REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

Criminal Appeal 250 of 2005

REPUBLIC …….....…….. APPELLANT

VERSUS

JAMES MURIMI MWANGI…..……..…...…RESPONDENT

(Appeal against the decision of the Resident Magistrate's Court at Gichugu

in Criminal Case No.681 of 2005 by A. LOROT – RM)

J U D G M E N T

This is one of those rare appeals lodged by the state against the acquittal of the appellant on a charge of stealing contrary to *Section 275* of the Penal Code by the Resident Magistrate's Court at Gichugu. The charge sheet stated that on 9th October, 2004 at Soko Mjinga village in Kirinyaga District within Central Province together with others not before court stole one lorry of building stones worth Ksh.17,000/= the property of **Joseph Kamau Kiguoya.** The appellant too faced an alternative charge of handling stolen goods contrary to *Section 322* of the Penal Code whose particulars were that on the same day and place otherwise than in the course of stealing dishonestly received or retained 50 pieces of building stones, knowing or having reasons to believe them to be stolen goods.

In support of the case, the prosecution lined up two witnesses. PW1, the complainant is a farmer from Kianjiru. He has a commercial plot at Soko Mjinga market. On 9th October, 2004 he went to check on the plot. He found the building stones he kept on the plot stolen. He saw foot marks on the road and traced them to the house of the accused who was acquitted where he came across stolen building stones. However the accused was absent. PW1 then went and reported the matter to the police. The police led by PW2 visited the home of the accused and later arrested him. He was subsequently charged with the offence by PW2.

Put on his defence, the accused in an unsworn statutory statement stated that the stones he is alleged to have stolen belonged to him. That his parents, all deceased, had bought the stones intending to put up a structure in their plot. But they passed on before they could do so. As the accused had no money to undertake the project he left the stones to wither for a while. It was then that the complainant came on the stage and started claiming ownership of the stones. He had earlier sent someone to collect the stones and the accused had refused. PW1 had prior to the death of the accused's mother harassed her over the plot. To date the plot is still in dispute.

Having carefully considered the matter, the presiding Magistrate came to the conclusion that the prosecution had not proved its case against the accused and acquitted him under *section 215* of the Criminal Procedure Code holding that:

"…….This is a case that has been brought by pure malice. The accused's mother and the complainant were not in good terms. They quarreled over some disputed property and she is now deceased. The complainant cannot be allowed to harass the accused. The delay has not been explained why the accused was not arrested immediately. I find that the police and the complainant are infact liable for malicious prosecution by (sic) the accused….."

That finding provoked this appeal by the state. In a 5 point petition of appeal, the state faults the learned Magistrate's findings on the following grounds:

"1. THAT the learned Honourable Magistrate erred in law by making findings unsupported by the evidence before him thus the respondents acquittal occasioned miscourage of justice.

2. THAT the learned Honourable Magistrate misdirected himself in law by failing to analyse the evidence before him.

3. THAT the learned Honourable Magistrate erred in law by failing to write and deliver judgment in accordance with *Section 169* of the Criminal Procedure Code.

4. THAT the learned Magistrate erred in law by holding that the prosecution case is based on pure malice after having earlier ruled that a prima facie case had been established under *Section 211* of the Criminal Procedure Code.

5. THAT the learned Magistrate erred in law in totally disregarding the entire prosecution evidence without assigning any reason for doing so.

When the appeal came up for hearing, the state was represented by Ms Ngalyuka, learned state counsel whereas the appellant appeared in person. In support of the appeal, Ms Ngalyuka submitted that the judgment fell short of section 169 of the Criminal Procedure code, that the grudge raised by the accused was never put to the complainant, that the delay in charging the accused could not have been fatal as there is no limitation as to the charging of a person with a criminal offence. Finally counsel submitted that the learned Magistrate failed to consider properly the prosecution case but considered the defence in isolation.

The accused opposed the appeal. He submitted that there was a dispute between his deceased mother and the complainant. That the complainant was using the case to harass him and acquire the disputed plot.

As required of me as a first appellate court, I have subjected the evidence tendered during the trial to fresh and exhaustive re-evaluation so as to main my decision as to the guilt or otherwise of the accused. See Okeno V Republic (1972) EA.32.

I agree with Ms Ngalyuka that the judgment of the learned Magistrate was short and terse. However that does not mean that it fell foul of the provisions of *section 169* of the Criminal Procedure Code. There is no set format for evaluation of the evidence by trial courts. Each trial court has its own way of evaluating evidence. Whereas others may be verbose, there are those however who are economical with the words. It cannot be said therefore that merely because a judgment is short and terse, the court rendering such judgment must have fallen short of the provisions of *section 169* of the Criminal Procedure code. In the circumstances of this case, the prosecution called two witnesses. Their evidence was short and precise. With regard to PW1, his evidence consisted of a mere 20 lines whereas that of PW2 was a mere 14 lines. That being the case, I do not think that accusation by the appellant's counsel that the court's judgment did not comply with *section 169* of the Criminal Procedure Code has any basis in law whatsoever. The learned Magistrate did evaluate the evidence tendered vis avis the defence advanced and found the prosecution case wanting. He gave reasons as to why he thought that the prosecution case was not believable. He stated that there had been inordinate and unexplained delay in charging the accused, that the case turned on the word of mouth by the complainant since there was no other evidence and finally there was a long standing dispute over a plot between the accused and the complainant and his deceased mother.

Much as there is no time limit for charging an accused person with a criminal offence as correctly submitted by Ms Ngalyuka, I would however hasten to add that such inordinate and unexplained delay in charging an accused person may go to the credibility and genuiness of the charges preferred. Malice may be read in such delay. In the circumstances of this case the respondent and the complainant are neighbours. The offence is alleged to have been committed on 9th October, 2004. However the respondent was only arrested 8 months later and no reason(s) were given for the delay. Given that the two had a dispute over the plot, it cannot be farfetched to assume as correctly submitted by the respondent that the complainant was using or misusing the criminal justice system to harass him in abide to alienate from him the plot in dispute. From my reading and evaluation of evidence, I have no doubt at all that this was a civil matter which was unnecessarily criminalized.

The learned Magistrate considered the defence advanced by the respondent alongside the prosecution evidence. It all turned on the credibility to be attached to the evidence of the complainant and the respondent. The learned Magistrate found the complainant's evidence wanting in material aspects. The complainant had conveniently avoided the issue of the disputed plot. He also did not allude to the fact that in the disputed plot, the respondent's parents had also poured stones similar to those claimed by the appellant. The respondent maintains that the stones recovered from his house are

his. The accused did not adduce any other evidence to displace this assertion. There was nothing particular to the stones that easily connected them to the complainant. In any event, the charge sheet talks of the respondent having stolen one lorry of building stones. However what was allegedly found in the house of the respondent were 50 pieces of building stones. I doubt whether 50 pieces of building stones can amount to a lorry load of stones. Both the appellant and respondent claimed ownership of the stones. It therefore behoved the complainant to adduce sufficient evidence as to his ownership. In the absence of such evidence, a doubt is created as to who between the complainant and accused is the real owner of the stones. In line with our criminal justice system, that doubt must be resolved in favour of the respondent.

It is also not lost on me that when the alleged stolen stones were found in the house of the accused, he was absent. There is therefore doubt as to whether the accused was responsible for the presence of the stones in his compound. Similarly there is the evidence to the effect that the complainant followed some footprints which led him to the house of the accused wherein he found the stones. However there is no evidence to link those foot prints to the accused. They could have been for other people unconnected to the accused.

Finally, it is regrettable that in concluding his judgment, the learned Magistrate went overboard and held that:

"……the complainants are (sic) in fact liable for malicious prosecution by (sic) the accused…." This unsolicited advice and or opinion was uncalled for. Trial courts should as much as possible avoid giving unsolicited legal advice or opinion for it leaves a bitter test in the mouth of a party who may have lost the case genuinely. He is most likely to think that the court was actually biased against him. However I do not discern such bias or misgivings in the circumstances of this case.

All said and done, I find no merit at all in this appeal. Accordingly it is dismissed.

Dated and delivered at Nyeri this 22nd day of September, 2008.

M.S.A MAKHANDIA

JUDGE