REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

Criminal Appeal 202 of 2007

KENNEDY MOGESI ONYAMBU ……...……..…. APPELLANT

VERSUS

REPUBLIC ……..…… RESPONDENT

(From original conviction and sentence in the Senior Resident

Magistrate's Court Homa Bay Criminal Case No.995 of 2007

by E. K. MWAITA ESQ., AG. S.R.M)

JUDGMENT

The appellant was charged with stealing by person employed in the public service contrary to section 280 of the Penal Code. The particulars of the offence were that on the 22nd day of February 2007 at Mbita Health Centre of Suba District within the Nyanza Province, the appellant, being a person employed in public service in the Ministry of Health, stole one computer system make "***DELL"*** valued at Kshs.250,000/= the property of the Government of Kenya.

The appellant denied the charge and after a full trial he was convicted and sentenced to four years' imprisonment. The appellant was aggrieved by the said conviction and sentence and preferred an appeal to this court. In his petition of appeal filed through Reuben Masese & Co., the following grounds were raised:

"*1. The learned trial magistrate erred in law*

and fact in convicting the appellant

against the weight of evidence.

2. The learned trial magistrate erred in law and fact by convicting the appellant on uncorroborated evidence as by law required.

3. The learned trial magistrate arrived at a wrong judgment by taking into account extrenous evidence and influence.

4. The trial magistrate erred in law and fact by showing total bias by recording his comments on taking the evidence of PW2 before the close of the prosecution case.

5. The learned trial magistrate erred in law and fact and arrived at a wrong decision by basing his judgment on hearsay evidence.

6. That the judgment handed down is manifestly harsh and excessive."

This being the first appellate court it is mandated to examine afresh the evidence that was tendered before the trial court, re-evaluate the same and reach its conclusion. The court must however bear in mind that it did not have the advantage of seeing the demeanour of the witnesses who testified before the trial court and cannot therefore make any comments about the same, see OKENO VS REPUBLIC [1972] E.A 32.

The evidence that was adduced before the trial court briefly stated was as hereunder:

On 21st February, 2007 at around 5 p.m. Alex John Odhiambo, PW1, a Public Health Officer, was at Suba Public Health Office. He closed the main door to the office at about 5.30 p.m. The keys to the main door used to be kept at Mbita Health Centre and he took them there. On the following day when PW1 reported to his office at around 8.00 a.m. he found the inside door to his office open and a computer that was on the table of the District Medical Records Officer missing.

The matter was reported to the police.

PW1 further testified that the appellant was in charge of cleaning the office and it was suspected he was the one who had stolen the computer.

Isaac Otieno Chacha, PW2, was working as a guard in a building that was next to Mbita Health Centre. He testified that on 22nd February 2007 at around 5 a.m, he heard the door to the building where the computer was being opened. When he checked to find out who was opening the door, he realized it was the appellant. The appellant put on lights in the building. After a short while, PW2 saw the appellant walking out carrying a carton. He (PW1) knew the appellant as he had been seeing him working as a sweeper in that office. PW1 greeted the appellant whom he knew and the latter responded. Later PW1 identified the appellant to the police.

In cross-examination, PW2 said that when the appellant was getting out of the office he had the office keys and he locked the door. At that point the learned trial magistrate indicated in the proceedings that he was impressed by the demeanour of the witness who struck him as a truthful person and was not shaken at all by the appellant in cross-examination. That comment by the learned trial magistrate is one of the grounds of appeal.

P.C. Joel Juma, PW7, one of the police officers who went to inspect the office were the computer had been kept testified that the main door the office was intact but there was a rear door that seemed to have been forced open. The computer was in an inner room. There was no sign of breakage of the inner door. He interviewed PW2 who gave him a description of the suspect. PW7 summoned the appellant to his office but he failed to show up. Later when he was on patrol in Mbita PW7 spotted the appellant and arrested him.

In his unsworn defence, the appellant denied having committed the offence. He denied that he had an encounter with PW2 on the material day.

In his submissions, Mr. Masese for the appellant stated that there were several people who had access to the office where the computer was kept and who were not called to testify. He also faulted the learned trial magistrate for allegedly exhibiting open bias against the appellant and particularly by remarking that he was impressed by the evidence of PW2 whom he referred to in his judgment as "*a star witness*". He further submitted that the learned trial magistrate shifted the burden of proof to the appellant.

Mr. Kemo, Senior Principal State Counsel, supported the judgment by the trial court and added that indeed PW2 was the star witness because he was the only one who saw the appellant leaving the office

building at 5 a.m. carrying something in a carton. In his view, there was nothing wrong with the trial magistrate's remark in the proceedings about the demeanour of PW2. He urged the court to dismiss the appeal.

The duty of a first appellate court was restated by the Court of Appeal in MWANGI VS REPUBLIC [2004] 2KLR 28. In that appeal the court cited with approval the decision of its predecessor in OKENO VS REPUBLIC [1972] E.A 32 at page 36 where it was stated, inter alia:

"*An appellant on a first appeal is entitled to*

to expect the evidence as a whole to be

submitted to a fresh and exhaustive examination

(Pandya vs. R [1975] E.A 336) and to the appellate

court's own decision on the evidence. The

first appellate court must itself weigh conflicting

evidence and draw its own conclusions.

(SHANTILAL M. RUWALA VS R, (1957) E.A.570).

It is not the function of a first appellate court

merely to scrutinize the evidence to see if there

was some evidence to support the lower

court's findings and conclusions; it must make

its own findings and draw its own conclusions.

Only then can it decide whether the magistrate's

findings should be supported. In doing so, it should

make allowance for the fact that the trial court

has had the advantage of hearing and seeing the

witnesses, see PETERS VS SUNDAY POST,

[1958] E.A 424."

In this appeal there is no dispute that a person gained unlawful entry into the office where the aforesaid computer was kept and stole the same. While it is true that there were several people who could have had access to the keys to the main door as they used to be kept at Mbita Health Centre, there was no evidence that anyone collected the said keys from the said institution. The appellant was an employee of the Ministry of Health and was working at Mbita Sub-District Hospital as a subordinate staff. The appellant was seen by PW2 entering the building. The lights were on and after a short while PW2 saw the appellant moving out of the building carrying a carton. PW2 greeted the appellant. A question may arise as to why PW2 did not bother to find out what the appellant was carrying in the carton. However, it has to be borne in mind that PW2 knew the appellant as a person who was working in that office. It was also not strange to have people going to that office at such an hour because according to the evidence given by PW2 in his

cross-examination by the appellant, people who are HIV positive used to go to that office at around 5 a.m. to collect HIV drugs. The evidence by PW2 was that of recognition of the appellant as opposed to that of identification. Evidence of recognition is always more reliable than that of identification as it depends on personal knowledge of the person identified, see ANJONONI VS REPUBLIC [1980] KLR 59.

When PW2 knew about the missing computer he told the police about what he had seen on the material day and the police commenced investigations. PW7 summoned the appellant to his office but the appellant failed to show up.

The learned defence counsel took issue with the fact that the learned trial magistrate noted in the proceedings that he was impressed by the manner in which PW2 testified where he commented that the witness appeared truthful and was not shaken in his cross examination by the appellant. In my view, there is nothing wrong with what was done by the learned trial magistrate. Indeed it is the responsibility of a trial magistrate to observe the demeanor of a witness and the best way to remember the same is to note it down in the proceedings. The learned trial magistrate cannot therefore be faulted for his comments on the demeanor of PW2, even for calling him the star witness, which indeed he was.

I am satisfied that there was sufficient evidence to justify conviction of the appellant for the offence which he was charged with. His conviction was therefore safe and cannot be disturbed. The sentence that was handed down by the trial court was not shown to be either harsh or excessive.

Consequently I dismiss this appeal in its entirety.

DATED, SIGNED and DELIVERED at KISII this 30th day of July, 2008.

D. MUSINGA

JUDGE.

Delivered in open court in the presence of:

N/A for the Appellant

Mr. Kemo, Senior Principal State Counsel for the Republic

D. MUSINGA

JUDGE