



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

**CRIMINAL APPEAL 76 OF 2005**

**CONSOLIDATED WITH  
CRIMINAL APPEAL 94 OF 2005**

**(From original conviction and sentence of the Chief Magistrate's  
Court at Nakuru in Criminal Case No. 535 of 2004)**

**MUGWIRI MUGIRA RECHE.....1ST APPELLANT**

**ABDI HASSAN OSMAN.....2ND APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

The appellants, Mutwiri Mugira Reche and Abdi Osman Hassan were charged (*together with other persons who were acquitted by the lower court*) with the offence of stealing contrary to Section 275 of the Penal Code. The particulars of the offence were that on the 26th of February 2004 at Malewa Road block along Nakuru-Nairobi Highway in Nakuru District, the appellants jointly stole Kshs 1,560,000/=, the property of Aldow Hamza Osman. The appellants pleaded not guilty to the charge. After a full trial, the appellants were found guilty as charged. They were sentenced to serve two years imprisonment. They were aggrieved by their conviction and sentence and each appellant filed his separate appeal against his conviction and sentence. At the hearing of the appeal, the separate appeals filed by the appellants were consolidated and heard as one.

In their petitions of appeals, the appellants raised more or less similar grounds of appeal. They were aggrieved that the trial magistrate had convicted them on insufficient evidence adduced by the prosecution. They were further aggrieved that they had been convicted after the trial magistrate had disregarded the evidence they had adduced in their defence. They faulted the trial magistrate for finding that the prosecution had established a case of theft against them after she had shifted the burden of proof from the prosecution to the defence. The appellants were aggrieved that they had been sentenced to serve a custodial sentence which was harsh and excessive in the circumstance. The appellants were aggrieved that the trial magistrate had convicted them for the offence charged yet no evidence had been adduced by the prosecution to connect them to the theft.

At the hearing of the appeal, I heard the submissions made by Mr Mugambi Learned Counsel for Mugwiri M. Reche (1st appellant), Mr Cheche, Learned Counsel for Abdi Osman Hassan (2nd appellant) and Mr Koech on behalf of the State. The two counsel for the appellants made persuasive arguments urging the court to allow the appeal. On his part, Mr Koech, Learned State Counsel opposed the appeal. He submitted that the appeals did not have merit and they should therefore be dismissed and the conviction of the appellants and the sentences imposed be upheld. Before addressing the issues that

came to the fore for determination by this court, it is imperative that the facts of this case be set out, albeit briefly.

On the 25th of February 2004, PW1 Aldow Hamza Osman, a Southern Sudanese, boarded a Gateway Bus registration number KAQ 787P at Busia. It was at 8.00 pm. PW1 had been given Kshs 1,560,000/= by PW4 Altyeb Fadull Alkaranga to take to Nairobi to pay for the supplies of his shop which he was then operating at Busia, Uganda. The Kshs 1,560,000/= were in seventeen bundles. They were put in a dark blue bag which was stitched. PW1 tied the bag around his body and wore a jacket. According to PW1, the journey from Busia to Naivasha was uneventful. When the bus reached a police roadblock at Naivasha at about 2.00 a.m., all the male passengers were ordered to alight from the bus. PW1 told the police in a loud voice that was heard by other passengers that he had money. He specifically stated that he had 1.56 million in his possession. A policeman, whom PW1 identified as the 2nd appellant, ordered PW1 to remove his shirt. He testified that he was handcuffed and beaten up with a butt of a gun. The 2nd appellant, accompanied by other police officers, then relieved PW1 of the cash that was in his possession.

PW1 recalled that a report was made to the 1st appellant who appeared to be the officer in charge of the police officers manning the road block. After the 1st appellant had been spoken to, PW1 was arrested and ordered to board a police motor vehicle. The road block was then dismantled and PW1 escorted to the Naivasha Police Station. On the way, the said police motor vehicle stopped three times. The passengers who were travelling in the same bus with PW1 refused to proceed with the journey without PW1. They followed the police motor vehicle to Naivasha police station. At the time, three buses belonging to Gateway bus services followed the police motor vehicle to the police station. At the police station, PW1 was surprised when the police produced a bag containing bhang (cannabis sativa) and told the report officer at the station that PW1 had been arrested in possession of the bhang. The passengers who had by then alighted from the buses protested and called the police officers who included the two appellants, liars.

PW5 Sergeant Magaki Abdalla who was then the officer on duty at the Police station realized that the passengers were going to cause a breach of peace, if the situation was not contained. He informed the then OCS of Naivasha Police station, PW8 Chief Inspector Stephen Mwangi. PW8 arrived at the police station at 5.45 a.m. and took charge of the situation. He realized that the complaint raised by the members of the public implicated the police officers who were manning the road block. He reported the matter to the OCPD. The investigation of the case was handed over to the D.C.I.O. Nakuru. PW8 testified that he saw the thirty nine rolls of bhang which were allegedly recovered from the possession of PW1. PW2 Julius Bwasha Buguka, the driver of the bus that PW1 was travelling in, testified that on the material night, when he reached the police roadblock at Naivasha, he was stopped by the police and all male passengers were ordered to alight from the bus. PW2 heard PW1 tell the police that he was a businessman and was carrying money. The police got hold of PW1 and handcuffed him. They removed the bag that PW1 was carrying in his person. The police did not allow any person who was in the bus to witness what was in the bag when the same was opened. Later PW2 heard the police claim that PW1 was carrying bhang (cannabis sativa). PW2 found this allegation to be unusual because on a previous occasion when a passenger in the bus he was then driving was found in possession of bhang, he, as the driver of the bus was informed immediately and saw bhang (cannabis sativa) at the scene. In the previous occasion that the police had arrested a passenger for being in possession of bhang, the bag containing the bhang was opened in the presence of the driver of the bus. PW2 testified that the passengers in the bus refused to travel to Nairobi without first the issue involving the police and PW1 first being resolved. It was then that PW2 decided to follow the police vehicle carrying PW1 to the Naivasha Police Station. PW3 Kiongolo Richard, an Inspector with Gateway Bus Service likewise recalled that when the police were conducting a body search on PW1, he (PW1) told the police who were searching him that he was carrying money. The police ordered PW1 to alight from the bus. He was taken some distance away from the bus. Later PW3 heard the police said that the bag which PW1 had tied on his body had money. However PW3 was surprised later, when at the police station the Police claimed that the bag which was found in possession of PW1 contained bhang (cannabis sativa). PW3 recalled that when this allegation was first made at the police station, the passengers who had by then alighted from the bus shouted that the police were lying.

PW6 Paul Nganga, a police driver recalled ferrying six police officers, who included the

appellants to man the road block along Nakuru-Nairobi road. Later during the night at about 5.30 a.m., he went to the road block and brought back the police officers to the police station. PW9 Mulindwa Godfrey, was a passenger in the bus which PW1 was travelling in. At the road block mounted by the police at Naivasha, PW1 saw the police forcefully remove a bag from PW1 which he was carrying inside his jacket. He saw PW1 being handcuffed. He did not see any money though he heard fellow passengers saying that PW1 had a lot of money in the bag. PW10 Farah Ismael Ali, a conductor of the bus that PW1 was travelling in, testified that he heard PW1 tell the police that he had money. The police officer whom PW1 told that he had money was the 2nd appellant. PW10 saw the 2nd appellant open the bag which he had by then removed from the possession of PW1. PW10 heard the 2nd appellant say that there was cash money in the bag.

PW10 heard the 2nd appellant suggest to PW1 that the money could have been robbed from someone. The police then took PW1 while handcuffed to their motor vehicle with the bag. Later at the police station, PW10 was surprised when the police produced a bag which they claimed was recovered in the possession of PW1. The said bag contained bhang (cannabis sativa). PW10 testified that he saw the bag the first time at the police station. He recalled that the bag which PW1 had, had not been opened at the scene (i.e. the road block). PW11 Joseph Ngiza, a Senior Superintendent of police, investigated the case. He testified that he believed the story of PW1 when he stated that he had the money which was robbed from him by the police officers who were manning the road block. Although PW11 did not make any recovery of the stolen money, his investigations established that PW1 had the money when the bus was stopped at the roadblock. PW11 was further convinced that it was the police officers, (who included the appellants), who were manning the roadblock who stole the money from the complainant.

When the appellants were put on their defence, they denied stealing the money from PW1. They insisted that the bag which was found in possession of PW1 contained bhang (cannabis sativa) and not money. It was their defence that the issue of the lost sum of money was raised so as to fudge the fact that PW1 had been arrested ferrying bhang.

This being a first appeal, this court is required to consider the appeal by re-examining and re-evaluating the evidence adduced before the trial magistrate and reach its own independent decision whether or not to uphold the conviction of the appellant. As was held by the Court of Appeal in the case of **Charles Mwita –versus- Republic C.A. Criminal Appeal No. 248 of 2003** (Eldoret) (unreported) at page 5:

***“In Okeno v R [1972]E.A. 32 at page 36 the predecessor of this Court stated:-***

***“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya –v- R [1957]EA. 336) and to the appellate court’s own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions, (Shantilal M. Ruwala –v- R [1957]EA 570) it is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower courts findings and conclusion; it must make its own findings and draw its own conclusions Only then can it decide whether the magistrate’s findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters v. Sunday Post, [1958] E.A. 424.”***

***The above sets out the duty of the first appellate court. We are of the view that it is upon the first appellate court to carry out that duty by actually re-evaluating the evidence. It is not enough for the first appellate court to merely state that it has re-evaluated the evidence. Indeed, in Gabriel Njoroge v. Republic [1988-85]1 KAR 1134, at page 1136 this Court said:-***

***“As this Court has constantly explained, it is the duty of the first appellate court to remember that the parties to the court are entitled, as well on the questions of fact as on the question of law to demand a decision of the court of the first appeal and as the court***

***cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions though it should always bear in mind that it has neither seen nor heard from the witnesses and to make due allowance in this respect (see Pandya v. R. [1957] E.A 336, Ruwala v. R [1957] E.A. 570). If the High Court has not carried out its task it becomes a matter of law on second appeal whether there was any evidence to support the conviction. Certainly misdirections and non-directions on material points are matters of law.”***

In the instant appeal, the issue for determination by this court is whether the prosecution proved the charge of theft against the appellants to the required standard of beyond reasonable doubt. I have considered the facts of this case and the submission made before me during the hearing of this appeal.

The thrust of the appellants case is that the complainant (PW1) was found in possession of bhang and not a colossal sum of money, as the complainant claimed. The appellants' case is that the issue of the money was raised by the complainant to conceal the fact that he had been arrested redhanded with bhang (cannabis sativa).

Having re-evaluated and re-examined the evidence adduced by the prosecution witness the following facts are in dispute. It is not disputed that the 1st appellant was in charge of the police officers who were manning the roadblock at Naivasha during the material night. There were police officers from three branches of the police. Some police officers were from the regular Police. Some were from the Administration Police while others were attached to the Criminal Investigation Department (CID). From the evidence adduced the total number of police officers who were manning the road block during the material night were nine. According to the complainant (PW1) he boarded the bus registration number KAQ 987P at Busia, Kenya. He was travelling to Nairobi to buy supplies for his shop and that of his uncle (PW4). The complainant testified that he was carrying Kshs 1.56 million in his person. The money was tied in seventeen bundles. PW1 put the money in a bag and tied it round his body. He then wore a jacket to conceal the bag.

PW1's evidence was corroborated by the evidence of PW4 who assisted PW1 to tie the money in the seventeen bundles. The journey from Busia to Naivasha was uneventful. The bus which the complainant was travelling passed through several police roadblocks. When the bus was stopped by the police at Naivasha, it was about 2.00 a.m. The police ordered all the male passengers to alight from the bus. Evidence was adduced to the effect that the reason why the male passengers were told to alight from the bus is because the police had decided to conduct a search of the bus and the passengers to establish if contraband goods were being ferried by the bus. The complainant testified that when the 2nd appellant wanted to conduct a search on his person, he told him (the 2nd appellant) that he was carrying money. PW2, the driver of the bus heard the complainant tell the police officers (among them the 2nd appellant) that he was carrying money. PW10, the bus conductor and PW9 a passenger in the bus, also heard the complainant tell the police that he was carrying money.

Evidence was adduced by the prosecution that upon realizing that the complainant was carrying money, the 2nd appellant had the complainant handcuffed. PW10 saw the complainant being taken some distance from the bus. PW2 and PW10 heard the 2nd appellant confirm that the appellant was carrying cash which he (the 2nd appellant) claim was proceeds from a robbery. The complainant was taken to the police motor vehicle and later to Naivasha Police Station. The bus which the complainant was travelling in, followed the police motor vehicle to the police station. Two other buses belonging to Gateway bus services also followed the police motor vehicle to the police station.

It is at the police station that a story emerged that the bag which had been found in possession of the complainant contained bhang and not money. The passengers who were travelling in the same bus with the complainant disputed this fact. They shouted at the police claiming that they were liars. Someone informed the press. It is after that that the police took action and acted on the complaint raised by the police. The District Investigation Officer, Nakuru DW11 was instructed to investigate the case. He established that indeed, the appellants with the other police officers who were manning the road block

stole the sum of Kshs 1.56 million from the complainant. Having carefully re-evaluated the evidence adduced before the trial magistrate, it is clear that a conspiracy was hatched by the police officers who were manning the road block to steal the money from the complainant. At the same time, they made a decision to frame the complainant for being in possession of thirty nine rolls of bhang. The theft could not have succeeded if the 1st appellant, who was the police officer in charge of the road block had not participated in the conspiracy and subsequent theft of the money from the complainant. The complainant's evidence on the circumstances under which he was unlawfully dispossessed of the said sum of money is cogent, consistent and truthful. There was no reason why the complainant could have told the police in the hearing of the his fellow passengers that he was not carrying any contraband goods but money in cash. If indeed, as claimed by the appellants that the complainant was carrying bhang (cannabis sativa) instead of the money, why did the appellants not confirm in the presence of the passengers or the bus driver and conductor that indeed the complainant was carrying bhang and not the money? The 2nd appellant actively participated in the theft. He was identified by the complainant, PW2 and PW10. Infact PW10 testified that the 2nd appellant confirmed that he had seen the money but was of the opinion that the money was not lawfully obtained by the complainant. The 2nd appellant speculated that the money could have been proceeds of a robbery.

The prosecution established that the complainant possessed the money at the time he was stopped by the police officers manning the road block. The 3rd appellant actively participated in the theft of the money. There is no doubt that the complainant identified him. Indeed, the complainant testified that the 2nd appellant spoke a few Arabic words with him in the course of the conversation which they had. The passengers in the bus were surprised, nay, shocked with disbelief when they were told at the police station that the complainant was ferrying bhang. They protested and barricaded the police station. It is this spirited action by the passengers in the bus that made the truth to eventually emerge. If the fellow passengers of the complainant had accompanied him to the police station, the fate of the complainant could have been different. Most probably he would have been charged on the trumped up charges of trafficking bhang (cannabis sativa).

Having carefully evaluated the evidence adduced by the prosecution and the defence offered by the appellants, I do hold that the prosecution proved its case against the appellants beyond any reasonable doubt. The entire scheme to steal the complainant's money could not have succeeded if the 1st appellant who was the officer in charge of the officers at the road block had not participated and connived in the conspiracy to steal the money from the complainant. In the circumstances of this case, I find no merit whatsoever in the appeals against conviction filed by the appellants and consequently dismiss the said appeals against conviction.

On sentence, I have considered the fact that the appellants, being police officers, were expected to uphold the law and not break it. By stealing from the complainant, the appellants betrayed the trust placed on them by the citizens of Kenya as the enforcers of the law. The trial magistrate rightly found that the appropriate sentence to be meted upon the appellants was custodial sentence. However, this court notes with disquiet that, the other police officers who conspired with the appellants were acquitted for no apparent reason by the trial magistrate. The appellants and the police officers who manned the roadblock conspired to steal from the complainant and also subvert the course of justice. I have noted that the appellants are first offenders. Prior to the incident, they had offered exemplary service to the Police Force. Because of the reasons stated above, in my considered view, the sentence imposed by the trial magistrate of two years imprisonment was rather harsh in the circumstances. I will set aside the said sentence and substitute it with an appropriate sentence of this court sentencing each of the appellants to serve one (1) year imprisonment. The said sentence shall take effect from the 20th of December 2004 when the appellant were sentenced by the trial magistrate.

It is so ordered.

**DATED at NAKURU this 13th day of October 2005.**

**L. KIMARU**

**JUDGE**