



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 331 OF 2002

(From Original Conviction and Sentence in Criminal Case No. 559 of 2002
of the Resident Magistrate's Court at Mombasa – A.W. Ngugi – R.M.)

ENOS AGANDA APPELLANT

- VERSUS -

REPUBLIC RESPONDENT

J U D G E M E N T

The appellant was charged on two counts before the Trial Court. In Count 1 he faced a charge of Theft by Servant Contrary to Section 281 of the Penal Code for which he was convicted and sentenced to serve 2 years imprisonment. On Count II he faced an alternative charge of handling stolen goods contrary to Section 322 (2) of the Penal Code and the court made no finding on it.

He has preferred an appeal and his Counsel Mr. Gakuhi consolidated grounds 1 to 3 which touch on the evidence.

The brief facts of the case are that the appellant was an employee of Mr. R-PERT HOIS, PW1 for a long period of time. He, according to PW1, was a trusted worker and used to entrust him with a key to his personal safe in which he kept money among other valuables. He further said Appellant used to call him to update him on his property when he was away from the Country. The Appellant and other employees lived in PW1's servant's quarters but he had left to stay in rented quarters as PW1 did not want members of his employees family living in his compound. According to PW1 he had provided his workers with other essential household goods like beds, mattresses, brooms, blenders etc. which they were to use while in employment. This was confirmed by the Appellant.

Trouble started when on the 5.2.2002 Appellant reported on duty only to discover a Battery Charger he had used the previous day and had returned it to its usual place was missing. He alerted PW2, Earnest Amase the watchman. In his evidence PW2 said he had checked and confirmed the house and its contents were intact when Appellant left duty the previous day. They asked the other workers and none had an answer. The Appellant then proceeded to Likoni Police Station where he reported the matter at 3 p.m. to PC. Waweru, Mercy Sidi and investigations commenced. She said Appellant had also telephoned PW1 who was away in Australia to inform him and PW1 confirmed the same. PW1 arrived back in the Country and questioned his workers on the missing charger but it was not found. He then, in the Company of PC. Vincent Ernest Wanyonyi and PC. Nyakoko conducted a search in each of the worker's quarters. They started with Appellant's and in it found the items named in Count 1 except the battery charger. PW1 in his evidence admitted he had given the items to Appellant to use but said they were not

to be removed from his compound. Appellant on his part said, he had no idea that using them in his rented quarters was wrong as when he moved out, PW1 knew about it. The court however found that he the appellant had indeed stolen the said items.

The State Counsel supported both conviction and Sentence on the grounds that the ingredients as envisaged by Section 268 of the Penal Code had been satisfied. It reads 268(1):-

“A person who fraudulently and without claim of right takes anything capable of being stolen or fraudulently converts to the use of any person, other than the general or special owner thereof any property is said to steal that thing or property.”

From the evidence of PW1 no fraud on the part of the Appellant is shown.

PW1 further admits Appellant had his permission to use the items while in his employment.

Subsection 2 reads:

“A person who takes anything capable of being stolen or who converts any property is deemed to do so fraudulently if he does so with any of the following intents, that is to say:

- (a) an intent permanently to deprive the general or special owner of the thing of it;
- (b) an intent to use the thing as pledge or security
- (c) an intent to part with it on a condition as to its return which the person taking or converting it may be unable to perform;
- (d) an intent to deal with it in such a manner that it cannot be returned in the same condition in which it was at time of taking or converting.”

The State Counsel submitted that subsection 2 (d) in this case was relevant. The evidence of PW1 is to the effect that he had allowed appellant the use of the items. These items are such that with time they suffer from wear and tear. PW1 did not give any conditions as to how long the items were to be used and therefore the question of them being returned in the same condition as before could not arise.

I have evaluated the evidence on record and found that there is no evidence at all to show the items found with appellant were stolen. PW1 says his only problem was that they were removed from his compound and not that the Appellant had them without his authority. I have also examined the behaviour of the appellant and it beats logic that he would have gone to report the theft when he was the thief and then make no attempt to hide the other items found displayed in his house.

For the reasons given the conviction herein cannot stand and the sentence is set aside. The Appellant is to be set free forthwith unless held under other lawful means.

Dated and Delivered at Mombasa this 27th day of September, 2002.

P.M. TUTUI

COMMISSIONER OF ASSIZE