



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

Criminal Appeal 82 of 2007

FRANCISCO NGANDO LELI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant Francisco Ngando Leli was charged, tried and convicted of stealing goods in transit contrary to Section 279 C of the Penal Code in Mombasa CM CR Case No.3597 of 2006. The particulars were that on the 19th day of May 2005 along Mombasa – Nairobi road in the Republic of Kenya, the appellant stole 1x20 feet container containing motor vehicle spare parts valued at Kshs. 2.2 million the property of Habo Agencies which was on transit from Mombasa to Nairobi. The appellant pleaded not guilty to the offence and after a full trial he was convicted and sentenced to five (5) years imprisonment.

Being dissatisfied with the conviction and sentence the appellant has appealed on ten (10) grounds which were argued by Learned counsel Mushelle. In a nutshell Learned counsel argued that the appellant was convicted on a charge which was defective for want of essential ingredients such as the make and serial number of the container; that the ownership of the property allegedly stolen was not established; that documents relied upon by the Learned trial Magistrate were not produced; that the Learned trial Magistrate shifted the burden of proof to the appellant, and improperly discredited the defence; that the conviction was against the weight of evidence and that the sentence imposed was therefore illegal.

The appeal was opposed by Mr. Ondari the Learned State Counsel. He submitted that what were stolen were the goods in transit and not the container and therefore the number of the container was not material. Counsel was of the view that the inconsistencies in the description of the motor vehicle used were not material. He further argued that the Learned trial Magistrate did not shift the burden of proof to the appellant as alleged but dismissed his defence in view of the evidence adduced by the prosecution. With regard to the delay in arresting the appellant, the Learned State Counsel submitted that the evidence disclosed that the appellant had taken cover. In the premises according to the State Counsel the conviction of the appellant was safe and the sentence imposed was proper.

This being a first appeal this court is mandated to reconsider and re-evaluate the evidence before the Learned trial Magistrate and arrive at its own independent determination as to whether or not the conviction should be upheld. Of course, I bear in mind that the Learned trial Magistrate saw the witnesses which advantage I do not have. In **Gabriel Njoroge – v – Republic (1982-88) 1 KAR 1134** the Court of Appeal observed as follows:-

“As this court has constantly explained, it is the duty of the first appellate court to remember that the parties to the court are entitled, as well on the questions of fact as on the question of Law to demand a decision of the court of the first appeal, and as the court cannot excuse itself from the task of weighing evidence and drawing its own inferences and conclusions though it should always bear in mind that it has neither seen nor heard from the witnesses and to make due allowance in this respect.”

The prosecution relied upon the evidence adduced by three witnesses. Benard Nyaiela Ogada, PW1, an employee of Hawanad Enterprises testified that on 19th May 2005, the said company had a contract to transport auto spares valued at Shs. 4.6 million in a 1x20 feet container to another company namely Mosqueet Auto Spares in Nairobi. After the container was verified and cleared by the Customs Department he called his Transport Manager Leonard Dzaro PW2 to provide a motor vehicle. PW2 brought a motor vehicle whose registration number PW1 could not remember. The vehicle was however of 10 wheels Mitsubishi Lorry. The lorry was loaded in the presence of DW1 but he could not recall the name of the driver nor the company from which the vehicle came. PW1 then gave out the delivery note and the gate pass to the appellant who at first, PW1 stated was the turn boy. PW1 added that he gave a gate pass and delivery note to the driver of the lorry. The appellant and the driver then left for Nairobi. On the following day DW1 called one Dhalla of Moqueel Auto Spares to enquire about the goods upon which the said Dhalla informed him that the goods had not been received. PW1 called the driver on his cell phone but the driver was not traced. DW1 was later informed by PW2 that the motor vehicle was damaged. After 3 days a search was mounted without success. DW1 at the end of his evidence stated that he knew the appellant as a transporter and that the goods belonged to Njoroge Transporters.

Leonard Willington Dzaro DW2 testified that he worked for Habo Agencies as a Transport Manager and his duties included providing motor vehicles from transporters for the said company. He was in that position on 19th May 2005. He told the court that the appellant was his friend and that they used to live together in his house. On 19th May 2005, the appellant was assigned a consignment of Auto Spare Parts to transport to Nairobi using lorry registration number KAE 039 P. DW2 witnessed the loading but the goods were not delivered to the owner. DW2 gave the value of the goods as over Kshs. 3 million.

Sgt. David Onyuka, PW3, testified that on 19th May 2005, while at Changamwe Police Station he received a report from PW1 that lorry registration No. KAE 039 P Isuzu had been loaded with a container to be transported to Nairobi but the goods had not been delivered to their destination. PW3 testified that DW1 stated that the lorry was owned by the appellant. He circulated particulars of the lorry and the owner to all police stations. On 11th October 2006 DW3 received information through PW2 that the appellant had been seen at Changamwe area. PW3 accompanied with PC Mbithi then arrested the appellant and charged him with the offence for which he was convicted.

Put on his defence, the appellant in unsworn statement denied the offence alleging that PW2 had a grudge against him over the relationship they both had with a woman named Eda Moshe and that the same PW2 was envious of the appellant because the appellant had secured a scholarship to study in the U.S.A.

This appeal has raised several issues. The first issue raised relates to the charge. I have independently perused the same and I am afraid on the face of the same, I detect no defect in its form or particulars. A related issue which in my view calls for closer scrutiny is whether the evidence offered by the prosecution supported or proved the charge. An answer to this issue will dispose of grounds 2, 3, 4, 5, 6, 7, 8 and 9 of the grounds of appeal in the appellant’s supplementary grounds of Appeal.

The particulars of the charge described the owner of the property allegedly stolen as Habo Agencies. However, the witnesses who testified before the Learned trial Magistrate were not united on who the owner was. PW1 Benard Nyaiela Ogalo initially stated that the container was to be delivered to Mosqueet Auto Spares in Nairobi. But when he was enquiring whether the delivery had been made DW1 directed the enquiries to one Dhalla of Moqueel Auto Spares. On cross examination he gave the owner of the goods as Njoroge Transporters.

PW1 further testified that he worked as a clerk for Hawanad Enterprises whose Transport Manager was PW2. The latter however testified that he was the Transport Manager of Habo Agencies and never mentioned Hawanad Enterprises. PW1 claimed that Hawanad Enterprises had a contract to transport Auto spares in a 1x20 feet container to Mosqueet Auto Spares. The container was verified and cleared by Customs Department and PW2 was called to provide a motor vehicle. Yet PW2 testified that his company Habo Agencies assigned the appellant a consignment of auto spares to transport to Nairobi. So at the end of the trial the issue of to whom the property belonged was not resolved. Did the property belong to Habo Agencies as alleged by PW2? Did it belong to Hawanad Enterprises, Mosqueet Auto Spares, Moqueel Auto Spares or Njoroge Transporters as claimed by PW1.

Learned State Counsel submitted that what was stolen were the goods in transit which goods were adequately described in the particulars of the charge as motor vehicle spare parts valued at Kshs. 2.2 million. In the State Counsel's view the number of the container was not material. That argument is with respect not entirely correct. The particulars of the charge besides stating the goods, specifically stated that the appellant had stolen a "1 x 20 container....." Plainly therefore the prosecution clearly alleged that the container had been stolen. The State Counsel did not deny that containers have serial numbers. I find and hold that having alleged that the container was stolen, evidence of which container was stolen was essential. Yet none of the witnesses gave any evidence that would lead to discovery of the alleged stolen container.

Further PW1 and PW2 were not united on which vehicle the appellant allegedly used to transport the container. Was it a Mitsubishi Lorry or an Isuzu one? They were also not united on the appellant's role. Was he a mere turn-boy or a big time transporter?

The above discrepancies and inconsistencies taken together were not insignificant in view of the defence put forward by the appellant and in view of the failure of the prosecution to produce a single document to support their allegation of a transportation contract or the ownership of the goods allegedly stolen. The Learned trial Magistrate did not adequately evaluate the discrepancies and off-handedly dismissed the defence put forward by the appellant.

From the foregoing it is clear to me that the evidence in support of the charge was not sufficient to support the conviction of the appellant. The conviction was therefore unsafe. The result is that the appeal is allowed, the conviction quashed and the sentence set aside. The appellant should be released forthwith unless otherwise lawfully held.

Order accordingly.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MOMBASA THIS 23RD DAY OF JUNE 2008.

F. AZANGALALA

JUDGE

Read in the presence of:

Mushelle Learned Counsel for the Appellant and Onserio Learned Counsel for the Respondent.

F. AZANGALALA

JUDGE

23RD JUNE 2008