



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
CRIMINAL APPEAL 295 OF 2004**

(From original conviction and sentence in Criminal Case No. 746 of 1999 of the Chief Magistrate's Court at Nakuru –B. K. KIRUI. ESQ.)

HENRY MOMANYI MACHINI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant was charged with the offence of stealing by servant contrary to Section 281 of the Penal Code. The particulars of the offence were that on diverse dates between 14th and 22nd April, 1999 at Christ the King Academy in Nakuru, jointly with others, being employees of Virginia Wanjiku, stole from their employer 21 bags of maize and beans all valued at Kshs.70,000/- which came into his possession by virtue of his employment. He was tried and convicted and was sentenced to 12 months probation. He was aggrieved by the said conviction and sentence and therefore he appealed against the same.

The evidence that was tendered before the trial court can be summarised as follows:-

The appellant was the school bursar, Christ the King Academy. He used to keep the keys to a store where some maize and beans were kept. On or about 23rd April, 1999 21 bags of maize and 13 bags of beans were stolen. Five people including the appellant were arrested and charged in connection with the incident. Apart from the appellant, the others were Thomas Araka Makini (a gateman), Francis Kinuthia (a gardener), Richard Wamogondo (a general workman) and Jeremiah Mwajema Kariuki, a kiosk operator which was located outside the school. The store had not been broken into and so the appellant was reasonably suspected to have had a hand in the disappearance of the said bags of maize and beans.

On 24/4/99 the police recovered 20 empty bags from the kiosk of the said Jeremiah Mwajema Kariuki. The bags belonged to the school

PW3 testified that she had given the store keys to the appellant and that on 22/4/99 the appellant had gone to the store together with Mr. Kinuthia the gardener to check for paints but found none. There was no direct evidence to connect the appellant to the said offence but a retracted confessionary statement by one of the accused implicated the appellant.

The court found that all the accused had a case to answer and placed them on their defence. In his sworn statement of defence, he stated that all the school keys were kept at the Headmistress's office and heads of departments normally handled keys for various departments but were all surrendered to the headmistress when the school closed. He further stated that the matron was responsible for the keys but

when the school closed all the keys were taken to the headmistress's office. He said that on 15th April, 1999 the secretary, PW3, handed over the keys to him. He then said that he used to give the keys to the gardener everyday in the morning and would stay with them upto 5 P.M. then return them. On 23/4/99 he gave the keys to the gardener as he had always done and he received them back at 5.00 P.M. He further defended himself by saying that on 24/4/99 the headmistress opened his office and took the keys so as to open the store but they could not open. He denied having had any knowledge regarding the theft. He denied having given out the keys to the gardener to remove the maize bags.

In his judgment, the learned trial magistrate relied heavily on the retracted confessionary statement of the 4th accused who had allegedly confessed that he had stolen the maize and beans in the company of the second and third accused (the appellant). The learned trial magistrate further stated:-

“I cautioned myself that he retracted the statement but I still believe he committed the offence as confessed as his statement appears sufficiently corroborated by above discussed circumstantial evidence as discussed above which already implicates the 2nd, 3rd and 4th accused persons.”

The learned trial magistrate also placed considerable weight on the fact that at the material time the appellant had the store keys alone and the store had not been broken into.

In his petition of appeal, the appellant raised 4 grounds of appeal as follows:-

1. That the learned trial magistrate erred in law and in fact in misdirecting himself on convicting the appellant entirely on disputed evidence of a coaccused.
2. That the learned trial magistrate erred in law and in holding that the prosecution had proved its case beyond any reasonable doubt when in fact it had not done so.
3. That the learned trial magistrate erred in law and in fact in failing to consider the defence raised by the appellant.
4. That the conviction was against the evidence tendered by the prosecution.

Mr. Konosi, learned counsel for the appellant argued all the four grounds together. He submitted that at the time when the said offence was committed, the appellant did not have exclusive possession of the keys to the store. There was evidence that he used to give the keys to any relevant person who asked for them. In particular, he regularly gave out the keys to the gardener who would return the same at 5.00 P.M. The possibility of somebody else having duplicated the store key could not be ruled out, counsel submitted.

Counsel further faulted the trial magistrate for having relied on a retracted confessionary statement of a co-accused to found a conviction as against the appellant.

On the other hand, Mr. Koech, Senior State Counsel submitted that the appellant's conviction was safe and sound, arguing that the appellant was in custody of the key to the store when the cereals were stolen. He further submitted that the retracted confessionary statement of a co-accused and the circumstantial evidence were sufficient to warrant a conviction.

I have carefully perused the entire record of appeal and considered all the submissions that were made by both counsel. It is evident that there was no direct evidence to connect the appellant with the offence as charged with save for the fact that the store where the stolen maize and beans had been kept had not been broken, the padlock had merely been opened and the appellant was in possession of the key at the time. However, it was not shown that he had exclusive possession and custody of the key all the time. There was evidence that there were other keys in the office of the headmistress and it could not be stated positively that any other person could not have gained access to those keys. The headmistress ought to have been called as a prosecution witness to testify regarding custody of those keys.

But more important is the fact that the appellant used to give the keys to the store to whoever requested for them and particularly to the gardener, who, perhaps by the nature of his work required to access the store regularly. In such a scenario, it was very easy for anyone else to duplicate another key and use it to open up the store. It was therefore unsafe to put much reliance on such evidence as the basis of founding a conviction. It was also not safe to rely on the circumstantial evidence as adduced as it was also very shaky.

In *MWANGI VS REPUBLIC* [1983] KLR 523, the Court of Appeal held that in a case depending exclusively on circumstantial evidence, the court must, before deciding upon a conviction, find that the inculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other hypothesis than that of guilt. It further held that it was also necessary before drawing the inference of the accused's guilt from the circumstantial evidence to be sure that there were no other co-existing circumstances which would weaken or destroy the inference. In view of the aforesaid holding, the appellant's defence was credible and ought to have been given better consideration than was the case.

It is trite law that before a court proceeds to convict on the strength of a retracted confession, it must warn itself that it is dangerous so to do unless there is material corroboration. The court must be fully satisfied that in all the circumstances of the case that the confession is true; see *TUWAMOI VS UGANDA* [1967] E.A. 84. I perused the proceedings carefully and I was not able to get any evidence which could have corroborated the retracted confession of the 4th accused. It was therefore quite unsafe to base the appellant's conviction on such a retracted confession in the absence of any other material evidence to support it.

All in all, I find that the conviction of the appellant by the trial court was unsafe and I quash the same but since I believe he has already served the one year probationary period, I cannot set it aside. All I can say is that the conviction and the sentence were unjustified in the circumstances as aforesaid.

DATED, SIGNED AND DELIVERED at Nakuru this 7th day of October, 2005.

D. MUSINGA

JUDGE

7/10/2005

Judgment delivered in open court in the presence of Mr. Ombati holding brief for Mr. Konosi for the appellant and N/A for A.G.

D. MUSINGA

JUDGE

7/10/2005