REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MOMBASA
APPELLATE SIDE
CRIMINAL APPEAL NO.292 OF 2001

(From Original Conviction and Sentence in Criminal Case No.1802 of 2001 of the Chief Magistrate's Court at Mombasa – R. Ndubi, Esq., - RM)

ALFRED CHENGO MWALIMU……..…….APPELLANT

=V E R S U S=

REPUBLIC……..……RESPONDENT

JUDGMENT OF COURT

The appellant was with two others charged with the offence of Godown breaking and committing a felony therein contrary to S.306(a) of the Penal Code. They were found guilty and convicted and were all three sentenced to 5 years imprisonment with 3 strokes of the cane each.

The prosecution case was that on the night of 25.5.2001 at Changamwe Industrial Area the appellant and his two colleagues in the lower court broke and entered a building owned by Topaz Transport Ltd. They picked 42 packages of tea leaves valued Kshs.384,258/30. PW.3, David Kinzui Imoi, a night guard, as he made rounds that night, found the premises broken into. He with a colleague re-activated the alarm and blew whistles. They informed their employer immediately, and the latter reported the theft to the Police. Sgt. Orioki, a Police Officer who was on duty at Changamwe Police Station dispatched a contingent of police officers to the scene at 3 a.m. They confirmed theft of tea-leaves, with some found spilling outside the godown. They notice foot-prints from the godown through a bush towards Bangladesh Estate. PW.1 and PW.4 who were on patrol were warned to be on the look-out for suspects carrying bags of tea-leaves. The two proceeded to Bangladesh village but on the Railway crossing they found spilled tea-leaves, with the aid of a spotlight. They followed the spills to a certain compound where they found the appellant and his co-accused in the lower court, standing next to a heap of tea-leaves bags. They arrested them and recovered 15 bags of the tea leaves. While the 1st and 2nd accused were escorted to the Police Station, the appellant is said to have led Pc. Kathingu and Pc. Sum (PW.1 & PW.4) to a spot opposite the rail line and there they are said to have recovered another 10 bags of tea bags. The appellant with his other colleagues were then charged with the offence herein.

The appellant in a sworn statement in his own defence stated that on the day when he was arrested which was the 26.5.2000 at 5.10 a.m., he went out from his house on his way to the latrine. He met four people near the house one of who asked him where he was going and he told them that he was on his way to the latrine. They showed torchlight into his face and when he requested that they put the light off, one of them slapped him and told him to go back into his house which he did. At 5.30 a.m. he left his house to go to and report the encounter, to the Police. When he had so reported, he was given Police Officers. As they headed to his house they found a motor vehicle belonging to a security firm and a police motor vehicle being loaded with goods. A third motor vehicle which was said to belong to O.C.S. The appellant then claimed that he talked to the O.C.S. who advised him to report the next day to record his statement. However, the same day at 10 a.m. CID officers went to his house and searched it and his workshop but found nothing. He was then placed in cells and later charged with this offence. He denied the offence although he admitted seeing a heap of tea bags in the compound near his house when he was returning from reporting at the Police Station. He called his wife and a neighbour who is a pastor to testify as his witnesses. She purported to confirm his story and added more. Where he had said that they ordered him to go back into

the house and he did, she stated that they beat him and threatened to beat her as well if she did not run into the house. She added that when he finally entered the house, the appellant complained of pain they had inflicted on him and he found it necessary to go and report the assault at Changamwe Police Station. Otherwise, she confirmed and filled in his story and indeed gave even a better reason why the appellant found it necessary to go and make a report at Changamwe Police Station. His 2nd witness, Elly Ngethe was a neighbour at Bangladesh Estate. On 26.5.2001 at about 5 a.m. in the morning Elly Ngethe had woken up early and was reading his Bible when he heard the appellant unlock and open his house to go to the toilet. Then he heard some conversation from outside. Someone said "who are you" and another "let's go". Elly went out and saw appellant covering himself with a leso and was being assaulted by some people. His wife was present and watching as the people left him there at his door after the said assault. The appellant then decided to go and report to the Police in respect of the assault. Several hours later he returned with the Police in a police vehicle. Thereafter the Police went to where tea bags were heaped. The witness confirmed that when the appellant left to report the assault, they all had seen in the compound, the heap of the tea bags. At about 10.30 Police Officers came to the village and searched several houses including that of the witness. It is after the said search that the Police decided to take the appellant with them and thereafter the witness learnt that the appellant was charged with this offence. Appellant concluded that he did not know the other accused who were co-accused before the court.

The trial court rightly stated that there was no direct evidence coming from any eye-witness. The trial Magistrate appears to have accepted the evidence that the appellant and two others were found in possession of the tea bags in the material night. He then without more proceeded to apply the principle of possession of recently stolen property. He then, as would be expected, presumed them to be the thieves unless they gave a reasonable and probable explanation as to how they came into the possession. After that went ahead to dismiss the appellant is detailed defence as a rehearsed falsehood.

Was the trial court's approach correct in law? Was there sufficient evidence from the prosecution to prove the charge beyond a reasonable doubt? Did the trial Magistrate properly consider or weigh the appellant's defence? These are the questions generally raised by this appeal and I now turn to determine them.

I have considered the evidence that was the basis of the conviction by the trial Magistrate. There is no dispute about the burglary in the go-down of M/s Topaz Transport Company Ltd., during the night of 25th – 26th May, 2001. There is also no dispute that about 25 teabags were found in a compound where the appellant and other persons lived in Bangladesh Estate. The prosecution evidence was that the appellant and his co-accused were found sitting on or next to them according to the evidence of PW.4, Pc. Edwin Sum, but standing next to it, according to PW.1, Pc. Phillip Katingo. But as per the evidence of the appellant and his two witnesses, the bags were in the compound and not under the control of the appellant, at the least. It never came out clearly, whose compound it was that the teabags were found in. What is quite clear, however, is that several people lived in the said compound, inclusive of defence witness, Pastor Elly Ngethe. It is on the record that what led the police witnesses to the compound was tea spills which according to the witnesses, they noticed by the help of a spotlight they carried. There was no other additional evidence on this point. Even after the tea bags were found, no evidence was led to the effect that one or more of the bags were torn and were therefore likely to have let tea spill along the way. Furthermore, the Police witnesses were operating at night. Even with possible evidence that there was moonlight and the help of torches, it would in my opinion be a Herculean task to pick a spill in the night and be able to easily follow it to the compound where the teabags were finally found. The trial Magistrate does not appear to have carefully examined the evidence to justify the conclusion he reached. PW.3, David Kinyanzui Imoi stated in his evidence that as he toured the go-down with a colleague, he noticed that the colleague start and got shocked and then told PW.3 that there were thieves. The latter rushed and pressed the alarm and the alarm crew arrived within 4 minutes. The thieves are said to have ran off within those 4 minutes during which the alarm crew arrived. It does not make sense that during those few moments the burglars would have ran off with all the 42 bags that were later discovered stolen, otherwise the witness was not telling all he knew. Furthermore, Sgt. Orioki who directed PW.4 and PW.1 to immediately go to Bangladesh failed to state why he immediately decided so and yet he knew nothing about the thieves and that he was giving his instructions from the Station. This sounds as strange as the story of the police noticing and following tea spills in the darkness.

Careful perusal of the trial Magistrate's evidence will show that he did not make a reasoned out finding as to whether or not appellant and his colleagues were found in possession of the tea bags. This however has to be implied from his conclusion that they were caught red-handed with the bags a few hours after the burglary was discovered. It is my view that the trial Magistrate should have made a reasoned out express finding of this fact since he thereafter had to rely on the finding to apply the principle of recent possession of stolen goods. Failure to make such a finding was an error which in my view deprived him of the application of recent possession principle and the latter applies only where possession has been established as a fact.

The final issue I would wish to determine is whether or not the trial magistrate properly considered the appellant's defence. He first made a presumption that the appellant and his co-accused were caught red-handed with the tea bags. He then used the principle of recent possession of recently stolen properly to

presume them to be the thieves unless there was evidence to the contrary.

It is my view and holding that having come to the above conclusion, he was entitled to expect the appellant to give a reasonable explanation as to how he came into possession and in default of such explanation, convict. In this case, however, the issue that became crucial and which the trial Magistrate did not clearly consider is the burden of proof and where it lay. It is trite law that the burden of proof in criminal cases all the time lies with the prosecution, so much so that even where the same it shifted to the accused by statute or by common law, the burden is not on the standard that is usually carried by the prosecution i.e. beyond a reasonable doubt. It is in such cases much less, in some cases, on the balance of probability, and in others even less. It was incumbent upon the prosecution to prove their case generally beyond a reasonable doubt. Did the prosecution do so? With great respect to the trial Magistrate, I would answer the question in the negative. Firstly, the trial Magistrate came to the conclusion on page 3 of Judgment that the accused were the thieves. He then at that stage stated that he had given a dispassionate consideration of the defences of the accused persons and found them not sincere or credible and that the defences were mere falsehoods. Unfortunately, he had already decided that they were guilty. He was therefore at this stage paying what we might in the common language term, lip service. This approach positioned the accused where it was now upon them to prove themselves innocent, not merely on the principle of recent possession but on the whole case.

I accordingly hold that the trial Magistrate erred in law in first convicting and then looking back at the defence to see whether the same made a difference. Even on the facts on record alone, the appellant had a reasonable and more credible defence. His story that he woke up at 5 a.m. to go to the latrine and was confronted by people who later turned out to be police officers and who later assaulted him in respect of which he decided to report them to the police, was credible. It was supported by his wife and a neighbour who is a pastor. All the two witnesses and the appellant gave their testimony under oath and were crossexamined by the prosecution. Their evidence was not broken or discredited. The Pastor was not of the appellant's church to presume favouritism. The burden upon the appellant was on the mere balance of probability, that it could be true. Had the trial Magistrate rightly considered the defence and had he been alive to the fact that the burden of proof all along lay with the prosecution generally, he would have not convicted. As things stand, he applied a wrong principle in respect to this issue and convicted where he should probably have not convicted.

The upshot is that this appeal must succeed. The appeal is allowed. The conviction is hereby quashed and the sentence set aside. The appellant is hereby set at liberty forthwith unless otherwise lawfully detained in prison. It is so ordered.

Dated and delivered at Mombasa this 27th day of July, 2002.

D. A. ONYANCHA

J U D G E