REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION

Criminal Appeal 969 of 2003

(From Original Conviction(s) and Sentence(s) in Criminal case No. 1593of 2000 of the Chief Magistrate's court at Makadara(Mrs. W. A. Juma – P.M.)

BENARD MULE MBUVI……..……..……..……..APPELLANT

VERSUS

REPUBLIC ……..……..……..RESPONDENT

J U D G M E N T

The Appellant **BERNARD MULEI MBUVI** was charged jointly with another with the offence of **STEALING BY A PERSON EMPLOYED IN THE PUBLIC SERVIC**E contrary to **Section 280 of the Penal Code**. The Appellant faced an alternative count of **HANDLING STOLEN PROPERTY** contrary to **Section 322 (2**) of the **Penal Code.**

It was alleged that on 21st January 2000 at GSU Headquarters while working as a mechanic, the Appellant stole one clutch plate, one drop arm and one release bearing and in the alternative he handled them knowing or having reason to believe them to have been stolen or unlawfully obtained. After being found guilty and convicted for the main count the Appellant was sentenced to a fine of Kshs.30,000/- in default nine months imprisonment.

The facts of the case were that the Appellant who was a mechanic at the GSU workshop was walking out of the workshop at 11.00 a.m. on the material day when PW1, the person in charge of the workshop thought he looked suspicious. PW1 called the Appellant and asked him why he looked suspicious. PW1 said that the Appellant's stomach was protruding and his buttocks extended backwards. On searching him, PW1 recovered the three items clutch plate, drop arm and release bearing, parts of a land rover vehicle all new, from his trousers. PW2, PW3 and PW4 all witnessed the recovery of the exhibits from the Appellant. Eventually the Appellant and his co-accused were arrested and charged.

The Appellant was representing himself in this appeal. In his very lengthy petition of appeal the Appellant raises 14 grounds. However these were more in the form of evidence.

After analyzing these grounds I found that they could be summarized as follows: -

1. That the learned trial magistrate erred in convicting the Appellant before the prosecution adduced all their evidence and before all documentary exhibits were produced.

2. That the learned trial magistrate erred in law and fact in shifting the burden of proof.

The Appellant's submission were that on the day in question, he was repairing a vehicle registration number GK Z127. That the foreman asked him to remove the clutch plate, drop arm and release bearing which he did. That the foreman asked him to replace the parts. That he took the old parts to PW1 who raised a job card for repair. The Appellant challenged the failure to call the Deputy Commandant and **CPL WENDO** who were present at the workshop at the material time. He submitted that no job card was produced in evidence and neither did the police carry out any investigations.

MISS GATERU, learned counsel for the State opposed the appeal. The counsel submitted that the prosecution had proved the case as required. That the evidence of PW1 proved that the Appellant had not been authorized to go for any spares. That the Appellant was suspected because he had concealed the spares in his clothes. That the evidence of PW1 was corroborated by PW2 and PW4.

I have carefully re-evaluated the evidence adduced before the trial court as I am mandated to do as an appellate court. The evidence against the Appellant is circumstantial in nature that he had concealed inside his trousers three new vehicle (Land rover) parts for which he had no documentation. PW1, the person in charge of the workshop at GSU Headquarters, saw the Appellant with his stomach and buttocks protruding outwards in a suspicious manner. He called him, interviewed him then lifted his clothes only to see the three spare parts exhibit 1 and 2 concealed in his trousers. The Appellant had no explanation. PW1 called PW2, PW3 and PW4 who all witnessed the said exhibits concealed inside the Appellant's clothes. The prosecution were able to establish that no request had been made for the spares. Such a request could only be made to PW1 who would then authorize PW4 or in his absence, store-man to issue them. Any issue of spares was through documentation which PW1, PW4 admitted in evidence from the evidence before court, at the time that the Appellant was found in possession of the spares, the Appellant's co-accused in the case was in charge of the stores where the vehicle spares including the ones in question were kept. PW4 said that he had been sent out on duty by PW1 and so he left the Appellant's co-accused in charge of the stores.

The evidence against the Appellant was both direct and circumstantial, as stated earlier.

The Appellant was found with spares tucked inside his clothes. They had not been requisitioned as required. In the case of **DAVID MERITA GICHUHI vs. REPUBLIC CA No. 138 of 2003** at Page 6 the Court of Appeal held:

> ***"Before a court can base a conviction exclusively on circumstantial evidence it must be satisfied that the inculpatory facts irresistibly point at the accused and are incompatible with the innocence of the accused and incapable of any explanation upon any other hypothesis than that of guilt. The court must also be sure that there are no other co-existing circumstances which would weaken or destroy the inference."***

I have carefully analysed the circumstances under which the Appellant was found in possession of the spares and also his explanation in defence. In defence he claims to have been authorized to go for the spares. However, PW1 later called him and asked him to take the new spares to his office. That on taking them to PW1's office, PW1 called the others and informed them that the spares were fake.

The Appellant's explanation is not plausible, logical or reasonable at all. The explanation was also not in tandem with the issue of cross-examination. That not withstanding the prosecution evidence clearly shows that four officers saw the exhibits tucked inside the Appellants clothes. The learned trial magistrate found them to be credible witnesses and believed them. I see no grounds upon which I could disagree with the learned trial magistrates finding of fact.

The Appellant's possession was not only unexplained. The circumstances of the possession were incapable of an explanation upon any other hypothesis except that of guilt.

I am also satisfied that there were no co-existing circumstances which could weaken or destroy the inference. The Appellant could not have been able to get the spares without help from the stores where the spares were kept. The store man in charge when the spares left the store was the Appellant's co-

accused in the trial court. He too was convicted for the same offence.

I have also considered the Appellant's submission that the documentation for the spares existed in the stores. I do not believe that to be factual. If such documents existed, it was PW4 or his deputy then, the Appellant's co-accused who among others, could have been able to produce them. PW4 specifically said in his evidence that there were no such documents. I do not see any basis of thinking otherwise.

The Appellant's final submission was that certain witnesses who should have been called were not called. The Deputy Commandant was only a co-witness just like PW2, PW3 and PW4.

The only extra role he played was to call police from Muthaiga Police Station. Failure to call him is not fatal since and no adverse inference against the prosecution could have been made in this case since the witness who were called were sufficient to prove the prosecution case. See **BUKENYA & OTHERS vs. UGANDA 1972 EA 548**. That finding also affects the Appellant's submission in regard to the investigating officer. PW6 took over investigation from one **CPL. SHOLA** who was proceeding on transfer. Same argument also affects PW7, the witness who was withdrawn before he could commence evidence in which he was to testify concerning a statement under inquiry he had recorded earlier. PW7 had not disclosed the name of the person he took the statement from. In regard to the evidence of PW7, I see no prejudice which the Appellant may have suffered in failure to call that witness.

Having considered this appeal, I find that it has no merit. I dismiss it accordingly.

Dated at Nairobi this 27th day of July 2005.

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LESIIT, J.

JUDGE