

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
APPELLATE SIDE
CRIMINAL APPEAL NO. 12 OF 2001

(From Original Conviction and Sentence in Criminal Case No. 3367 of
1999 of the Senior Principal Magistrate's Court at Machakos: J. S. Kaburu
Esq. on 21.11.2000)

JOHNSTONE F. W. WABWIRE ::::::::::::::::::::::::::::::::::: APPELLANTS

VERSUS

REPUBLIC ::::::::::::::::::::::::::::::::::: RESPONDENT

Coram: J. W. Mwera J.
Wanyama Advocate for Appellant
Orinda State Counsel for Respondent
C.C. Muli

J U D G E M E N T

The appellant was charged with some eleven (11) counts in the lower court. Ten of them related to forgery C/S. 349 Penal Code. But he was acquitted of all these. He was convicted on count one 1 stealing by servant C/S. 281 Penal Code in that between 14.10.98 at M/s Galsheet (K) Limited. Athi River, the appellant being a servant of the said M/s Galsheet jointly with others not before court stole 20,000 litres of fuel oil and 10,000 litres of illuminating kerosene – all to the value of Sh.886,634/= the property of his employer.

After trial and conviction, the lower court imposed an 18 – month prison term on the appellant with effect from 21.11.2000.

On 5.2.2001 a 7 – point petition of appeal was launched against conviction and sentence. As is bound to be that with so many grounds of appeal repetition at the time of arguing them is bound to arise, Mr. Wanyama consolidated them as follows: ground 1 and 4, ground 2 and 5, ground 3 and 6 and ground 7 on its own. He argued that from the twelve (12) prosecution witnesses who testified, it was an error for the Learned Trial Magistrate to rely heavily on evidence of Philip Ndungu (P.W.10) who once when directed to deliver fuel from M/s Caltex to M/s Galsheet premises diverted the stocks and instead dumped them at Nairobi's Mathare North. That his evidence was not corroborated. The Learned State Counsel who conceded the appeal called P.W.10 an accomplice, noting that conviction on theft mainly hinged on this. That other drivers/loaders from M/s Caltex did testify that they delivered full loads to M/s Galsheet – a thing, the Learned Trial Magistrate is said to have overlooked in favour of the appellant. This court on perusal of evidence of P.W.10 although he was a new driver with M/s Caltex while an old hand there, a loader/conductor caused him to dump the fuel at Mathare North, he did not report this to his employer. He was on the face of it all an accomplice. Even with his newness and being led by a conductor the Learned Trial Magistrate ought to have been alert to this character and warned himself at the time he relied on evidence of P.W.10, that this was an accomplice witness and his testimony required warning before relying on it. On this point alone this appeal should be allowed. But other grounds equally important follow.

In grounds 2 and 5 this court was told that when engineers working with the appellant specifically on fuel deliveries physically or in their duties checked or satisfied themselves with this stocks delivered, they did not detect shortages to show that the appellant did not ensure that fuel stocks were duly delivered in the Galsheet tanks save to conclude that he stole what he was charged with.

The evidence of Austin Oduor (P.W.2) Peter Kimando (P.W.2), and John Ngundu (P.W.9) particularly came into focus here. On perusing that evidence this court noted that P.W.2 said that he could not say if there were any shortages in the fuel delivered and he did not know if M/s Galsheet lost any fuel.

As for P.W.3 he had no evidence that fuel was not received. They did not detect any shortage of fuel.

On his part P.W.9 did a physical check and did not notice a shortage of fuel.

With this kind of evidence it could not be safe to conclude, and so the Learned Trial Magistrate was in error to conclude, that the appellant stole the fuel that should have come to his employer. If there was no fuel shortage, why, it can in the circumstances be said that none was stolen. Lastly it was argued that scant attention was given to the defence and that the Learned Trial Magistrate after discounting the forgery charges and dismissing them nonetheless took bits of the same in regard to convict on the theft by servant charge.

The racket which the Learned Trial Magistrate referred to in his judgement, no doubt to him, it incorporated the forging of documents to show that fuel went from M/s Caltex to M/s Galsheet. After dismissing the charges under S.349 Penal Code then it was no more valid to allude to the acts there to suppose and conclude that:

“The conclusion made was that since the accused was incharge of the stores and had confirmed receiving the fuel then he was aware of that racket whereby fuel was collected from Caltex to go to Galsheet but it never went there.”

There was no evidence to back up such conclusion and awareness on the appellant’s side.

Indeed it was a merited point for Mr. Wanyama to argue, and the Learned State Counsel who could not support the conviction here, to observe that the defence evidence was given a very short shrift. This court notes that the only part that the Learned Trial magistrate spoke of the defence was when the appellant denied the offence terming the documents of fuel delivery genuine. That he received the fuel and signed for it on documents that a messenger passed on to the engineer(s) to (counter) sign. A large amount of fuel – worth quite a lot of money was involved. There were some eleven charges and twelve prosecution witnesses testified. The Learned Trial Magistrate was bound here and indeed as it should be done in all criminal cases to evaluate and analyze evidence from both sides in a satisfactory manner before concluding that the prosecution had proved its case beyond a reasonable doubt. That could hardly be discerned from the judgement of the learned Senior Principal Magistrate, Mr. Kaburu – a usually careful and analytical judicial officer.

In sum the appeal is allowed. Conviction quashed and sentence set aside. Appellant to be set at liberty unless otherwise lawfully held.

Judgement accordingly.

Delivered on 27th February 2001.

J. W. MWERA

JUDGE