REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION

CRIMINAL APPEAL 51 OF 2002

(From original conviction and sentence in Criminal Case No. 7994 of 1999 of the Senior Principal Magistrate's Court at Kibera)

ONYANCHA BWONA NYAMARI …..……APPELLANT

VERSUS

REPUBLIC …….RESPONDENT

JUDGMENT

This is an Appeal from the Judgment of Mrs. Karanja, Senior Principal Magistrate at Kibera, Nairobi in which the Appellant, Onyancha Bwona Nyabari together with four others were convicted for the offence of stealing goods in transit contrary to Section 279 (c) of the Penal Code. Following the conviction they were each sentenced to serve 18 months imprisonment plus one stroke of the cane. Being aggrieved by the conviction and sentence, the Appellant lodged the instant Appeal. In the petition of Appeal dated 27th December, 2001, the Appellant set out seven grounds of Appeal. However at the hearing of the Appeal the Appellant abandoned all the other grounds and only argued grounds 2, 6, and 7 in petition of Appeal.

These grounds are to the effect that the Learned Magistrate erred in law and fact and against the weight of evidence in finding the Appellant guilty of stealing goods in transit. That the conviction was against the weight of evidence and finally that the sentence imposed was manifestly excessive in the circumstances. The Appellant also in the cause of urging the Appeal touched on the issue of the defence of the Appellant not having been given due consideration although it was not one of the grounds in the petition of Appeal.

The facts of the case are that Bakex Millers of Thika imported a total of 4,500 metric tonnes of wheat from Argentina. The wheat was to be cleared through the port of Mombasa. They contracted General Cargo Services to clear and arrange for the transportation of the wheat. The wheat was duly cleared and 1, 302 bags loaded into 3 Wagons. 2 of the Wagons had 450 bags while the 3rd had 402 bags and they were all destined for Thika. Out of the three Wagons, only two reached their destination. The Wagon with 402 bags found itself at Makadara Railway Station.

Before then and on 23rd July, 1999 , one George Maina Ndung'u 4th accused in the Court below had called on Gabriel Ripa, (PW10), the then district Goods Officer at Makongeni/Makadara Railway Station wanting to know whether the Wagon in question had arrived. He showed PW10 a photocopy of the consignment note. PW10 advised him that it was too early for the wagon to have arrived since it had only been dispatched the previous day. He told him to check with him the following Monday. In the

meantime PW10 became suspicious with regard to documentation shown to him by the 4th accused. According to PW10, if the 4th accused was the owner of the wheat consignment, then he should have had a carbon copy of the consignment's note and not a photocopy.

He launched investigations. He soon noticed some alterations in one of the documents. Instead of receiving the carbon copies from Mombasa for the said wagon as it is the normal practice, they had also received photocopies. Through one Shem Shiba (PW12), a delivery Clerk at the Makadara/Makongeni Railway Station, he dispatched a telegram inquiry to Mombasa Railway Station asking them to confirm the true owner of the said wheat. In reply to the telegram, they were informed that the wheat was actually consigned to Bakex Millers of Thika. It would appear therefore that this wagon together with the wheat had been illegally diverted to the said Railway Station. PW10 and his people were therefore put on alert.

Soon thereafter 5th accused in the Court below appeared at the station with the same photocopies of the documents that 4th accused had earlier on shown to PW10 and was informed that the consignment had arrived. She was asked to go and come back with the carbon copy of the documents. PW10 then alerted the Police so that they could lay an ambush. In the meantime, 5th accused proceeded to hire lorries which were driven by PW5, PW6 and PW7 telling them that she had a consignment of wheat that she wanted transported from the Railway Station to Kabansora Millers. The lorries were driven into the station and were loaded with the wheat. However the Police were laying in wait. 5th accused then proceeded to the Makadara Railway Station offices to have the documentation stamped and also to be issued with a gate pass.

The lorries were then driven to the gate in readiness to leave. Just them 4th accused arrived and as he was enquiring as to what was happening, he was arrested so was 5th accused. Following further interrogations of the two, 4th accused offered to take the Police officers to a place where 1st, 2nd and 3rd accused had agreed to meet with him so as to collect their money. Indeed 4th accused took the Police officers to Sun Court Hotel and the Police again laid an ambush. Soon thereafter 1st, 2nd and 3rd accused persons entered the Hotel and sat at the Lounge. The Police then pounced and arrested them. They were then charged with the offences in the charge sheet. The Appellant herein who was the 1st accused faced one count of stealing goods in transit contrary to Section 279 (1) of the Penal Code and further count of forgery contrary to Section 249 of the Penal Code. However the Appellant was convicted on the first count only. He was acquitted on the forgery count.

In support of his grounds of Appeal Mr. Nyandieka, Learned Counsel who appeared for the Appellant submitted that it was not in dispute that the Appellant was an employee of Kenya Railways then based at Mombasa. The documents that were used to facilitate the transportation of the wheat were actually prepared in Mombasa. Counsel however submitted that the Learned Magistrate acquitted the Appellant of the offence of forgery but nonetheless proceeded to hold that the persons who had opportunity to alter the documents were the Appellant and the 6th accused, a co-worker. That from the evidence on record the documents were prepared by the 6th accused and not the Appellant and were in the custody of 6th accused throughout. It was the Learned Counsel's contention that the Appellant was convicted on the incriminating evidence of the co-accused.

Counsel further submitted that PW8 who was the officer in charge of the Appellant and 6th accused in the office had specifically testified that he did not assign the Appellant any duties on the day the documents were allegedly altered. He also specifically stated in his evidence that none of those documents were written by the Appellant. Learned Counsel further submitted that given the evidence on record the finding by the trial Magistrate that the Appellant and 6th accused altered the documents cannot be correct. Learned Counsel further attacked the finding of the Magistrate that the Appellant had gone to receive the proceeds of the sale of the diverted wheat when he was arrested. Counsel submitted that there was no basis at all for that finding as there was no such evidence.

According to the evidence on record, it is 4th accused who claimed ownership of the wheat who offered to take the Police to the person selling the wheat to him. There was no question of sharing money. There was evidence that the 4th accused specifically stated that he was dealing with 2nd and 3rd accused whom he had met in Mombasa and who had offered to sell wheat to him. The evidence on record

according to Learned Counsel exonerated the Appellant completely. That other than suspicion in the mind of the Court, there was no evidence at all connecting the Appellant to the offence.

Given that the 4th accused categorically stated that he did not know the Appellant and given that he was arrested whilst drinking water in the Hotel, the trial Court erred in making an inference of guilt from mere suspicion. Counsel submitted further that there were sufficient doubts raised in the Appellant's defence which ought to have been resolved in the Appellant's favour. Further the Appellant was convicted on the evidence of an accomplice. Such evidence is worthless unless there is corroboration. The Magistrate in her Judgment concluded that corroboration was alarmingly absent. In support of his submissions that the Appellant was arrested and charged on mere suspicion, Counsel referred the Court to the case of **SAWE VS REPUBLIC (2003) KLR 364**. The mere fact that the Appellant was found at the hotel is not enough without any other evidence to infer guilt on the part of the Appellant. On sentence, Counsel submitted that the Appellant had lost his job and attendant benefits. In the circumstances the sentence meted out was excessive, Counsel concluded his submission.

In response, Ms. Gateru, Learned State Counsel opposed the Appeal both on conviction and sentence. She was only willing to concede to that part of the Appeal on sentence involving the stroke of cane, since Corporal punishment had been banished from our statute books. On sentence, Counsel submitted that the offence upon conviction carried a maximum sentence of 14 years. The Appellant was however sentenced to only 18 months. That sentence cannot be said to be harsh or excessive. As to the charge, Counsel maintained that the Prosecution had proved its case against the Appellant to the required standard. It was not disputed that there was diversion of wheat from Thika to Makadara/Makongeni Railway Station without the knowledge or consent of the owner (PW1). Other than diversion, the Prosecution also proved that there was intention to dispose off the said wheat by selling to 4th accused. That the 4th accused was arrested in a police ambush who in turn assisted the Police with investigations leading to the arrest of the Appellant and two others. Counsel further submitted that the evidence touching on the Appellant was circumstantial.

That notwithstanding the evidence was strong enough to sustain a conviction. That from the evidence adduced, it was the Appellant, 6th accused, PW4 and PW8 who used to work in the offices where the alteration to the documents was said to have taken place. Any one of them could have been responsible. That PW4 & 8 were exonerated following investigations leaving the appellants and 6th accused as the main suspects. Counsel conceded that without the accomplice evidence of 6th accused there was no other evidence linking the Appellant to the crime. Counsel also submitted that it could not have been a mere coincidence that the appellant, 2nd and 3rd accused could have on the material just bumped into each other and headed for the hotel from where they were arrested.

On Appellants defence, learned State Counsel submitted that the same was properly considered and dismissed when it was found to be lacking in merit. Counsel therefore urged me to dismiss the appeal.

This being the first appellate court, I am enjoined on the basis of **OKENO –VS- R (1972) E.A. 32** to look afresh at the evidence tendered in the lower Court, re-evaluate and re-assess it and reach my own conclusion as to the guilt or otherwise of the appellant.

As correctly submitted by both Counsel for the appellant and the Respondent, the evidence linking the appellant to the crime is purely circumstantial and that of the accomplice, 6th accused in the Court below. As it has been stated on many occasions, in every case depending on circumstantial evidence, each link in the chain must be closely and separately examined to determine its strength before the whole chain can be put together and a conclusion drawn that the chain of evidence as proved is incapable of explanation on any other reasonable hypothesis except the hypothesis that the accused is guilty of the charge – S**ee REX –VSKIPKERING ARAP KOSKE & ANOTHER (1949) 16 EACA 135.**

What were the circumstances that the Learned trial Magistrate considered in arriving at the conclusion that the Appellant was guilty? One the fact that the Appellant was an employee of Kenya Railways and worked in the office whereat the documents diverting the wheat from Thika to

Makadara/Makongeni railway Station were purportedly altered and secondly that the Appellant was arrested in the hotel in the company of the co-accused as they waited to be paid their respective shares of the proceeds of the sale of the wheat.

It is common ground that he Appellant was an employee of Kenya Railways and that the worked in the office where the documents were allegedly altered to facilitate the diversion of the wheat. However from the evidence of PW4 and PW8, the Appellant used to share the offices with two other persons. Under cross-examination by Mr. Odero Learned Counsel for the Appellant then, PW4 stated:-

> ***"……accused 1 had no specific duties because he was under interdiction for 4 years. He would therefore be given work as it came. On the date in question, I did not assign him any work. Nobody told me that he gave accused work that day. I had given work to Otieno and Ndukanio. I did not give accused 1 any work…"***

From the foregoing, it is clear that the Appellant was not assigned any work by his boss on the day in question. However the others whom he shared the office were. How then could he have been in a position to alter the alleged documents that he did not have in the first place? Under cross-examination the same witness categorically stated:-

> **"……none of those documents were written by Onyancha (accused 1)…**"

On the aspect of alteration of the documents 6th accused testified:

> *- "….. on 23. 7. 1999 I noticed that the book where I had recorded the seals had been changed to read Makadara instead of Thika.*
>
> *I erased Makadara and put Thika. I did not know what was going on….. On 30. 7. 1999 some investigators came to the office of the goods Agent with 2 labels and 2 seals. I told them that the writings belonged to Onyancha, Accused 1…"*

First and foremost, it is not possible to tell how the witness came to the conclusion that the writing belonged to the Appellant. He did not say that he was familiar and or conversant with the Appellant's handwriting. Further this testimony came through unsworn statement of defence of the co-accused.

The Appellant therefore had no opportunity at all to test that allegation further by way of cross-examination. In any event, this evidence is from an accomplice and as we all know, such evidence is useless unless there is corroboration. My evaluation of the evidence on record reveals that there was no evidence at all to corroborate the accomplice evidence aforesaid. The Learned Magistrate also found and correctly so in my view, that corroboration was glaringly absent.

Between the testimony of PW8 who categorically stated that the documents were not written by Onyancha and that of the co-accused who claimed that the documents were written by Onyancha, who should have the Court believed? In my view, I think the Court ought to have treated the evidence of the co-accused with a lot of circumspection bearing in mind that a co-accused in a case would do or say anything to save his skin. I hold the view that the evidence of PW8 was more credible and reliable on the issue. He had nothing to loose or gain by so testifying. Further I am of the considered view that this matter could have easily been resolved had the prosecution called in evidence either a document examiner or hand writing expert. They were not called. No reason was advanced for the failure to call such vital witness. One can only assume that perhaps their evidence would not have advanced the Prosecution case.

It is also not lost on this Court that the Appellant was acquitted on the count of forgery for lack of evidence from either a document examiner or hand writing expert. This is how the Learned Magistrate put it.

> ***"I nonetheless agree with the defence that there was no evidence from a document***

examiner or handwriting expert to confirm that indeed the documents were forged by accused 1 or accused 6 or both…….. In the absence of such accused 6's evidence cannot suffice to support a conviction in that Court…." In the circumstances, I find that count 2 has not been proved against accused 1 and accused 6."

Having held that the evidence of either handwriting expert or document examiner was critical in determining a case of forgery, I am at a loss how the Magistrate would turn around and hold that the documents were altered by the Appellant. That determination could only have come by the evidence of the aforesaid experts.

Further in his own sworn statement of defence, the Appellant stated that on the day of the alleged crime, he had been given time off from work and travelled upcountry. This evidence was not seriously challenged in cross-examination. The question then is was the Appellant present or away from the scene of crime. Considering the evidence of PW8 that the Appellant was on interdiction and could hardly be given work, it behoved the trial Magistrate to consider this aspect of the defence rather critically. So that her conclusion in the Judgment that the person who had opportunity to alter the documents were the Appellant and the co-accused is rather suspect.

Before leaving Mombasa, I think it is important to consider the evidence of accused 4. He testified that:- "……Sometime while in Mombasa, 3 people came to my office. They were brought by one George Mvita who used to be our broker. He left the people with me saying I should discuss the matter with them. They were accused 2 and accused 3 i.e. Timothy and Briza Athumani. I told them I had no money then. They told me that they had 3 bogies and I would buy them if they kept them for me. I told them I had no money then but I was going to look for money…."

From the testimony it is quite clear that the Appellant had no dealings whatsoever with accused 4. Accused 4 only dealt with accused 2 and 3. He even introduced the said accused persons to his wife, accused 7. This evidence in my view taken in totality with the other evidence on record, tend to exonerate the Appellant from the commission of the offence. To that extent I would agree with the submissions of Learned Counsel that other than mere suspicion in the mind of the Court, there was no other evidence connecting the Appellant to the alleged offence. In the case o**f SAWE VS REPUBLIC (2003) KLR 364:-** it was held that.

"…… suspicion however strong, cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt…."

This case is on all fours with the above statement of the law.

I wish now to comment on the arrest of the Appellant. The Appellant was arrested at Sun Court Hotel in an ambush laid by the Police. According to the prosecution, the Appellant together with accused 2 and 3 were arrested as they waited to be paid their share of the proceeds of the sale of the diverted wheat. My perusal of the recorded evidence does not disclose such evidence. On this issue all that accused 4 stated was that:

- "…… they told me I had to produce the people who were selling me the wheat. I told them that the people who were selling the wheat to me were meeting me at my hotel at 3 p. m….. at 3 p. m. I was informed that my visitors had come. We went downstairs. We found 3 of them in the Lounge drinking water.

They were arrested and we were taken to the Police station……. I had plans with accused 1 and 3. I did not know accused 1 before….. I had no money to pay for the wheat. I was supposed to pay after delivery and sale….."

Under cross-examination by the Prosecutor he testified that:-

"…… I and accused 2 and 3 are the ones who could have benefited if the deal went through…."

From the foregoing it is clear that there is no mention of the Appellant having been arrested as he waited to be paid by c0-accsued 4. If anything he is completely exonerated from the crime by the testimony of the 4th accused.

The Appellant gave in his sworn statement of defence a detailed account as to how he found himself in the hotel. In my view the explanation taken together with the totality of the evidence on record was plausible and the defence ought to have been given due consideration.

As I have already stated there is no evidence at all on record suggesting that the Appellant ever handled the documents that led to the diversion of the wheat. If anything the documents were prepared by accused 6 and were in his custody throughout. There is therefore no nexus at all between the documents and the Appellant. That being my view of the matter, it was wrong for the trial Magistrate to have convicted the Appellant on the evidence that was tenuous and based on mere suspicion. In my view the evidence before Court , the circumstances of the offence and the Appellant's arrest do not point irresistibly at the Appellant and neither are the facts incapable of explanation upon any other hypothesis than that of guilt.

Having taken all facts into consideration, with great circumspection and exercising caution, I find that the conviction of the Appellant was unsafe. I find merit in this appeal and allow it. Consequently I quash the conviction and set aside the sentence. The Appellant is set at liberty.

Dated at Nairobi this 17th of July, 2005.

M.S.A. MAKHANDIA

JUDGE