REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MERU

Criminal Appeal 279 of 2002

FREDRICK KIRAITHE KAITHE ……APPELLANT

VERSUS

REPUBLIC ……RESPONDENT

J U D G M E N T

1. When the Appeal herein came up for hearing, Mr. Mwanzia learned counsel for the Appellant abandoned all the grounds set out in the Petition of Appeal and relied only on the sole ground set out in the Supplementary Petition of Appeal. That ground is this:

1. "The Learned Magistrate erred in law by convicting the Appellant when the essential ingredients of the charge were not proved beyond reasonable doubt".

2. The appellant had been charged with the offence of stealing contrary to s.275 of the Penal Code. It was alleged that on 8.4.2001 along Kiirua/Meru/Nkubu road in Meru Central District within Eastern Province he stole "**luggage, clothes and materials valued at Ksh.40,000/- the property of CONSOLATA NJERI NJOGU"**

3.The evidence as I note on record was that P.W.1 Consolata Njeri Njogu trades in clothing materials and on 8.4.2001 had gone to Kiirua Market to sell shirts, skirts, blouses and petticoats inter-alia together with her employee, Boniface Murimi. In the evening they boarded M/V Reg No. KTK 630 Peugeot 404 driven by the Appellant on their way to Nkubu Market. The M/V had a carrier and the Appellant put the bundle containing all the items noted before on top of the motor-vehicle and secured them within the carrier. He drove off and along the way (at Kinoro area) an unknown passenger in the motor-vehicle (it was apparently a Public Service Vehicle) told the Appellant that he had heard "**something**" falling off. P.W.1 said that the Appellant took no notice and drove off but stopped at Gitoro area when again he was reminded of the possibility of something having fallen off. When he stopped the motor vehicle and on checking the carrier, he came back and declared that everything was in place. At Nkubu P.W.1 realized that her luggage was not there and the Appellant offered to go back and see if he could find it. Together with P.W.2, Boniface Murimi they went back all the way to Kiirua but the luggage was not traced. P.W.3 Jane Njoki was present when the two returned and announced that they were unable to get the luggage. The Appellant asked for more time to do so but was not able to get it by 11.00 a.m. the next day and P.W.1 together with P.W.3 reported to the Police. P.W.4 P.C. Daniel Njoroge who enquired into the matter said that he was told by the Appellant that the luggage was lost on the way and he needed time to look for it. When he could not get it, he changed his story and said that in fact he never saw it at all and he was charged with the offence aforesaid.

4. The Appellant in his defence admitted that he indeed took P.W.1 and P.W.2 on the material date as 2 of the 9 passengers in the motor vehicle. It was 4.00.p.m. and raining and the lady (P.W.1) was holding a paper-bag. There was nothing on the motor vehicle carrier, he said, and later when P.W.2 came to him and said that P.W.1 had lost her luggage, he offered to return to Kiirua but the luggage could not be found. Later he was charged and he said that he knew nothing of the offence and P.W.1 was out to frame him.

5. He was found guilty of the offence and fined Ksh.10,000 in default 12 months in prison. He was dissatisfied and filed this Appeal.

6. Mr. Mwanzia relied on the decisions in:-

a. Mohammed vs R [1968] EALR 665 and,

b. Lerrunyani vs R [1968] EALR 107

7. His reliance on the two authorities was based on the holding in the Mohammed Case that for a charge of stealing to be proved it must be shown that there was a "**fraudulent intention"** on the part of the accused and in the Lerunyani case that the element of "**taking"** must also be established in such cases. That since none of these matters had been established, the Appellant was improperly convicted and sentenced.

8. Mr. Muteti, learned State Counsel argued that the lost goods were in the actual possession of the Appellant and that he could not explain how they left his possession and without such an explanation he was guilty as charged. That the authorities cited may otherwise apply but in the circumstances of this case they were distinguishable as the actions of the Appellant pointed towards criminal culpability on his part.

9. The offence of stealing is found in s.275 of the Penal Code which states as follows:

"Any person who steals anything capable of being stolen is guilty of the felony termed theft"

10. "Theft" is defined in the Oxford Law Dictionary, 5th ed, 2000 as;

"the dishonest appropriation of property belonging to someone else with the intention of keeping permanently 'Appropriation' is defined as "the assumption of the rights of the owner of the property and includesany act showing that one is treating the property as one's own".

11. Sir John Ainley CJ in the Lerunyani case adds that theft in that context "Implies at least an act which results in a turning about, a charge in the control of a thing, in the ownership of a thing or in the possession of a thing"

12. Applying these statements to the case at hand, it is with certainty that I say that there was no evidence whatsoever that the Appellant ever "appropriated" or assumed ownership of the luggage belonging to P.W.1. That he tied it to the carrier of the motor vehicle and later said that all luggage was there when asked to check on it and in fact was not there at their destination is no pointer to any act of theft on his part. It was the case as I gather from the record that what fell off the motor vehicle and which was brought to the notice of the Appellant might have been P.W.1's luggage. That the Appellant refused to stop when told to do so does not mean that he "stole" the luggage by those acts. He may have been negligent and there is a remedy for that act on his part but theft cannot be proved by such facts.

13. The Appellants actions cannot in my book be considered as amounting to stealing the goods which actions are even incomparable to those of a driver like himself called Mohamed in the Mohamed Case (supra). Mohamed in that case had taken maize to his house and off-loaded it "because if was raining!" He kept it there without telling the owner of the maize

because he wanted the maize to dry. He was arrested and charged with theft of the load of maize. The High Court in Tanzania (Duff J.) said that;

"Undoubtedly the conduct of the Appellant in not disclosing to his employers……that he had kept the maize at his house would give rise to suspicions, but this in my view is not sufficient reason from which to conclude that the necessary fraudulent intention had been established. I do not agree, as learned State Attorney submitted, that the Appellant intended to misappropriate the property."

14. In that case there was at least evidence that Mohammed had in his possession the load of maize. There is completely no contact between the Appellant in this case and the luggage save that he packed it in the normal course of his work. He was with P.W.1 and P.W.2 in the same car throughout. When did he appropriate the luggage for it to be said that he stole it?

15. This case surprised me even more when I saw the evidence of the investigating officer P.W.4. When the luggage could not be traced he stated in court that he "asked the complainant to do what she could". What could she do? The answer is given by him.

"I then arrested the accused and charged" (sic). On what grounds he charged him we cannot tell.

16. For my part, the evidence before the lower court was so weak it could not sustain any offence let alone prove theft beyond reasonable doubt.

17. The Appeal is merited and is hereby allowed.

18. The conviction is quashed, the sentence set aside and the Appellant shall have a refund of the Ksh.10,000/- fine paid for this wrongful conviction.

19. Orders accordingly.

Dated, signed and delivered in open court at Meru this 4th day of May 2006

ISAAC LENAOLA

JUDGE

In the Presence of

Mr. Mwanzia Advocate for the Appellant

Mr. Muteti State Counsel for the State

ISAAC LENAOLA

JUDGE