REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CRIMINAL APPEAL 188 OF 2007

MARANGU M'MUKINDIA KIIRI ……..…APPELLANT

VERSUS

REPUBLIC …….…….. RESPONDENT

CONSOLIDATED WITH

HIGH COURT CRIMINAL APPEAL NO.189 OF 2007

KIMANI GATWAMWERI……..…….....……...APPELLANT

VERSUS

REPUBLIC ……...……..RESPONDENT

(Appeal from original Conviction and Sentence of the Senior Principal Magistrate's Court at Nanyuki in Criminal Case No.1055 of 2006 by E.G. MBAYA –S. R.M.)

J U D G M E N T

The two **Marangu M'Mukindia** and **Kamathi Gatwamweri** hereinafter referred to as "*the appellants"*, were jointly charged before the Senior Principal Magistrate's Court, Nanyuki with Stealing Contrary to *Section 275* of the Penal Code. It was alleged that on 6th April, 2006 at Katheri in Laikipia District the two, jointly stole one cider tree valued at Ksh.10,000/= the property of **Nelson Koome Magiri**. The two returned a plea of not guilty and their trial ensued.

The prosecution case briefly stated was that on 6th April, 2006 at 6.45 pm one, **Nelson Koome** hereinafter referred to as "*the complainant"* was informed by his sister that his podo tree had been stolen. The following day he went to the land and confirmed as true what he had been told by his sister. He immediately reported the matter to the Assistant Chief and subsequently learnt that the posts from the tree were at Ndemu Primary school. Both himself and the local Chief (PW2) went to the primary school and saw the tree posts about 7 in number in the school store. They hired a motor vehicle but when they went to collect them they found the store locked. The complainant proceeded to Nanyuki police station and reported the matter. He identified the posts because they had marks where he had previously attempted to cut the tree. He told the court the appellant was the Chairman of the school committee

whereas 2nd appellant a committee member.

PW2 **Douglas Gikinda** was the Senior Chief, Ontilili location. He testified that on 10th April, 2006 the complainant reported to him that his tree was stolen by people he knew. He went with him to the scene and confirmed that one red cider tree had been cut. They next went to Ontilili mixed day school and saw the posts there. When he questioned the school storeman, he told them that the school management had taken the posts there. He sent for the Chairman, the 1st appellant, but he instead sent a committee member the 2nd appellant who said they had no posts. PW2 then ordered AP's and the complainant to go to the school and possess the posts but 2nd appellant ran to the school, locked the store and carried away the keys.

PW3 – **Senior Sergent Chelimo** recalled that on 2nd June, 2006 the complainant went to his office and reported that his tree had been cut but he had seen the posts therefrom at Ndemu Primary School. He went to Ndemu Primary School with the complainant but did not get the posts as they had been removed from the store. He summoned the Chief who told him he had seen the posts in the school store but the 2nd appellant had locked the office and gone away with the keys. He then caused the arrest of the appellants and subsequently charged them with the offence.

Put on their defence the appellants opted to give sworn statements of defence. The 1st appellant denied having stolen the complainant's tree. He denied that he was the Chairman of the Primary School Committee. He was however chairman of the secondary school board. His duties he said were limited to calling meetings and overseeing the operations of the school but school items were in the hands of the school principal and he would not know whether the complainant's stolen tree was recovered from the school store. He said that only the head teacher would know. Regarding the evidence of PW2 he said that the witness had a grudge against him having had a land case with his father.

The 2nd appellant similarly denied the charge saying that he does not work in the school in question and only goes there when the chairman call meetings. He further denied to have run away with the school store keys and said he was surprised with that evidence.

The learned magistrate having carefully considered and evaluated the evidence tendered by both the prosecution and defense found favour with the prosecutions side holding:

"**There is no doubt the complainant's tree was stolen and cut into posts. These posts were later seen in the store of Ndemu primary school. Apparently this store was being used by Ndemu primary school although it was given to the secondary school. Thirdly it is also apparent that both the accused were aware about the stolen trees. I make this finding because initially the 1st accused when summoned by the Chief he refused to attend the summons and instead sent accused 2 who went before the Chief and denied that the posts were in their store. When the Chief however gave directions to the complainant and AP's to repossess the posts known to be in the school store evidence is before court that accused 2 ran ahead closed the school store and escaped with the keys thus preventing or frustrating any recovery that would have been made. This conduct on the part of both accused in my considered view leads to the conclusion that the (sic) knew how the complainant's tree had been cut and taken to their school store. In their defence the accused have tried to hide behind the phrase that since they are not the principal and or head teacher of the institution in question they know nothing about school property. I did not believe them, after displaying conduct which manifestly leads to a conclusion that they knew about the theft of the tree in question they cannot hide behind staying they are not the school principal. The complainants tree had been cut and moved from its original location the accused by their conduct show that they well knew how this had happened and it is neither here nor there from them to say they are not the school principal. On the evidence I find each of them guilty and convicted each as by law provided."**

The appellant's were aggrieved the conviction aforesaid as well as the sentence of a fine of Kshs.5,000/= in default that was subsequently imposed by the learned magistrate. Thus they separately

lodged these appeals which I have consolidated for ease of hearing and as they arose from the same trial in the subordinate court.

Through **Messrs Chweya & Associates Advocates**, the appellants complain that:-

"**1. That the learned Magistrate erred in law and fact by holding that the prosecution proved its case beyond reasonable doubt contrary to evidence on record.**

2. The learned magistrate erred in law and in fact by believing the evidence of the prosecution witnesses as opposed to the evidence of the defence.

3. The learned Magistrate erred in law and in fact in convicting and sentencing the appellant on the basis of contradicting and inconsistent evidence by the prosecution witnesses.

4. The learned Magistrate erred in law and in fact by convicting and sentencing the appellant basing her judgment on assumption and guesswork as manifested in her judgment.

5. The learned magistrate erred in law and in fact by not holding that crucial prosecution witnesses were not called by the prosecution.

6. The learned magistrate erred in law and in fact by dismissing the defence put forth by the appellant.

7. The conviction was therefore unwarranted and the sentence illegal under the circumstances as the judgment was not based on evidence on record.

8. There was no direct evidence connecting the appellant to the offence.

9. That there is gross misdirection by the trial magistrate in law and in fact which has made the appellant suffer incalculable miscarriage of justice to his great detriment as the prosecution did not prove their case to required standards."

When the appeal came up for hearing, **Mr. Chewaya**, learned advocate for the appellants submitted that the charge sheet was at variance with the evidence tendered, No witness connected the appellants to the offence, *section 169* of the Criminal Procedure was not complied with, that there was failure to call crucial prosecution witnesses and finally that the defence of the appellants was not considered.

In response, **Mr. Makura**, learned Senior State Counsel submitted in opposing the appeal that the charge was proved beyond reasonable doubts. PW3 corroborated the evidence of the complainant. Through the evidence of PW1, PW2 & PW3 a fact not disputed was that a tree was stolen. It did not matter whether it was podo or ceder. Posts were found in the school where the appellants were key players. The conduct of the appellant pointed to their culpability. The fact that some witnesses were not called was neither here or there. No specific number of witnesses need to be called to prove a fact. The evidence on record was not threadbare. It was sufficient and no adverse inference ought to be drawn.

This court as the first appellate court has a duty to re-appraise the evidence and come to its independent finding. In doing so I have to appreciate that I did not have the advantage enjoyed by the trial court of seeing and hearing the witnesses and have to make due allowance for that – **Soki V Republic (2004) 1 KLR 756** and **Kimeu V Republic (2002) 1 KLR 756.**

It is common ground that nobody saw the appellants cut the complainant's tree nor steal the same and or cut it into posts. It is also common ground that the posts resulting from the complainant's tree were later seen at Ndemu Primary School. However it would appear that the appellant's conviction turned on their conduct. According to the learned magistrate when the 1st appellant was summoned by the Chief, he refused to attend to the summons and instead sent the 2nd appellant. I do not see how that decision by the 1st appellant to dispatch the 2nd appellant to attend to the summons before the Chief on his behalf can be

said to be inconsistent with his innocence. It is common ground that the 1st appellant was the chairman of the board for Shuri Secondary School and the 2nd appellant a board member thereof. If the chief was summoning the 1st appellant with regard to matters touching on the school, and the 1st appellant was held up on some other duties and decided to dispatch a member of the board, how can that be considered an act inconsistent with his innocence?

As for the 2nd appellant, it was the learned magistrate's view that when confronted with allegations that stolen posts were in the store, he denied the allegations. However when the Chief directed the AP's to repossess the posts, the 2nd appellant ran ahead of them and closed the school store and escaped with the keys thus preventing or frustrating any recovery that would have been made. Of course the 2nd appellant disputed this evidence. I think that the learned Magistrate misread the evidence. The complainant who was throughout the incident with the Chief made no such reference to the conduct of the 2nd appellant. If indeed the 2nd appellant had acted as testified to by the chief, it would not have escaped the attention of the chief. Yes, the Chief did testify to the effect that the 2nd appellant escaped with the keys. However, the chief's evidence in my view is self-serving because the 2nd appellant was not the storeman. According to the Chief, the storeman was one, **Mr. Koome**. He was the one in charge of the store in which allegedly the posts were. Whey could the chief have obtained the keys from him so as to access the store? Further if indeed the 2nd appellant ran away with the store keys and the Chief was convinced that the stolen posts were therein, why could he have directed that the store be forcefully opened. After all he had in his presence, police officers, the complainant and the storekeeper. To my mind, there is much more than meets the eye in this whole episode. I am tempted to agree with the appellants in what they state in their defences and in particular the 1st appellant, that the chief has a grudge against him due to a land case he had with his father. The gusto exhibited by Chief in handling the case betrays and or belies his impartiality in the matter.

As already stated, no witness connected the appellants directly to the offence. Infact from the testimony of the investigating officer, the appellants were merely charged because they were chairman and committee members of the school management board respectively. However the store in which the posts were allegedly found is not in the school in which the appellants were chairman and board member respectively. The learned magistrate in my view completely ignored this aspect of the evidence. If the appellants had nothing to do with the school in which the posts were found, how then could they be held to account for what goes on in the said school. The person(s) that should have been interrogated on the issue should have been the storekeeper and the headmaster. According to the evidence of the Chief, he was told by the storeman that the school management took the posts there. It has to be noted that the said storeman was never called as a witness though. Accordingly the evidence of the Chief in that regard was hearsay and ought to have been disregarded by the learned magistrate. Further, though the storeman talked of school management, he did not however finger out the appellants directly on the issue. There must have been other board members as well. Finally, the school management could also mean the headmaster of the school. Why was he/she not brought in the picture. It would appear that the said headmaster was not even investigated. He would have been in a position to know who exactly brought to the store the posts.

Further it is not lost on me that the charge sheet was at variance with the evidence led by he prosecution. Whereas the charge sheet talked of the appellants having stolen the complainant's cider tree, the evidence led talked of 7 posts. Further whereas the charge sheet talked of cider tree, the complainant talked of a podo tree. Yet the prosecution did not deem it fit to amend the charge sheet so as to be in tandem with the evidence led. These discrepancies would tend to lend credence to the appellant's defence that the case was a mere frame up. Finally, even the alleged posts were never tendered in evidence. Yet the complainant and the chief claimed to have seen the same in the store. In the absence of such exhibits, how could the trial court have been convinced that the charge as laid had been proved. No explanation was given by the prosecution as to why they could not avail the stolen posts as exhibits.

All said and done, I think this is one of those cases whose investigations if at all, left a lot to be desired. Perhaps there was no need to have such investigation since it was a frame up. Otherwise how do you

explain the failure to call such material witnesses as the complainant's sister who first informed him of his tree having been cut, **Mr. Koome** the storeman in whose store the posts were allegedly found and the headmaster of the school. It is trite law that when key witnesses are not called, the court may infer that their evidence could have been adverse to the prosecution case.

The upshot of the foregoing is that the appeal is allowed, conviction quashed and sentence imposed set aside. I note that the appellants were fined. If they paid the fine, the same should be refunded to them forthwith.

Dated and delivered at Nyeri this 31st day of July, 2009.

M.S.A. MAKHANDIA

JUDGE