



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**  
**AT NAKURU**

**CRIMINAL APPEAL 66 OF 2005**

**(From original conviction and sentence in Criminal Case No. 313 of 2003  
of the Resident Magistrate's Court NAKURU –S. MUKETI)**

**WILSON ANDERI KAMADI.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

The appellant was jointly charged with another person for the offence of factory breaking and committing a felony contrary to Section 306(a) of the Penal code. The particulars of the offence were that on diverse dates between 20th December, 2002 and 12th January, 2003 at Mastermind Tobacco Ltd. in Nakuru District within Rift Valley Province they jointly broke and entered the factory of Mastermind Tobacco Limited and committed a felony therein by stealing 104 cartons of Supermatch Kings valued at Kshs.835,050/- property of the said company. He was convicted and sentenced to nine months imprisonment and being aggrieved by the said conviction and sentence he appealed against the same.

The appellant was a watchman employed by Securicor Security Services and the material time was said to have been guarding the complainant's premises.

According to the evidence of **PW1**, on 12/1/03 he realised that 104 cartons of cigarettes were missing. According to him, some people had gained access into the factory premises by removing an iron sheet from the roof. He said that the appellant was guarding the door but did not give the specific dates when he was guarding and also he did not know when the theft took place. Although PW1 was a storekeeper, he did not produce before the court any records showing what was received in the complaint's godown and what went out. He even stated in cross-examination that he did not know whether the appellant was working at the complaint's premises on the dates when he was alleged to have committed the offence. The prosecution was granted an adjournment to avail to the court documents relating to the stock in the complaint's premises and according to PW1 on 11/1/03 there were 32969 cartons of cigarettes and on 13/1/03 the stock was 31,159 and according to him, only 104 cartons were missing. That calculation in itself is wrong. The difference between the stock as at 11.1.03 and 13/1/03 is 1810 and not 104. The witness told the court that he used to count the stocks every day but he did not tell the court what number of cartons was recorded on 12/1/03. However on 13/1/03, after discovering the theft, they loaded 1810 cartons to go to the depot. If those figures as given by the said witness were correct, it is apparent that 32,969 cartons that were there on 11.01.03 less 1810 cartons that were delivered on 13/01/03 bring a difference of 31,159. PW1 said that the book stock showed a difference of 104 cartons but that difference was not explained. From the above figures there was no discrepancy on the number of cartons at all. According to the evidence of PW1, 11th January 2003 was a Saturday and the closing stock was 32,969; 12th January 2003 was a Sunday and presumably there was no official business that was transacted at all

and on 13th January, 2003 after 1810 cartons were loaded out, a count was done and the closing stock was found to be 31,159. The witness did not have the delivery notes of 13/1/2003. However, the figures given by the witness do not show any missing stock at all.

The witness reported to the police that 121 cartons were missing then later on he said they were 114 and the figure that was indicated in the charge sheet was 104. From the figures as shown in the record of PW1's evidence, this court is unable to detect any evidence to show that 104 cartons of cigarettes went missing between 11/1/03 and 13/1/03.

According to the evidence of **PW2**, the theft occurred between 8th and 11th January, 2003. PW2 was a District Manager with Securicor Security Services, the appellant's employer and he testified that the theft must have occurred between 8th and 12th January, 2003 and by that time the appellant was working at Kencell Communications. The witness further told the court that between 28th December 2002 and 14th January 2003 he did not get any report of theft at the complainant's premises. The only incriminating evidence against the appellant as per PW2 was that he was found with a note book which showed some transactions involving fairly large sums of money. That was however mere suspicion and there was nothing to show that those alleged transactions had anything to do with the charge which the appellant faced.

The evidence of **PW3, P.C. Charles Obode** was also circumstantial. It related to the suspicious entries in the appellant's diary which were referred to by PW2. He also testified that the appellant bought several items in the month of January 2003 and also had a bank account which had a credit balance of Kshs.135,000/-. The appellant did not sufficiently explain how he acquired the money with which he bought various items like television set and a video deck which the witness took from the appellant's house. He only said that he was engaged in a certain business.

The appellant, in his sworn defence denied the charge that he faced. He admitted having been found with a diary but said that the records that were contained therein had nothing to do with commission of the said offence. He testified that he used to operate a retail shop and sought to attribute his healthy financial status to the said business operations.

The learned trial magistrate found that there was no direct evidence to convict the appellant with the commission of the offence as charged with but relied on the evidence relating to the various entries in his diary to convict him.

Mr. Gumo, Assistant Deputy Public Prosecutor did not, and rightly so, support the conviction and sentence.

The prosecution failed to show that the appellant actually broke and entered the factory of Mastermind Tobacco Limited and stole 104 cartons of cigarettes therein as alleged in the charge. The place was well guarded and had an electric fence round it. It was not shown that the electric fence was interfered with. The other watchmen who were guarding the premises were never called to testify.

The trial court seems to have convicted the appellant for the simple reason that:-

***“inspite of his simple calling as a watchman, his diary was inserted with entries of huge financial transactions.”***

With great respect to the learned trial magistrate, the onus of proving the charge lay entirely with the prosecution. It was not for the appellant to prove his innocence. It is trite law that suspicion, however strong, cannot be the basis of a conviction.

I therefore allow the appeal, quash the conviction and set aside the sentence that was imposed. The appellant should be set at liberty unless otherwise lawfully held.

DATED, SIGNED & DELIVERED at Nakuru this 17th day of June, 2005.

**D. MUSINGA**

**JUDGE**

**17/6/2005**