



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MOMBASA
APPELLATE SIDE

CRIMINAL APPEAL NO.197 OF 2001

(Being an Appeal from Original Conviction and Sentence in Criminal Case
No.1913 of 2001 of the Snr. Principal Magistrate 's Court at Malindi – J.
Manyasi, SPM)

ANTHONY MALEVE APPELLANT

VERSUS

REPUBLIC RESPONDENT

J U D G M E N T

The Appellant in this appeal Anthony Maleve (alias Chapu Chapu) was originally charged with seven counts of stealing contrary to Section 275 of the Penal Code. Before the Prosecution closed its case it did withdraw count Number 6 as no witness was called to support the same charge. The Appellant was after full hearing convicted of the six counts and was sentenced to serve prison term of 2 ½ years imprisonment on each of the counts 1, 2, 3, 4, 5, and 7.

The facts of the case as can be seen from the evidence before the court by the Prosecution witnesses are briefly that each of the six complainants (there was one complainant in each count) plus the Appellant sold some curios to a certain tourist referred to as a Mzungu. The tourist did not pay on the spot but promised to pay later. Each complainant was owed different amount depending on what he sold the tourist. When there were signs that payment was being delayed, the complainants, jointly and severally sent the Appellant to go to the Mzungu and demand payment for the curios sold to the Mzungu. He would then take the same payment to them. According to the witnesses, PW.1, PW.2, PW.3, PW.4, PW.5 and PW.6, the Appellant went to collect the same money from the Mzungu but did not surrender to each witness his share. The witnesses concluded that he collected the same money because although the Appellant denied he was paid any money by Mzungu on their behalf, the security officer at the hotel had told them the Mzungu paid the money. The Appellant in his unsworn statement denied having received any such money and stated that all he received was 305 Dollars which was his own money.

The learned State Counsel did not support the Conviction and with every respect he rightly did so. There are a number of misdirections in the judgment of the learned Senior Principal Magistrate which would make it difficult to accept that the conviction in this case was safe.

First even if the facts remain as they were, the offence that could be said to have been committed would have been theft by agent and not stealing contrary to Section 275. Each of the six witnesses authorized the accused to receive the money on behalf of each of them. He was therefore receiving the same money (if he received it at all) as their agent. When he failed to surrender it to each of them, he was converting what he rightly received in the first place for the Principal who had sent him to receive it. The same money had not actually become the property of any of the witnesses by the time it was stolen and it

was not stolen from the same witnesses. Thus the charge of stealing preferred against the Appellant in each case was at variance with the facts of case and the correct charge should have been theft by agent and not stealing.

Secondly, the learned Magistrate, in her judgment says the Appellant admitted that he was paid 310 US Dollars. That must have been a slip of the pen because throughout the evidence of PW.7 and that of the Appellant was that he received 305 US Dollars and not 310 US Dollars. I do not however attach any importance to that.

Thirdly, the appellant in his evidence said that one Tourist he called Paul had a deal with him and bought some carvings from him. That tourist paid him 20 dollars as deposit leaving a balance to be paid later. He was to supply Paul with 2 Giraffes 48” later. He supplied the same and when Paul delayed in paying him he sought police help and in the presence of police Paul paid him 305 Dollars and that was money due to him and not paid for any other witness.

The money, he says was paid by Paul to the General Manager who gave the money to the Appellant in the presence of two police officers. That evidence is supported by the evidence of PW.7 No.44148 CPL Richard Maina of Watamu Police Station who also witnessed the payment and said that the payment was made by the tourist who agreed to have taken the curios and paid for the same to the accused. These pieces of evidence meant that the issue that was clearly before the court below was whether the amount of US Dollars 305 paid to the accused on 16.10.2000 at about 12.30 p.m. was payment made to him on behalf of all the other suppliers i.e. the six prosecution witnesses. To solve that problem the learned Magistrate had to receive the evidence of the Tourist who was never called as a witness. It is that Tourist who could have told the court whether the US Dollars 305 he paid to the Appellant was the balance remaining in respect of the deal between him and the Appellant or whether it was payment to the Appellant and the other suppliers (i.e. the witnesses). As the Tourist was not called as a witness, the other alternative way of solving the problem was to call the General Manager of the hotel or better still the Tourist officer in the presence of whom the payment was made. He could have thrown some light as to the identity of the people who were being paid that money whether it was Appellant’s own money or money paid to him to take to the other suppliers. Neither General Manager nor Tourist officer was called as a witness. Thus by the time this hearing was finalized, this difficulty had not been solved. The law is now well settled and that is that in such a case where there is such a serious doubt as was here, the benefit of the doubt had to go to the Appellant. The learned Magistrate did not direct her mind to the same and it remains that the conviction in this case was not proper as clearly the Prosecution had not proved beyond reasonable doubt that the money paid US Dollars 305 was paid to the Appellant on behalf of himself and the complainants or was his own money paid to him for the wares he supplied to the Tourist himself. That burden having not been discharged, the Appellant was entitled to acquittal. Perhaps if the Tourist officer or General Manager of the Hotel were called and if the same produced a list (which some witnesses say was prepared of the recipients) it would have helped in discharging the burden of showing that the money was paid to the Appellant and others. Sadly that was not done and no list was produced. That list would have shown what was paid to who.

From the above, it would be clear why I say the learned State Counsel was right in conceding the Appeal.

Appeal allowed, conviction quashed, sentence set aside, Appellant set free unless otherwise lawfully held. Judgment accordingly.

Dated and Delivered at Mombasa this 18th Day of September 2002.

J.W. ONYANGO OTIENO

JUDGE