REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA

Criminal Appeal 4 of 2008

JOSEPH MBUVI ……..…….APPELLANT

VERSUS

REPUBLIC …….RESPONDENT

J U D G M E N T

Joseph Mbuvi, the appellant herein, was tried on a charge of two counts. In count I, the appellant is accused of stealing by servant contrary to section 281 of the penal code. The particulars to this count are that on the 8th day of January 2007 at Benvick Warehouse along Mombasa-Nairobi road in Mombasa District within Coast Province, being a clerk to Halb E.A. Trading, stole from the said company 447 bags of Pakistani rice valued at Kshs.670,500/- which came to his possession by virtue of his employment. In the second count, the appellant was accused of forgery contrary to section 345 as read with section 349 of the penal code. The particulars are that on 8th January 2007 at Benvick Warehouse along Mombasa-Nairobi road, with intent to defraud, forged a document namely a release order from Halb E.A. Trading purporting to be genuine. After undergoing a trial the appellant was convicted on both counts and sentenced to serve two (2) years imprisonment on each count.

The prosecution's case was supported by the evidence of 7 witnesses. Joab Ochieng (P.W.1) a clerk with Awanad Enterprises Ltd told the trial court that on 10th January 2007 he worked with the appellant in the same section until he was transferred on 11th January 2007 to another section. During the handing over he claimed he saw two release orders which appeared to be suspect. One was dated 21.12.2006 and the other was dated 5th January 2007. P.W. 1 informed the anomaly to Jack Omondi Odongo (P.W.2) who in turn cross-checked and discovered that the alleged release orders were not captured in the computer system. Meanwhile the appellant had taken a few days off duty. When he came back he was requested by P.W.2 to explain the anomaly. The appellant now included the release orders in the computer system. This prompted P.W.2 to call for the delivery notes, but the appellant was unable to avail claiming they were taken by the customers. P.W 2 went to physically to count the bags of rice and discovered that about 447 bags were missing from the warehouse. The matter was reported to the police where the apprehended and later charged. The trial magistrate came to the conclusion that based on the evidence of forgery he was convinced the appellant stole 447 bags of rice and in view of the fact that he was unable to avail the delivery note. The trial magistrate also concluded that the appellant forged the documents complained of in Count II.

The appellant gave sworn testimony in his defence. He claimed that on 8th January 2007, received a release order from Chieni Plain and Wholesalers. He said he called P.W. 2, a general manager with Halb E.A. Traders who in turn told him there was a computer error in the release order. Shortly the appellant said that P.W. 1 informed him that there was a complaint that 447 bags of rice had not reached the customer. On being cross-examined the appellant said that he worked for the complainant as a godown clerk. His defence basically is that there was a computer error. He said the prosecution witnesses were against him because they wanted him sacked from the employment of the complainant company.

On appeal, the appellant put forward 9 grounds to challenge both the conviction and the sentence. One of the grounds which was ably argued on appeal is that there was no evidence to prove that the appellant was on employee of Halb E.A. Trading. Of course this submission cannot stand in view of the admission by the appellant in his defence that he was an employee of Halb E.A Trading.

The second ground argued on appeal is that the trial magistrate did not consider the appellant's defence. Mr. Monda, the learned State Counsel did not address me on this issue. It is the submission of Mr. Egunza, learned advocate for the appellant that the trial magistrate committed a fatal error when he failed to consider the appellant's defence. I have perused the evidence on record and find that the appellant raised two issues in his defence. First, he said that his fellow employees wanted him to be sacked. Secondly, the appellant also alleged that there was a computer error which gave rise to the disputed release order. The learned Resident Magistrate did not at all consider the appellant's defence in his judgment. He just considered the prosecution's evidence and he totally ignored the appellant's defence. This being the first appellate court I am entitled to reconsider that defence. A careful reconsideration clearly indicates that it was possible that a computer error could have occurred. This has obviously cast doubt on the prosecution's case. It is a principle in criminal law that the accused person will always be given the benefit of doubt. Had the trial magistrate considered which he was enjoined to do, the appellant's defence he could have come to a different conclusion. It was necessary for the trial court to analyze the evidence of the apparent grudge between the appellant and P.W.1. Courts of Law must not consider the evidence of either the prosecution or the defence in isolation. The same must be considered together. On this ground alone I will allow the appeal without the need of considering the other grounds raised.

For the above reasons, the appeal is allowed. I quash the conviction and set aside the sentence. The appellant be released forthwith unless lawfully held.

Dated and delivered at Mombasa this 27th day of June 2008.

J. K. SERGON

J U D G E

In open court in the presence of Mr. Egunza for the appellant and Mr. Monda for the state.