



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MALINDI**

Criminal Appeal 15 of 2009

(From original sentence and conviction in Criminal Case No. 1660 of 2009 of the Senior Principal Magistrate's Court at Malindi)

ALI HAMISI MOHAMED alias ASHIKURAAPPELLANT

VERSUS

REPUBLICPROSECUTOR

JUDGMENT

The appellant Ali Hamisi Mohammed alias Ashikura, was convicted on a charge of stealing by servant contrary to section 281 Penal Code and sentenced to serve two (2) years imprisonment.

The prosecution case was that on 7th day of October 2007 at Kibelenyani shop in Barani village within Malindi District, being a servant to Said Suleiman Ali, stole two boxes of finger size batteries from Said Suleiman Ali valued at ksh 960/- which came into his possession by virtue of his employment. He denied the charge and prosecution called total of three witnesses to prove its case. Suleiman Ali (PW1) who ran a shop at Kibelengani told the trial court that appellant was his employee. A customer named Mama Linga went to the shop and ordered for 15kgs of sugar – which order was taken by appellant for packaging. PW2 Ayub Swalehi Abudulahi (another employee) then verified the contents of the package and found two blue boxes which had batteries inside the sack of sugar and he informed PW 1 about this. So appellant was interrogated, arrested and charged.

The sugar and two boxes of battery were produced as exhibit.

In his sworn defence, appellant confirmed that he was the complainant's employee working as a salesman collecting large sums of moneys and said he didn't see why he would steal such a small amount and that he would just get orders and present to the loader who would issue to various clients. A defence witness Kadole Said Mungatana who used to work in the complainant's shop as a store man confirmed that appellant was a salesman and never used to pack goods in the shop, which duty he said was assigned to other workers.

Upon considering the evidence, the learned trial magistrate found that appellant was indeed an employee of the complainant and that there was evidence tht an order for sugar had been made by a customer – the sugar was produced as exhibit 1 and that the batteries were found stuffed inside the sugar. His finding was that appellant did not seriously challenge that fact and he made the conclusion that the same was placed there without the knowledge or permission of the owner (ie complainant) and that must have been with fraudulent intent and that the offence of stealing was proved beyond reasonable doubt.

He further noted that:

“complainant says, when the order was made by the storeman, it is accused who handled the same. PW2 says he took the packed order from the accused for verification and ...found the two boxes inside. Accused said he only took the order and handed it over to store for processing. I believe evidence by prosecution ...accused who received the order and is the one who handed over the same to PW2 for verification. He does not deny that fact.”

The learned trial magistrate concluded that there was a continuous transaction and that nobody else handled that order apart from the appellant and that appellant never said he gave the order to someone else who eventually got the packed sugar back to hand over to PW2. he also noted that the conduct of appellant running away when summoned by the complainant was inconsistent with his innocence.

He noted further that appellant’s witness (DW2) could not say whether the batteries were found with the appellant or not Appellant challenged the findings on grounds that:-

- (1) The trial magistrate failed to consider the evidence adduced by the appellant and his witnesses who were working with the appellant.
- (2) The trial magistrate erred by convicting appellant on a defective charge and so the entire trial, conviction and sentence was a mistrial ab initio.
- (3) The trial magistrate erred in sentencing appellant to sign imprisonment which was manifestly excessive considering the circumstances of the case.
- (4) The appellant’s mitigation was not considered at all.

Mr. Naulikha on behalf of the State conceded to the appeal on grounds that the conviction was improper and that the sentence be reduced to the period already served in view of the value of the property.

Mr. Gekanana who appeared for the appellant opted not to address the court.

A few questions arise as to whether the conviction was safe, although Mr. Naulikha did not elaborate on why he thought the conviction was not proper. Here are a few issues not addressed by the trial magistrate.

- (1) Why wasn’t Mama Linga, the customer who purportedly ordered for the sugar not called as witness to confirm what orders she had made- had she only ordered for sugar, or did she order for sugar and batteries?
- (2) Appellant took the order, but was he the one who packed the sugar into the sack in view of what the storeman DW2 told the trial court and also appellant’s reference to there being loaders who would pack the sugar.
- (3) Did the two packets of batteries originate from PW1’s shop? No evidence was led to prove that and it was simply concluded tht since they were found in the bag of sugar, they automatically belonged to PW1. There is no evidence of PW1 carrying out stock taking and confirming that two packets of batteries were missing from his stock.
- (4) Appellant’s conduct of running away upon being interrogated was considered as a confirmation of his complicity, showing a guilty mind – which may well have been so but in the absence of answers to the questions posed above, then that rationale cannot hold.

Consequently the conviction was unsafe and is quashed.

The sentence is set aside.

The appellant shall be set at liberty forthwith unless otherwise lawfully held.

Delivered and dated this **23rd** day of **July 2009** at Malindi Law Court.

Mr.Gekanana holding brief Mabeya for Appellant.

Mr.Ogoti for State.

H. A. OMONDI

JUDGE