



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

**AT MOMBASA**

**Criminal Case 67 of 2007**

**JOHN KARIUKI NDEGE ..... APPELLANT**

**- V E R S U S -**

**REPUBLIC ..... RESPONDENT**

***(From the conviction and sentence in Cr. Case no. 1808 of 2006 by C.N.Kerage DM II)***

**JUDGEMENT**

Though the Appellant has listed five grounds in this appeal they are or amount to only two which are that there was no sufficient evidence to warrant his conviction and that the sentence of 18 months' imprisonment is, in the circumstances of this case, manifestly excessive. This is how the appeal arose.

The Appellant and another, Dorcas Maria Muteti (Dorcas), were charged before the District Magistrate's court at Mombasa with theft contrary to section 275 of the Penal Code. It was alleged that on the 27<sup>th</sup> day of May 2006 at about 5.00 a.m. at Miritini area of Mombasa District of Coast Province the two jointly stole 32 steel pipes and 12 sleepers valued at Kshs. 97,000/- the property of the Kenya Railways Corporation. Though the record is not clear Dorcas is said to have pleaded guilty and fined shs. 50,000/- and in default to serve 6 months imprisonment. The Appellant was after trial convicted and sentenced to 18 months' imprisonment without the option of fine. He has appealed against both the conviction and sentence.

The gravamen of the submissions by Mr. Alando for the Appellant in the first ground was that the evidence on record did not support the charge. He contended that while the particulars of the charge talk of 32 steel pipes and 12 railways sleepers PW5 the Investigating Officer talked of 34 steel pipes and 27 sleepers. And even though the trial magistrate went to the police station where those properties were kept the numbers were not verified. Mr. Alando also submitted that the Appellant's employer did not authorise him to carry unlawfully obtained goods as the learned trial magistrate stated in her judgment.

On sentence Mr. Alando submitted that Dorcas the co-accused in the same case having been sentenced to a fine of shs. 50,000/- or in default 6 months' imprisonment the sentence of 18 months' imprisonment without the option of fine was manifestly excessive.

For the state Mr. Onserio submitted that the discrepancy in the number of the stolen items is not fatal and that the sentence of 18 months' imprisonment against the maximum of three years is not excessive.

I have perused the lower court record. It is true as Mr. Alando submitted that the Investigating Officer PW6 talked of 34 steel pipes and 27 sleepers. But that is not borne out in the evidence of the other witnesses. I.P.Peter Mwaniki PW4, CPL. Chilungo Jitwa PW5 and PC driver Franklin Mbogori, the three police officers who while on patrol duties on the material date at 6.00 a.m. saw the canter KAC 892N and arrested the Appellant who was driving it and Dorcas when they found it with stolen properties counted 32 steel pipes and 12 sleepers. Tom Muruti Osiyenya PW3 a Kenya Railways employee who identified the pipes and sleepers as belonging to Kenya Railways as they had KR marks also said the pipes were 32 and the sleepers 12. Ignatius Kishio PW2, another Kenya Railways employee could not remember how many pipes he saw but was sure of seeing 12 sleepers.

Taking all this evidence into account I am satisfied that the Appellant was found with 32 steel pipes or posts and 12 sleepers. Bearing in mind the fact that the Investigating Officer was not among those who arrested the suspect I think he was mistaken on the figures.

I am also satisfied that the Appellant's conviction was based on sufficient and credible evidence. The Appellant was the driver of the canter, which was transporting the stolen properties, which were positively identified as belonging to Kenya Railways at dusk in suspicious circumstances.

I am unable to understand Mr. Alando's contention that the Appellant's employer did authorise him to transport illegally obtained goods. How could he have done that?

I find no merit in the appeal against conviction and I accordingly dismiss it.

The appeal against sentence, however, has merit. Though, as I have said, the record is not clear on the sentence meted out to Dorcas when she pleaded guilty I accept counsel's submission that Dorcas was fined shs. 50,000/-. Although the Appellant pleaded not guilty he should have been fined the same sum if not less as he was a transporter of those goods which appear to have "belonged" to Dorcas.

For these reasons and as the Appellant has served nearly three month's imprisonment I allow the appeal on sentence and reduce it to a term that will secure his immediate release. The Appellant should therefore be set free forthwith unless otherwise lawfully held.

DATED and delivered this 23rd day of July 2007.

D.K. MARAGA

JUDGE