



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU**

Criminal Appeal 75 of 2005

HALIMA OSMAN APPELLANT

VERSUS

REPUBLIC RESPONDENT

(Being an appeal from the judgment of Mr. J. N. Njuki, SRM Marsabit, delivered on 6th May, 2005).

JUDGMENT

The appellant was tried, convicted and sentenced to serve 18 months imprisonment for the offence of stealing contrary to Section 275 of the Penal Code. It was the prosecution case that on 2nd September, 2004 at Marsabit Township the appellant stole a wheelbarrow valued at Kshs.1500/-, the property of Abdi Juma Galgalo. After a full trial the court dealt with the appellant as I have stated above. The appellant was not satisfied with the finding and sentence of the trial court hence this appeal. She has listed in her Petition of Appeal seven (7) grounds which were argued together by her counsel. Before I consider those grounds and the appeal, I must, as I am bound to do, re-evaluate the evidence on record in order to arrive at my independent conclusion, always bearing in mind that, unlike the trial court, I have not heard or seen the witnesses.

It was the prosecution case that the complainant, PW1 Abdi Juma went to the market to sell bananas which he had ferried to the market on his wheelbarrow. After selling the bananas to the appellant he asked the latter to keep the wheelbarrow for him. She agreed to keep it at the store. Two days later when the complainant sought the wheelbarrow from the appellant, the latter claimed that she could not trace it from the store. This evidence received support from the evidence of PW2-Hassan Jattani (Hassan). The matter was reported to the police. PW3, P.C John Gikaria went to question the appellant who admitted that the complainant had left her with the wheelbarrow but maintained that it had been stolen from the store where she had kept it. She was given two days to try and find out who may have taken it. Two days later the appellant disowned the complainant maintaining she knew nothing about the wheelbarrow. Consequently she was arrested and subsequently charged with the present offence.

In her defence the appellant confirmed that she saw the complainant with a wheelbarrow on the day in question and that the complainant in fact sold to her some bananas. But she was categorical that the complainant went away with the wheelbarrow. The appellant's only witness, DW1 Halima Jilla (Halima) also confirmed seeing the complainant take away his wheelbarrow.

That constitutes the evidence in this case. The trial magistrate found that the prosecution had proved the case against the appellant. The trial magistrate was of the view that the evidence adduced by the prosecution nearly pointed to the appellant's innocence, but the appellant's defence, which he described as defiant, made it appear that she knew more about the wheelbarrow. The court held that having failed

to offer a convincing reason as to the whereabouts of the wheelbarrow; the appellant was guilty of the offence charged.

It is the appellant's grounds of appeal that;

- (1) the trial court disregarded her defence
- (2) the evidence did not support the charge
- (3) there was no evidence of conversion and other ingredients of the offence were not proved.
- (4) There were discrepancies in the prosecution evidence and
- (5) The sentence was harsh and oppressive.

Learned counsel for the respondent conceded the appeal on the ground that theft had not been proved by the prosecution. That the appellant's conduct when approached by the police was not consistent with that of a thief.

I have considered the appeal. From the facts outlined in the foregoing paragraphs it is clear and I find that the appellant and the complainant were known to each other. Indeed on the day in question they transacted business.

But it is the complainant's word against the appellant's that the former left the wheelbarrow with the latter.

I am persuaded by the evidence of the complainant that he left the wheelbarrow in the store where the appellant kept her stuff. That he left it after the appellant had agreed that it be kept in the store. The appellant herself told the police that she would find out who took it from the store. I am also satisfied that the wheelbarrow disappeared. The only issue is whether the appellant fraudulently and without claim of right took or controverted the wheelbarrow to her use or the use of any other person; whether the appellant took or converted the wheelbarrow with the intention of depriving the complainant of its use permanently.

I have already found that the wheelbarrow was left with the appellant. It is also a fact that it disappeared and has not been traced to date. There is no evidence that any other person apart from the appellant had access to the store in question.

That being so the burden shifted to the appellant to show on a preponderance of evidence the whereabouts of the wheelbarrow. See Section 111 of the Evidence Act.

The appellant failed to discharge this burden. Indeed she appeared evasive in her defence. Her defence as well as that of her witness that the complainant took the wheelbarrow with him was displaced by the prosecution evidence.

I find no reason for the complainant to insist that he left his wheelbarrow with the appellant if at all he did not. The two had been transacting business in the past and there is no evidence of bad blood between them.

For these reasons I find no fault in the finding of the learned trial magistrate. Regarding the sentence, Section 275 of the Penal Code provides for a sentence of 3 years. However, given the circumstances of this case, that the complainant and the appellant did business together, and the fact that the appellant is a first offender, I will substitute the sentence of 18 months with a fine of Kshs.1,500/= or one month imprisonment in default.

Right of appeal explained.

DATED AND DELIVERED AT MERU THIS 15TH DAY OF JUNE, 2007

W. OUKO

JUDGE