REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI

Criminal Appeal 142 of 2006

MICHAEL WANGOMBE GITITU ..... APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

(Appeal from original Conviction and Sentence of the Senior Resident Magistrate's Court at Karatina in Criminal Case No. 353 of 2005 dated 6th July 2006 by P. C. Tororey – SRM)

J U D G M E N T

The appellant was charged with the offence of stealing contrary to section 275 of the Penal Code. The brief facts that informed the prosecution case were that on the 21/3/04 the complainant **Gerald Wanjohi Ndei** (PW1) who owns plot aforesaid in Gatura Market found 2 people ferrying construction stones from his plot No. 27 to the home of the appellant. He intercepted them and demanded to know who had authorised them to do so and the two men including **Joseph Kamotho** (DW3) led him to the home of the appellant where the stones were being taken. The complainant met the appellant who claimed ownership of the stones as well. The appellant was using the stones to construct a cow shade. The complainant then made a report to the police. **P.C. Benson Wambugu** (PW5) received the complaint and visited the scene and arrested the appellant and took away some of the stones as exhibits. The appellant was then charged.

The appellant denied the offence and maintained that the building stones were his. He did admit to hiring DW3 and another person to ferry the stones from his former plot to his home where he was constructing a cow shade. The stones had been lying on his former plot No. 49 at the same market which he had later sold to **Madrine Wandia** (DW2) and not on plot No. 27 which the complainant claims was his. The appellant told the court that he had bought the said stones in 1984 and dumped them in his plot aforesaid. When he sold the plot to (DW2) as aforesaid he subsequently decided to remove the stones from the plot as he never sold them with the plot. Whilst in the process of so removing the complainant followed his hired helps and alleged that the stones were his.

After careful consideration and evaluation of the evidence as a whole the learned magistrate found for the prosecution, convicted the appellant and thereafter sentenced him to a fine of Kshs.30,000/= in default, 1 year imprisonment.

The appellant was aggrieved by the conviction and sentence. Hence he preferred this appeal through **Messrs Lucy Mwai & Co. Advocates**. In his petition of appeal, the appellant faulted the learned magistrate for convicting him on the following grounds:-

1. The learned trial magistrate erred in law and in fact in convicting the Appellant for the offence of stealing building stones whose description and size were not indicated in the charge sheet, thus

the evidence adduced does not support the particulars of the charge.

2. The learned trial magistrate erred in law in convicting the appellant for an offence which was not proved beyond reasonable doubt in view of the defence tendered.

3. The learned trial magistrate erred in law and in fact for convicting the appellant without sufficient evidence.

4. The learned trial magistrate erred in law in wrongly rejecting the defence of the appellant.

When the appeal come up for hearing, **Miss Mwai**, learned counsel for the appellant orally submitted that the size of the stones was not ascertained by court and or by evidence. Again it was not ascertained from which plot the stones had been removed. Counsel submitted that the stones brought to court as exhibits were not identified by size nor was the plot from which the said stones were removed ascertained. The appellant tendered a sale agreement confirming that he indeed bought the stones. It was on this basis that counsel for the appellant sought to have the appeal allowed, and the fine imposed if paid refunded.

Ms Ngalyuka, learned state counsel would hear none of the appellant's submissions. Counsel submitted that the complainant tendered evidence to show that the stones were his. He called PW2, PW3 and PW4 in support thereof. To counsel therefore the learned magistrate was right in dismissing the appellant's defence. The stones belonged to PW1 and the appellant had no reason to ferry the same to a different plot. That the appellant's plot was 47 and not 27.

As a first appellate court I am required to subject the evidence tendered during the trial to fresh and exhaustive evaluation so as to reach my own decision as to the guilt or otherwise of the appellant – **Okeno v/s Republic (1972) E.A. 32**.

The appellant concedes that he removed the stones to his house where he was putting up a cow shade. He claims that the stones he so removed were his having purchased them way back in 1984. He supported his contention by tendering in evidence a receipt to that effect. He therefore did not steal the stones. On the other hand the complainant claimed the stones to be his too stating that he bought and transported them to his plot No. 27 Gatura sometimes in 1971. However he had no evidence, documentary or otherwise to back up his claim. Since both the appellant and the complainant all claimed ownership of the stones it was critical that each one of them brings forth such evidence as will irresistibly point to one of them as the real owner of the stones to the exclusion of the other. On this issue I am satisfied that the appellant was able to discharge that burden of proof. The appellant tendered in evidence a receipt he was issued with when he purchased the stones. The complainant had no such receipt. Indeed his evidence on the issue was to the effect that "**..... Right now, I have no receipt as I bought them a long time ago .....**" If this was the case, why then couldn't he have called the person from whom he purchased the stones to testify on his behalf.

From the evidence of PW1 and PW2 respectively, they seem to suggest that the stones stolen were size 9 x 9. However what was brought to court as exhibit was not identified by size at all. Yet the appellant's stones were a mixture of size 4, 6 and 9. I would therefore agree with the submission of the learned counsel for the appellant that the size of the stones in court ought to have been ascertained by court or by evidence. It may well be that the said stones were not size 9 x 9 in which event then there would have been no basis for charging the appellant with the offence. Failure to ascertain the size of the stones was thus fatal to the prosecution case. The same goes for the failure by the prosecution to ascertain by cogent evidence from which plot in particular on the market that the stones were removed. The police officer (PW5) and the complainant's other witnesses (PW2, PW3 & PW4) all stated that the appellant had hired two young men to ferry the stones to his house. However PW5 did not ascertain whether the stones were removed from plot No. 27 belonging to the complainant or plot No. 49 belonging to the appellant.

The appellant gave cogent evidence in his defence and called 2 witnesses in support thereof. He tendered in evidence a receipt to show that he bought and dumped the stones in his aforesaid plot in 1984. He was however unable to develop the plot and sold it to DW2. However he only sold the plot and not the

stones. These were the stones he was removing from the plot when he was challenged by the complainant as to its ownership. The appellant too was able to show that he had sold his said plot to DW2 by producing the sale agreement. DW2 confirmed the presence of the stones on the plot that she purchased as aforesaid. She also confirmed that she purchased the plot, minus the stones and had no objection to the removal of the stones from her plot by the appellant. It is my considered judgment that with this kind of evidence, the court ought to have made a finding that the said evidence had cast a doubt in the prosecution case and resolved such doubt in favour of the appellant as required by our criminal justice system. I now do so with the consequence that the appeal is allowed, the conviction quashed and sentence of a fine of Kshs.30,000/= in default to serve 1 year imprisonment imposed on the appellant is set aside. The fine of Kshs.30,000/= if paid by the appellant should forthwith be refunded to him.

Dated and delivered at Nyeri this 29th day of September 2008

M. S. A. MAKHANDIA

JUDGE