



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

APELLATE SIDE

CRIMINAL APPEAL NO. 23 OF 2004

(From Original Conviction and Sentence in Criminal Case No. 218 of 2002 of the Principal Magistrate's Court at Kapsabet by F.A. MABELE Esq. P.M., dated 29/9/2003)

REPUBLICAPPELLANT

VERSUS

MICHAEL KIPKEMBOI

KOGO.....RESPONDENT

JUDGMENT

MICHAEL KIPKEMBOI KOGO was originally charged with the offence of stealing by servant contrary to section 281 of the Penal Code. He was alternatively charged with the offence of handling stolen property contrary to section 322(2) of the same Code. The particulars of the offence in the main count were that on diverse dates between the month of October 2001 and January 2002 at Kapsabet township in Nandi District of the Rift Valley Province being a servant to Christian Intermediate Training Centre (CITC) stole from the CITC assorted workshop tools valued at Kshs. 75,765/= which came to his possession on account of his employer.

The particulars of the alternative charge were that on the 20th day of February 2002 at Komobo Sub-location in Nandi District of the Rift Valley Province otherwise than in the course of stealing arranged the retention of several items, whose particulars were spelt out in the charge sheet, knowing or having reason to believe them to be stolen goods.

After a full trial, in which the prosecution led its case through three witnesses, and after which the accused gave his sworn defence and called one witness, the learned trial Magistrate, found that the prosecution case was doubtful. He thus gave the respondent the benefit of doubt, and acquitted him.

The State which feels aggrieved by the said judgment and acquittal has now preferred this appeal, which was originally based on four grounds, one of which Miss Oundo, learned State Counsel chose to abandon. She then proceeded to urge the following grounds:

1. THAT the learned trial Magistrate erred in law and in fact in acquitting the Respondent under Section 215 of Criminal Procedure Code.

2. THAT the learned trial Magistrate erred in law and in fact in acquitting the Respondent where there was overwhelming evidence against him worth conviction.

3. THAT the learned trial Magistrate erred in law and in fact in acquitting the Respondent on a decision which was unreasonable, having regard to the evidence adduced in court and the recovery of stolen items.

I shall now refer to Kogo as the respondent, while the State shall appear as the appellant.

It was the submission of Miss Oundo, that there was overwhelming evidence against the respondent, which evidence was corroborated, that the prosecution was able to discharge its onus of proof, and that having proven the case beyond reasonable doubt, the respondent ought to have been convicted as charged. She therefore urged the court to find that the acquittal was unlawful.

Mr. Sagassi was however of a different view. It was his submission that the court ought to look at the evidence as a whole. He urged this court to find that the main prosecution witness shifted responsibility and that his evidence was therefore not reliable, that PW3 conceded that a few items, which had been marked 'CITC', were shown by PW 2 to have been borrowed by respondent, but that he had not handed them back formally by the time when the second search was conducted, which in his opinion meant that the charge was premature.

I have, as is expected of me, this being the first appellate Court re-evaluated the evidence on record with a view to establishing whether or not, this appeal is meritorious. PW1, a manager at CITC testified how he went to the quarters of five of their employees on 30/10/2001, with a view to finding out whether there were any of CITC's tools. He found a number of tools which were positively identified as those belonging to CITC, in the respondent's house. In the months of December 2001, and January 2002, CITC realised that more tools were missing and again more items which were to be used in the workshop by artisans were recovered from the respondent's home. He was able to show the marks of CITC on some of the tools.

The investigating officer (PW 3) narrated how he had conducted a search at the Respondents home on 22/2/2002 and how he had recovered some items belonging to CITC.

It was clear from the evidence that his contract of service was not renewed after its expiry on 31/12/2000 and that he was informed accordingly vide CITC'S letter of 24/1/2002. The issue that arises then is, what was he doing with CITC'S items two months after the termination of his contract.

In his defence, the respondent had conceded that he had some of CITC'S items namely tools in his possession but that he had authority to have them and that all that was required was to return their or hand them over. He stated that " I did not hand over the things because *I wanted to find out from the labour office the reason for my dismissal. I can only hand over after this case has been finalised*".

The only logical conclusion, which the learned trial magistrate should have arrived at, was that the respondent intended to deny his former employer (CITC) use of its items, an act which by all accounts, amounted to theft by servant.

I do in this circumstances allow this appeal, set aside this order of acquittal and instead convict the respondent as charged and sentence him to serve 12 months imprisonment.

Dated and delivered this 27th day of January 2005

JEANNE GACHECHE

Judge

Delivered in the presence of: