REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU

Criminal Appeal 95 & 96 of 2006

(From original conviction and sentence of the Principal Magistrate's Court at Nyahururu in Criminal Case No. 4793 of 2004 -[H. M. Nyaberi], R.M.)

WILSON NGUNJIRI KIRUTHI.....1ST APPELLANT

PAUL MWAURA KIGUTHI.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The appellants, Wilson Ngunjiri Kiruthi and Paul Mwaura Kiguthi were charged with two counts under the Penal Code. The first count was theft of motor vehicle parts contrary to Section 279 (c) of the Penal code. The particulars of the offence were that on the night of the 5th and 6th November 2004 at Nyandarua High School in Nyandarua District, jointly with others not before court, they stole one starter and one alternator valued at Kshs 255,209/= from motor vehicle registration number KAN 110U Isuzu Bus, the property of Nyandarua High School. The appellants were alternatively charged with neglecting to prevent a felony contrary to Section 392 of the Penal Code. The particulars of the offence were that on the night of the 5th and the 6th November 2004 at Nyandarua High School in Nyandarua District, the appellants being night watchmen failed to prevent the commission of a felony namely theft. The appellants pleaded not guilty to the charges and after a full trial they were convicted on the first count of theft. They were sentenced to serve three years imprisonment. The appellants were aggrieved by their conviction and sentence and have appealed to this court.

The appellants filed more or less similar grounds of appeals in their petitions of appeal. They were aggrieved that they had been convicted based on insufficient evidence of the prosecution. They faulted the trial magistrate for failing to consider that the prosecution had failed to produce crucial witnesses who could have exonerated the appellants from the offence. They were further aggrieved that the trial magistrate had considered extraneous matters before arriving at the said decision convicting the appellants. They were further aggrieved that the testimony adduced by the appellants in their defence was not considered by the trial magistrate before he arrived at the said decision convicting them. They were further aggrieved that they were sentenced to serve a custodial sentence that was manifestly excessive in the circumstances.

At the hearing of the appeal, Mr. Kamanga learned counsel for the appellants submitted that the evidence offered by the prosecution witnesses was not sufficient to sustain the conviction of the appellants. He argued that none of the three prosecution witnesses connected the appellants with the commission of the offence. He submitted that the prosecution had shifted the burden of proof to the appellants when the investigating officer testified that the appellants had failed to explain what had transpired during the material night. He submitted that the appellants were not found in possession of the stolen items. He further argued that the prosecution had not established that the theft had actually taken place on the nights of the 5th and 6th November 2004 when the appellants were on duty. He submitted that there was a possibility that the theft could have occurred between the 2nd November 2004 when the bus was parked at the garage and the 6th November 2004 when the theft was discovered. Mr. Kamanga argued that the trial magistrate erred when he relied on the evidence of the footmarks at the scene of the theft which in his

view was tenuous. He took issue with the decision made by the prosecution not to call the day watchman who could have confirmed the exact time when the theft took place. He was of the view that the testimony of the day watchman could have been favourable to the appellants. He submitted that the totality of the evidence adduced by the prosecution did not establish the appellants' guilt.

Miss Opati for the State opposed the appeal. She submitted that the prosecution established that the motor vehicle parts were stolen on the night of the 5th and 6th November 2004 during the watch of the appellants who had been employed as night watchmen by Nyandarua High School. She submitted that the prosecution had established that there was collusion between the appellants and the thieves. This is because the theft occurred in a garage which was close to the main buildings of the school which the appellants were guarding. She argued that the appellants did not report the theft of the motor vehicle parts to the principal, a fact which she concluded was incompatible with the innocence of the appellants. She urged this court to uphold the conviction of the appellants as it was based on sound evidence. She further urged this court to dismiss the appeal.

This being a first appeal this court is mandated to reconsider and to re-evaluate the evidence adduced before the trial magistrate's court so as to arrive at its own independent decision whether or not to uphold the conviction of the appellant. In reaching its determination, this court is required to put in mind the fact that it neither saw nor heard the witnesses as they testified and therefore cannot be expected to make any decision as to the demeanour of the witnesses *(See* Njoroge -vs- Republic [1987] KLR 19). In this appeal, the issue for determination for this court is whether the prosecution proved its case to the required standard of proof beyond reasonable doubt. I have considered the evidence that was adduced before the trial magistrate's court and also carefully considered the submissions made by Mr. Kamanga on behalf of the appellants and by Miss Opati on behalf of the State.

It was the prosecution's case that the said motor vehicle parts were stolen on the nights of the 5th and the 6th November 2004 when the appellants were on guard as night watchmen. Evidence was however adduced by PW1 Charles Mureithi Gitahi, the driver of the said Isuzu Bus that he had parked the said bus in the garage at 3.00 p.m. on the 2nd November 2004. From the 2nd November 2004 to the 6th November 2004 at 9.00 a.m., no one opened the garage where the bus was parked. In fact, PW1 testified that he was the one who was in possession of the keys to the entrance of the garage where the bus was parked. No evidence was adduced by the prosecution to suggest that the appellants had access to the keys that opened the door to the garage. According to PW1, he made the discovery of the missing parts of the bus when he attempted to switch on the engine of the bus. When he went under the bus to investigate what the problem was, he discovered that the alternator and the starter had been stolen.

He immediately made a report to the Deputy Principal who informed the Principal PW2 Joseph Munoru Mungai about the incident. PW2 gave instructions for a report to be immediately made to the police. A report was made to the police who visited the scene and immediately zeroed in on the appellants. After interrogating them, PW3 PC Edward Rotich who was the investigating officer in this case, arrived at a decision to charge the appellants. One reason that informed his decision was the fact that the appellants had failed to explain what had transpired on the night that the theft took place. PW3 testified that he reached the conclusion that the theft had taken place on the night of the 5th and 6th November 2004 because of the fresh footsteps that were under the bus.

I have re-evaluated the said evidence adduced by the prosecution witnesses. It is clear that PW3 visited the scene where the theft took place with a fixed mind. This court is unable to find any evidence that could have led PW3 to reach the conclusion that the theft took place on the night of 5th and 6th November 2004 and not any other time after 3.00 p.m. on the 2nd November 2004. The evidence of the footsteps was inconclusive. This is because PW1 testified that he went inside the bus to investigate what was wrong with the bus when he was unable to start it. The footsteps could well have been the footsteps of PW1. Further PW1 testified that there was a gap under the gate of the garage on which a person could go through into the garage. There is a possibility that a person entered through the gap and stole the alternator and the starter. PW3 did not investigate the other crucial aspects of the likely suspects particularly the other members of staff who worked at the school and the people who could have visited

the school. PW3 did not eliminate the possibility that the theft could have been undertaken at other times other than at night. Evidence was adduced in court by PW2 that the entire school compound comprises of 54 acres. The entire 54 acres including all the buildings in the school were guarded by only two watchmen at night. It is evident to this court that the appellants could not have been expected to be vigilant to the extent that they would guard the entire compound by themselves. Maybe there is a case for the school to employ more night watchmen.

Further it is clear that the investigating officer reached the conclusion that the appellants were the thieves unless they gave an explanation to the contrary. This is contrary to the laws of this country that require the prosecution to prove its case against an accused person to the required standard of proof beyond reasonable doubt. The appellants were under no obligation to prove their innocence. The trial magistrate similarly fell in this error. At page 3 of his judgment, the trial magistrate found as follows:

"Though none of the prosecution witness deposed that the accused were seen or found with any of the alleged motor vehicle parts in question, they did not offer any satisfactory explanation where they were on the material night when the offence was committed. The court feels, that, if at all they were on duty, they could have heard or seen the person committing the theft at the garage.... The court therefore finds the accused having failed to explain how the theft occurred while they were on duty, I am satisfied that the accused jointly colluded with other persons not before court to steal the motor vehicle parts of the school bus namely KAN 110U."

It is evident from the aforementioned finding by the trial magistrate that his conviction of the appellants was not based on the evidence that was adduced by the prosecution witnesses but was rather based on his assessment of the failure by the appellants to explain their whereabouts when the theft occurred. The trial court erred by going to the unchartered waters of speculation. It is the view of this court that such assessment of the evidence adduced could have assisted the court in reaching an appropriate finding if the charge was that of failing to prevent the commission of a felony. It would not constitute proper assessment of the evidence in support of the charge of theft.

I agree with the submission by Mr. Kamanga that the failure by the prosecution to call the day watchman as a witness raised reasonable doubt that the prosecution was concealing certain information from being availed to the court for adjudication. In the present appeal, it is clear that the day watchman could have offered an insight on how the said garage was secured during day time between the 2nd November 2004 and the 6th November 2004 when the theft was discovered. The appellants in their unsworn statements in their defence denied that they had stolen the said motor vehicle parts. Taking into consideration the evidence that was adduced by the prosecution witness, that is the least that they could have done in the circumstances of this case. Reasonable doubt was raised by the appellants on the case brought against them by the prosecution. There are gaps in the prosecution case that clearly points to the fact that the theft of the motor vehicle spare parts was not properly investigated by the police. The appellants were convenient scapegoats.

The upshot of the above reasons is that the appeals filed by the appellants have merit. They are hereby allowed. Their conviction by the trial magistrate is hereby quashed. They are acquitted of the charge of theft. They are ordered set at liberty and released from prison forthwith unless otherwise lawfully held.

DATED at NAKURU this 9th day of February 2007.

L. KIMARU

JUDGE