



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CRIMINAL APPEAL NO. 53 OF 2009

(From Original Conviction and Sentence in Criminal Case No. 250 of 2008 of the Chief Magistrate’s Court at Mombasa: L. Mutende – S.P.M.)

ISIAH ONYANGO OLANDE APPELLANT
VERSUS
REPUBLIC RESPONDENT

JUDGEMENT

The Appellant **ISIAH ONYANGO OLANDE** has filed this appeal to challenge his conviction and sentence by the learned Senior Principal Magistrate sitting at Mombasa Law Courts. The Appellant was arraigned before the lower court on 10th February 2008 charged with **STEALING BY SERVANT CONTRARY TO SECTION 281 OF THE PENAL CODE**. The particulars of the charge were

“On the 7th day of January 2008 at Changamwe Industrial Area in Mombasa District within the Coast Province, jointly with others not before court being employed by Transami (K) Ltd as driver, stole four hundred and forty eight (448) bags of refined sugar valued at Kshs.864,475.20 which came into his possession by virtue of his employment.”

The appellant entered a plea of ‘not guilty’ and his trial commenced on 22nd May 2008, at which trial the prosecution led by **INSPECTOR MARY** called a total of eight (8) witnesses in support of their case.

Briefly the prosecution case revolved around two containers of sugar imported by Transami Kenya Limited. These containers were to be moved from the Port Reitz Container Depot by Consul Base Limited, the company which clears goods on behalf of Transami to the Transami yard along the Nairobi-Mombasa Highway. The evidence adduced was that the appellant Isaiah Olande was the driver employed by Consul Base to transport the two containers to the yard. On 8th November 2008 the appellant, driving a motor vehicle Registration KAN 753A, a semi-trailer made two trips on that evening carrying two containers serial numbers CCHU 339205/6 and on the second trip a container serial ZIMU 251240/6. **PW3 ABUBAKER MOHAMED** who works as a clerk with Transami told the court that on 8th January 2008 at 4.00 p.m. he was directed to strip the two containers. He did as directed. Whereas each container was supposed to have 430 bags of sugar this was not the case. **PW3** told the court that the first container he stripped had only 198 bags whilst the second one had only 214 bags. Therefore the total number of missing bags was 448. **PW3** reported this loss to his supervisor **JUSTUS MUHIA MWANGANGI, PW1** who after confirming the theft called in police who eventually arrested and charged the Appellant.

MR. WABUOTO Advocate appeared and argued the appeal on behalf of the Appellant whilst **MR. ONSERIO**, learned State Counsel conceded the appeal.

This being a court of first appeal I am mindful of my obligation to re-examine and re-evaluate the evidence adduced before the lower court [see **OKENO –VS- REPUBLIC [1972] E.A.L.R. 32**]. The fact that the Appellant was an employee of Transami is not in any doubt. In his sworn defence the Appellant

readily concedes that he was a driver employed by Transami Kenya Limited. It is alleged that the Appellant stole 448 bags of sugar. In order to prove that such a theft did actually occur the prosecution must satisfy the court that at the time the Appellant took delivery of the two containers they did in fact contain 448 bags of sugar. **PW2 CLEOPHAS JUSTUS**, a port clerk at Consul Base testified that it was he who handed over the containers to the Appellant for onward transmission to the Transami yard. All he is able to tell the court is that at the time the containers left they all had seals which were intact. At no time did he check to confirm the contents of each container. At page 8 line 14 **PW2** says

“The five trailers came to Consul Base that morning of the same day. They were a direct release, none of them was opened. If it is to be verified, it is opened but if it is to be released directly it is not interfered with.”

Further down the page whilst under cross-examination by **MR. OMONDI** counsel for the Appellant, **PW2** admits at line 19

“the containers were not opened at Consul Base. I don’t know how many bags of sugar were missing. The containers left the Consul Base intact. The seals were thereon”

Therefore all that **PW2** is able to tell the court is that upon delivery to the Appellant the containers were closed and with the seals intact. He however is totally unable to verify the contents of each container and he concedes that the containers were not opened by Consul Base (the carrier) in order to verify the contents. This remains a serious anomaly in the prosecution case.

Be that as it may, even if this court was to proceed on the assumption that the two containers did in fact contain 448 bags of sugar, certain inconsistencies still arise. It is alleged that having left Consul Base intact the containers arrived at the Transami yard having been tampered with. It is further alleged that the Appellant must have opened the containers in the course of his trip to the yard and removed the missing bags of sugar. **PW5 ALKAT MURANGA MWONGELI** a security guard with KK security services tells the court that he was on duty at the Transami yard on the evening of 7th January 2008 when the two containers were delivered. His evidence at page 12 line 6 was

“I was doing work of recording motor vehicles that bringing (sic) in the container. We record the container and its status, the trailer number and show when the truck leaves. We keep records”

Further down the page at line 15 he states

“at the depot I identified the seals were intact.”

PW5 the first person to see the containers when they came into the Transami yard confirms that all the seals were intact. Despite his evidence that it was his duty to check on the status (condition) of the container, he made no mention of having noticed any type of interference with the containers. Under cross-examination by Mr. Omondi for the Appellant **PW5** reiterates at page 12 line 19

“We confirm if the seals are intact – having checked physically then I let them leave”

The fact that **PW5** permitted the Appellant to leave after having made the delivery is clear evidence of the fact that at the point of delivery and first inspection at the Transami yard nothing was found to be amiss with the containers. If this was so then the Appellant could not have possibly opened the two containers during the trip from the port to the Transami yard.

PW1 gave evidence regarding the procedure used to secure the containers by their carrier. He states at page 5 line 7

“When goods arrive at the port, they are sealed by Consul Base. These are loaded containers. The Consul Base on being instructed by Transami, seals the containers, on arrival at the port the container will be having 2 seals. The Consul Base inserts a 3rd seal hence 3 in number.”

From this evidence it would be expected that when the container leaves the port and upon its arrival at the

Transami yard, it would be secured by three (3) seals, the third having been fixed by Consul Base. From the evidence of **PW2**, the containers left the port with 3 seals intact. At page 8 line 2 he emphatically states

“The containers had three (3) seals each”

PW3 ABUBAKER MUHAMED, a clerk at the Transami Warehouse, told the court that he was instructed to strip the containers on 8th January 2008 at 4.00 p.m. It is at this point that he realized that the containers only had two seals each and he noted that some bags of sugar were missing. Firstly the evidence of **PW3** is self contradictory. At first he says that he stripped the containers on 8th January 2008 that is almost 24 hours after delivery. In his evidence-in-chief he declares that it was on 7th January 2008 when he stripped these containers, later under cross-examination by defence counsel at page 9 line31 **PW3** states

“I opened the 1st container on 8/1/2008. I cannot remember very well the date I did the actual counting The container (sic) were opened on 8/1/2008”

As Mr. Wabuoto for the Appellant points out in the face of such inconsistent and contradictory evidence it is very difficult to establish at what point the containers were tampered with. If the stripping was done a full 24 hours after delivery then the Appellant cannot be said to have had exclusive possession of the containers. They were left in the Transami yard overnight and for much of the day on 8th January 2008. Several other people had access to them and therefore had equal opportunity to tamper with them. The circumstantial evidence is insufficient. Mere suspicion however strong cannot form the basis for a conviction. **PW5** the guard had access to the containers the whole night as he was on duty at the yard. No concrete reason has been given why the prosecution have ruled him out as a suspect. As counsel pointed out the evidence of **PW1** and **PW4** is mere hearsay. They were only called in **after** the theft had been discovered and neither is able to shed any light as to how the bags of sugar went missing. There is no eye witness who saw the Appellant open the containers and steal the sugar. No bags of sugar were recovered on the Appellant. In requiring that the Appellant give a reasonable explanation for the disappearance of the goods, the learned trial magistrate erred, as this was tantamount to shifting the burden of proof from the prosecution to the Appellant. On the whole I find that several doubts abound in the prosecution case. The benefit of those doubts must be decided in favour of the Appellant. In my view this conviction was not sound. I hereby quash the same. The consequent 3½ year sentence is also set aside. This appeal succeeds. The Appellant to be set at liberty forthwith unless he is otherwise lawfully held.

Dated and Delivered in Mombasa this 3rd day of November 2010.

M. ODERO
JUDGE

Read in open court in the presence of:-
Mr. Oduor holding brief for Mr. Wabuoto
Mr. Onserio for State

M. ODERO
JUDGE
3/11/2010

