to wonder who made the alteration and at what point were the written words inserted. This indeed amounts to a serious defect in the charge sheet.

Counsel for the Appellants also argued that the prosecution failed to call all necessary evidence to prove their case. The consignment was offloaded at the port and was to be delivered to the Mitchell Cotts yard in Kasarani. No documentation was produced to show exactly how many bags of fertilizer left the port on vehicles headed to that destination. It is alleged that 600 (or was it 640) bags were stolen. In order to prove that such a theft did occur, the prosecution needs to prove what quantity of fertilizer existed **before** the theft and what quantity remained **after** such theft. This unfortunately was not done. **PW1 ATHANUS MWAKIO**, a security officer with Mitchell Cotts states in his evidence at page 20 line 21

"I did not see the missing goods or the lorry which transported it but the records show they went missing."

There **'records'** referred to by **PW1** were not produced in court as exhibits thus the court was unable to verify what he was saying. Likewise **PW3 SAMUEL LUAGULA MACHIO** the General Manager of **'Shiva Carriers Ltd'**, the company hired to transport the goods states at page 25 line 23

"I went through my tallies of all the trucks loaded at the port and those which arrived at the warehouse and found they tallied."

Once again the records **PW3** claims to have referred to were not produced as exhibits in court. Such documentary evidence was available and I am left to wonder why it was not produced to the lower court. Any serious investigator would not have failed to avail these documents to the court.

PW5 ANN AYO OKELELO referred in her evidence to one **'Habel'** whom she says approached her seeking a store to keep fertilizers in Mikindani. This **'Habel'** was a crucial and necessary witness but he was not called to testify. Once again no reason is given for this omission.

Lastly the Investigating Officer **PC HAJI** did not come to testify. This was despite the court having allowed several adjournments to obtain his presence in court. Whilst failure by an investigating officer to testify is not necessarily fatal to a prosecution case, in this case where several questions remain unanswered, his evidence was necessary to seal the loopholes in the prosecution case. I am left to wonder whether his failure to appear in court was deliberate.

On the whole I find the prosecution case to have been poorly investigated. The evidence adduced before the court was shallow and contained several anomalies. In my view the prosecution did not meet the required standard of proof. This coupled with the defective charge sheet leads me to allow this appeal. The conviction of the two Appellants is not safe and I do hereby quash the same. The subsequent two (2) year sentences are set aside. Each Appellant to be set at liberty forthwith unless they are otherwise lawfully held.

Dated and Delivered in Mombasa this 27th day of October 2010.

M. ODERO
JUDGE

Read in open court in the presence of:-
Mr. Magolo for Appellants
Mr. Muteti for State

M. ODERO
JUDGE
27/10/2010