

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

APPELLANT SIDE

CRIMINAL APPEAL NO. 191 OF 1992

(From Original conviction and Sentence in Criminal case No. 19 of 2002

of the Senior Resident Magistrate's Court at Voi – E.N. MAINA – SRM)

ROBERT KIMATHI MBAYA.....APPELLANT

-VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

The appellant was convicted of the offence of stealing contrary to section 275 of the penal code. The particulars of the offence were that on diverse dates between the 6th July 2001 and 25th September 2001 at Mwatate township in Taita Taveta District at the Coast Province, jointly with others not before court stole a sum of Ksh. 81,200/= the property of Darius Mwakulu Kombo. The appellant was sentenced to 3 years imprisonment. The appellant now appeals to this court and has filed 8 grounds of appeal which can be summarized into two grounds that is, that the trial magistrate erred in law and fact in relying on contradictory evidence to convict the appellant and secondly that the trial court erred by convicting the appellant whereas the case was not proved beyond reasonable doubt.

The appellant argued his appeal in person and the Respondent was represented by Miss Mwaniki. The learned State Counsel opposed the appeal and urged this court to dismiss the appeal. Her submissions were that the appellant was positively identified and that the evidence of P.W.1 the complainant were well corroborated. That the appellant knew his previous employer Zone Holdings Co. Ltd had been struck out of the register of companies at the time of receiving monies from the complainant. That the trial court took into consideration all the evidence and came to the right conclusion. That the conviction was safe and the sentence was proper.

Before embarking on the issues concerning this appeal, it is important to state the brief case before the trial court. On 25.6.2001, the appellant visited the shop of the complainant and introduced himself as an employee of Zone Holdings Company Ltd. which dealt in giving Credit to businessmen to purchase cars, posho mills and other machineries. The appellant informed the complainant that the company offices were based in Mwingi town and on 6/7/2001 the appellant again visited the shop of the complainant where he convinced the complainant to purchase a posho mill worth Ksh.160.000/= on soft terms but he had to pay registration fee of Kshs.1,200/= first and that the posho mill would be released to him upon paying half the purchase price – and by 25/9/2001, the appellant had received a sum of KSh.81,200/= from the complainant but could not deliver the machine until he was arrested at Matuu. Evidence were also led that Zone Holdings Credit and Investment Co. Ltd. was registered on 10/5/95 and was struck out from the register of companies on 24.7.2000. The appellant was purporting to be an employee and agent of the above company on 6.7.2001 and even issuing receipt to the complainant bearing the name of Zone Holdings & Investment Company Ltd. The appellant's defence was that he did not know the company had closed its business and that he gave out the money he received to the company and that customers were to get in touch with the company if they were having a problem.

This appeal raises one question to be decided: whether the prosecution proved its case to the required standard of beyond reasonable doubt. Before concluding her judgment the trial Senior Resident Magistrate analysed the evidence brought before her. She considered the evidence given by the prosecution and the unsworn statement given by the accused now the appellant. She also considered the relevant law touching on the definition of the offence of theft. I find that there was no contradictory evidence on record and hence this ground of appeal fails as it lacks foundation. I also find that the trial Senior Resident Magistrate correctly convicted the appellant based on the evidence presented before her. The evidence were unshaken and it proved the case beyond reasonable doubt. On the issue of sentence, I find that the learned Senior Resident Magistrate applied the correct principles in sentencing. The principles were sent out in the case of **WANJEMA =VS= REPUBLIC [1971] E.A. 493.**

“A sentence must in the end, depend upon the facts of its own particular case. In the circumstance with which we are concerned a custodial order was appropriately made. But that which was made cannot possibly be allowed to stand. An appellate court should not interfere with the discretion which a trial court has exercised as to sentence unless it is evident that it overlooked some material factors, took into account some immaterial fact, acted upon a wrong principle or the sentence is manifestly excessive in the circumstances of the case .”

The record shows that the trial Senior Resident Magistrate considered all the relevant principles and arrived at the correct sentence which I have not been convinced to interfere with.

Consequently the appellant’s appeal has no merit. It is accordingly dismissed in its entirety.

Dated and Delivered at Mombasa this 7th day of April 2003.

J.K. SERGON

J U D G E