



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
APPELLATE SIDE
H.C.CR. APPEAL NO.201 OF 2002

(Being an appeal from Original Criminal Conviction and sentence in Criminal Case No.18 of 2002 of the Senior Resident Magistrate's Court at Kwale – S.S. Maindi, DM.II)

LUCY WANGARE MBURU.....APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

Coram: Before Hon. Justice Mwera

Monda for the State

No. appearance for Appellant

Court clerk – Sango

J U D G E M E N T

The appellant was charged under S.281 Penal Code that on diverse dates between 2/11/2001 and 8/12/2001 at Kwale Market, Kwale being a servant of Alphonse Gachoka she stole curtains, utensils, motor vehicle spare parts, items of clothing, a singer sewing machine all valued KSh.109,200/-. She pleaded not guilty. After a trial the appellant was found guilty, convicted and sentenced to serve 2 years imprisonment.

In her petition the appellant laid out grounds including one to the effect that the complainant did not check his property allegedly stolen and that no one saw her stealing anything from her employer – the appellant. And no exhibit was brought to court.

When the appeal came up for hearing the learned State Counsel conceded it, and in this court's view properly so, on the basis that no goods allegedly stolen were recovered and that no evidence was laid to connect the appellant to the theft. He added that that created reasonable doubt and the lower court should have resolved it in favour of the appellant.

Going over the lower court record it shows that the complainant (PW.1 Alphonse), after narrating how he came by employing the appellant, added how he thought his property was stolen by her. In the last part of examination in-chief he said that on arresting the appellant on 27.12.01:

“Nothing was recovered”

P.C. Mwaniki Njiru (PW.5) went over the theft report and added”

“The accused was arrested on 31.11.2002 and after writing the statement, we confirmed that the things that we found with him (sic), were one (sic) of the things that had gone missing ---- nothing else had been recovered. At Likoni when she opened her bag they saw white curtains and the complainant said they were white. -----”

Other than the variance in the dates of arrest (on 27.12.01 by PW.1 and 31.11.2002 by PW.5) this police officer told the lower court of “they” having seen white curtains and that the complainant said that they were white. It can be assumed that PW.1 said that his white curtains had gone missing. On her part Wanjiru (PW.3) had told the court that when the appellant visited her at Harambee Bar where she (PW.3) worked, she left a bag which she returned to take away a few days later. That asked to open it PW.3 saw items of clothing, saucers and cups, curtains, spoons, car bearings etc. That the appellant then took her bag and left.

In her judgment the learned Trial Magistrate said inter alia:

“From the evidence on record I have no doubt the accused committed the offence. She was seen with the items at Harambee Bar ----- and therefore I do not believe her evidence.”

With all due respect to the trial magistrate, this finding is not borne out by evidence at all. All P.C. Mwaniki (PW.5) said was hearsay. He did not see or recover any item allegedly stolen from the appellant. The complainant said that nothing was recovered. What Wanjiru (PW.3) saw was never confirmed to have belonged to the complainant. The appellant seemed to say that she did not steal her employer’s property and was implying that she was arrested and charged because of a grudge. All evidence seen together as per the record, hardly links the appellant to the charge in question and she ought to have been acquitted.

The other point to allow this appeal is that P.C. Yegon did prosecute the case in the lower court on 8.4.2002 when the appellant testified. This is definitely contrary to section 85(2) (C.P.C.) P.C. Yegon did not qualify to be a public prosecutor appointed by the Attorney General and thus the proceedings in the lower court, though mainly conducted by I.P. Lunani were a nullity (see Roy **Elirema & Anr. Vs. R. 67/2002 C.A.**)

In sum this appeal is allowed. The appellant to be set at liberty forthwith unless otherwise lawfully held.

Judgement delivered on 31st May 2004.

J.W. MWERA

JUDGE