**REPUBLIC OF KENYA**

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

**APPELLATE SIDE**

**CRIMINAL APPEAL NO.370 OF 2002**

(Being an Appeal from Original Conviction and sentence in Criminal Case No.942 of 2000 of the Chief Magistrate's Court at Mombasa –R. Ndubi,RM)

**HAMID MOHAMED ……..……APPELLANT**

**Versus**

**REPUBLIC…… RESPONDENT**

coram: Before Hon. Justice Mwera
State Counsel: Miss Mwaniki
Khatib for Appellant.
Court clerk: Sango

**J U D G E M E N T**

The appellant was charged with another under S.275 Penal Code in that on diverse dates between 15.12.1999 and 26.1.2000 at the D.C.'s office Mombasa, jointly with others not before court they stole cash Sh.335,712/- the property of Kenya Pipeline Company.

After trial (the 2nd accused, Farooq Saad jumped bail before judgment), the appellant was found guilty, convicted and ordered to serve 3 years imprisonment w.e.f. 26.10.2001. At this juncture it is observed that the appellant got the maximum sentence for theft under

S.275 Penal Code. It used to be, and this court thinks it is still a principle in sentencing that unless there are exceptional circumstances, courts should not mete out maximum sentences, should it appear on appeal that the sentence ought to be enhanced. But be that as it may, at the time of arguing the appeal herein the court was told that the appellant was let off on presidential amnesty but that he was pursuing the appeal to clear his name.

Mr. Khatib adopted and argued grounds 1, 2, 3 and 6 in the appellant's own petition of appeal abandoning grounds 4 and 5 therein. Save for arguing ground 6 on its own, to the effect that no witness came from the complainant company Kenya Pipeline Co. Ltd. to testify about the alleged loss, the other grounds were argued globally.

The court heard that the appellant and Farooq Saad, Farooq, were in the Committee which apparently was mandated to identify a group of squatters who were due for payment of compensation following intended dislocation/displacement of same people in a village called Hodi, to make way for construction

of some facility which Kenya Pipeline Co. Ltd. (KPLC) was putting up via its subsidiary M/s East African Gas Company or a firm by that name.

Mr. Khatib submitted that the payments were made by one Uba Salim (PW.3) to the squatters Farooq identified to him and not the appellant. That the appellant was not paid any money and thus there was nothing to link him to the alleged theft. That all the squatters who testified that they did not know Farooq ended up actually not being paid and examples of the evidence of Jacinta Muya (PW.6), Mwakale Juma (PW.8), and Chiwewe Ndegwa (PW.9) were given. And that all in all, there was no evidence at all on which the appellant was convicted and sentenced.

The learned State Counsel's view was that, the site in question was owned by KPLC for which Benson Kahura (PW.1) once worked. That when East African Gas was formed by KPLC, apparently it never quite off the ground and the compensation herein fell

to be paid, KPLC took their former officer Kahura, who had retired, to be its supervisor on the ground.That by this nexus even if nobody designated as an employee of KPLC testified here, the evidence of PW.1 was in no way invalid and if there was any defect as to the actual complainant here, S.382 C.P.C should be invoked. That the learned trial magistrate had cleared this bit of the case in the judgment particularly focussing on the aspect of nexus. That this court should similarly treat the appellant, to whom no prejudice was occasioned, if at the end of the day it transpires that the complainant in the lower court was not appropriately named. That evidence of theft not only could be garnered from the testimony the prosecution of that the appellant brought in Farooq whom he knew, so that they would identify the genuine squatters together but also the appellant's statement under inquiry was admitted in evidence without objection. That its contents did clearly point to the appellant's knowledge of the alleged scheme of theft and thus he was liable. The production of that statement (Ex.1) by IP. Nyambok has the following as recorded:

"The suspect told me that they took different people

to be paid at the D.C.'s office instead of the real beneficiaries.

The suspect wr ote the statement in Swahili."

The learned State Counsel added that six witnesses (from PW.4 to 10) who were genuine beneficiaries testified that they did not sign any compensation forms and they never got any payments. That yet the appellant knew the genuine squatters (see Mary Ireri PW.4). That he was their leader in the land dispute that had arisen and he had their names for the purpose of instituting a suit. And that the appellant's defence was properly dismissed as insincere.

The arguments then closed with Mr. Khatib dismissing the statement under inquiry (Ex.1) because it ran contrary to evidence of six prosecution witnesses who were paid in presence of Farooq – and not the appellant.

Having gone over the lower court record and carefully followed the learned trial magistrate's judgment, this court is satisfied that the conviction herein was proper. The respective testimonies are pertinent. PW.1 for instance said that the appellant and Farooq came forward with the object of identifying genuine squatters to be paid compensation. And the appellant's statement under inquiry (Ex.1) said exactly that:

"Mimi Hamid M. Omar na Farooq A. Saad tulishirikishwa

katika kazi hii na Bwana Benson Kahura kumsaidia kul;ipa

wenyeji was Hodi malipo yao ya ridhaa ----."

This simply translates to the effect that the appellant and Farooq were enlisted in the compensation payment due to the villagers of Hodi. Kahura (PW.1) introduced these two at the D.C.'s office for the

sake of identifying genuine squatters. The statement continued that the arrangement to pay was arrived at at a joint meeting with KPLC and East African Gas. That as payments proceeded with Farooq taking the leading role, he hatched the plot to steal some of the money by not presenting genuine claims. That initially the appellant did not agree to that scheme but because he respected Farooq's name, he fell in it later – hence this case.

By the foregoing it is proper to hold as the learned trial magistrate found that the issue of the actual complainant was not of much consequence. There was a joint meeting and at no time is this court left with a view that the appellant was prejudiced in his case whether the complainant was stated as KPLC or some other. S.382 CPC is invoked.

As to the nexus between the appellant and the offence, this court is satisfied that he worked in the scheme to steal with Farooq both of whom had otherwise been brought in the project to identify genuine squatters who would be paid. Although Farooq appears to have taken the leading role, the appellant knew of it and quite probably benefited from the theft.

In such this appeal is dismissed in its entirety.

**Judgement delivered on 24th February 2004.**

**J.W. MWERA**

**JUDGE**