



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION
CRIMINAL APPEAL NO. 381 OF 2001

From Original Conviction and Sentence in Criminal Case
 No.1151 of 1998 of the Chief Magistrate’s Court at Nairobi

SIMON KARANJA NDUASHEY APPELLANT

VERSUS

REPUBLIC RESPONDENT

CONSOLIDATED WITH

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 395 OF 2001

**From Original Conviction and Sentence in Criminal case No.1151
 of 1998 of the Chief Magistrate’s court at Nairobi**

JULIUS LELGEK ROTICH APPELLANT

VERSUS

REPUBLIC RESPONDENT

J U D G E M E N T

The 2 appeals herein were consolidated at the hearing. The first appellant SIMON KARANJA NDUASHEY (original third accused) and the second appellant JULIUS LELGEK ROTICH (original fifth accused) were convicted by the Senior Resident Magistrate Nairobi of the offence of stealing c/s 275 of the Penal Code and on 2 counts of neglect of official duty c/s128 as read with S.36 of the Penal Code. For the offence of theft both appellants were sentenced to serve 3 years imprisonment and on the other 2 counts they were sentenced to serve 2 years imprisonment. The sentences are to run concurrently.

The particulars of charges against the appellant and 3 others in count 1 are that on the 5th of January, 1997 at Kenya Airfreight Handling Services Ltd strong room JKIA Nairobi jointly with others not before court stole US 1 million dollars the property of Citibank N.A Fedha Towers Nairobi. The particulars of count 2 are that between 24th December, 1996 and 5th January, 1997 at Kenya Airfreight Handling Ltd JKIA being persons employed in the Public Service as Cargo Handlers willfully neglected to verify and confirm a letter dated 23rd December, 1996 purported to have been written and signed by MARTIN NJOROGE of Citibank, for the appointment of Ms CHACHO INTER AFRIC SERVICES as a clearing

agent for Citibank N.A. The particulars of count 3 are that on 23rd December, 1996 and 5th January, 1997 at Kenya Airfreight Handling Ltd within JKIA being persons employed in the Public Service as Cargo Handlers willfully neglected to verify and confirm a letter dated 23rd December, 1996 purported to have been written and signed by MARTIN NJOROGE of Citibank N.A which resulted to the release of US dollar 1 million to Chacho Inter Afric Services Ltd.

The appeal is against both conviction and sentence. The prosecution case was that on 5.1.97 Charles Omondi Odhiambo the first accused at the trial, went to the Kenya Airfreight Handling Ltd with a view to clearing a consignment of 1 million US dollars as clearing agent for Citibank. Previously the clearing business was being handled for Citibank by a firm by the name Wells Cargo. The first accused presented a purported letter of appointment of his firm as a clearing agent for Citibank. The letter was allegedly signed by one Martin Njoroge. The first appellant was a Principal Cargo Officer. His duties included giving authority for removal of goods from the strong room. The responsibilities of the second appellant included receiving agents clearing letters and to cause the records to be updated.

On the material day i.e. 5th January, 1997 the first accused presented to the 1st appellant a release order from the Customs Department which authorized him to collect the consignment of 1 million US dollars on behalf of Citibank. On perusing the relevant documents presented to him and being satisfied that all the right procedures had been followed, he released the consignment to the first accused. The release order was signed by PW5. It was in evidence tendered by the prosecution that it was not the business of the first appellant to confirm whether the letter of appointment was genuine or even to update the records. In his defence the first appellant testified that it was not his duty to endorse any document. That was not rebutted by the prosecution. It is thus crystal clear that the first appellant did what was expected of him in the course of his duties.

As regards the second appellant the role he played was to mark letters from agents and handed over the same to his juniors. PW5 and PW6 confirmed that it was not the duty of the second appellant to confirm the authenticity of the letters presented to him. The marking of the letters to his juniors was not an order by the second appellant for release of goods. The office in which the appellant worked was an open one. It had no door. It was accessible to all members of staff.

In his evidence the second appellant testified that he put the letter of authority presented by the first accused in his outtray for his secretary to pick it. This was on 24th December, 1996. He then left for the Christmas Holidays. In view of the evidence adduced at the trial the learned Magistrate was wrong in arriving at the conclusion that the appellants neglected their duties by failing to verify exhibit number 3. The evidence presented falls short of the required standard in a criminal case. There was no scintilla of evidence to show that the first accused had a common intention with the appellants. The conviction was unsafe. The learned State Counsel Mrs. Nyamosi in my view rightly conceded the appeal.

I allow the appeal, quash the conviction and set aside sentence. The appellants will be set at liberty forthwith unless they are otherwise lawfully held.

Dated this 11th day of May, 2001.

J.K. MITEY

JUDGE