



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT EMBU
CRIMINAL APPEAL NO. 19 OF 2004**

JAPHET WAMBUA SYENGO..... APPELLANT

VERSUS

REPUBLICRESPONDENT

JUDGMENT

1. The Appellant was charged, convicted and sentenced to a term of one (1) year in prison. The offences were that of Stealing by a Person employed in the Public Service Contrary to Section 280 of the Penal Code and giving false information to a person employed in the Public Service Contrary to Section 129 (a) of the Penal Code.

2. The Appeal was against both the conviction and sentence. In short, precise and focused submissions, Mr Kalili for the Appellant argued that firstly, the totality of the evidence as presented did not establish any offence on the part of the Appellant.

Further, that the Appellant's defence and explanation was consistent throughout and was in fact confirmed by all witnesses and he ought to have been given the benefit of doubt. As such, Counsel urged that the findings of the trial Magistrate was not in consonance with the evidence and the Appeal ought to succeed.

3. Mr. Omwega, quite correctly as I shall shortly demonstrate conceded the Appeal and was of the view that the Appellant in the circumstances of his case ought to have been given the benefit of doubt.

4. The evidence of the Prosecution in the lower court was pretty straight forward.

PW1 testified that as the Project Manager, Kiambere Irrigation Project, he sent the Appellant and one Karanja Mwangi on 15.5.2003 to collect Salaries for the Staff of the Project. He gave the Appellant a cheque for Ksh.165,700/=. On 16.5.2003, the Appellant came at about 8.00 p.m. and told him that he had been flashed out of a matatu by people posing as Policemen, handcuffed, taken into a bush, robbed, given Ksh.200/= for fare and abandoned. He reported the matter at Kiritiri Police Post and later at Kiambere Police Post. PW2, Joseph Karanja Mwangi merely spoke about the events prior to the alleged theft. PW3 was the conductor of the matatu in which the Appellant was travelling in. He testified that before they reached Kiritiri, they stopped to drop off a passenger and immediately a Saloon Car came from behind with lights flashing and overtook them. It stopped and the driver of the matatu also stopped. One man came and spoke to the driver while the other flashed out all the passengers. They identified themselves as police officers, pointed out the Appellant, asked him where he thought he was running away to, handcuffed him and took him into their car and sped off. When he returned to Embu, his colleagues confirmed that their car number had been sought and taken by some people after they had left Embu and he told them; "***we had carried a robber.***"

5. PW4 was the driver of the matatu and he corroborated the evidence of PW3. PW5 was the officer who investigated the matter of the cheque and payroll at the Kiambere Irrigation Project while PW6 was the Investigating Officer whose evidence was in tandem and consistent with what PW1, PW2, PW3 and PW4 said.

6. The Appellant testified on oath and was cross-examined by the Prosecutor. He narrated his apparent ordeal as stated by PW3 and PW4 but added some details including the registration number of the vehicle that he was taken into from the matatu (KAN 499Y). He testified that his advocate tried to get the particulars of ownership but he was unsuccessful. Further, that an officer called Ombese from Kiritiri Police Post accompanied him to the spot where he was robbed and indeed there were tyre marks. Nothing came out of the cross-examination that is of relevance to this Appeal.

7. The learned trial Magistrate after restating the evidence of the Prosecution witnesses asked himself the question, "***whether the accused committed the offences as alleged***" and later, in my view and respectfully so trashed the Appellant's defence as a sham. He correctly pointed out that the facts as stated were undisputed but saw the Appellant's hand in the whole scheme. The question is, where is the evidence that the Appellant was the brains behind the robbery? In my view, there was none. It may well have been that he indeed hatched the plot but that is a doubtful proposition. If there is doubt, an accused must get the benefit of that doubt.

8. With respect, the Magistrate went on a speculation mission in the entire judgment. A court must be guided by the evidence before it and once it starts to create possibilities that are not borne out by the evidence, the Appeal Court must step in. I do not see from the very nearly detailed out evidence before the trial Magistrate that the two counts facing the Appellant were proved beyond reasonable doubt. In my view, the prosecution witnesses actually corroborated the defence of the Appellant before that court.

9. I agree therefore that to sustain the conviction and sentence in this matter would be a travesty of justice.

10. I hereby quash the conviction and set aside the sentence. As the Appellant is out on bond pending appeal, he is now at liberty unless otherwise lawfully held.

Orders accordingly.

Dated and delivered in open court on this 25th day of November 2004.

I.LENAOLA

AG. JUDGE

Mr Ithiga for Mr Kalili for Appellant

Mr. Omwega for Republic

I.LENAOLA

AG. JUDGE