

REPUBLIC OF KENYA
COURT OF KENYA AT NAIROBI IN THE HIGH
CRIMINAL CASE NO. 282 OF 2001

MOHAMED NOOR MUNYE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

The appellant Mohamed Noor Munye was charged jointly with another person one Abdulahi Mohamood Ali with the offence of obtaining by false pretences c/s 313 of the Penal Code.

It was alleged in the particulars of the charge that, the two, with others not before court, by false pretence and with intent to defraud, obtained 96 tyres from Zhong Fei import and Export limited, Nairobi by presenting a cheque NO. 878892 to the said firm which turned out to be forged.

After a full trial the appellant was convicted and sentenced to 2½ years imprisonment. This is an appeal against both the conviction and sentence.

As the first appellate court, I have gone through the entire evidence and made independent evaluation of the same. In convicting the appellant, the learned trial magistrate had the following to say:

“Having gone through the evidence on record in total I have no doubt that the 2nd accused in this matter having not proved or even raised a doubt in the court’s mind that he could have been an owner of the tyres that were recovered and produced in court as an exhibit must have been an accessory to the theft. That’s the only reasonable explanation as to why he could not tell the court where the tyres originated from.....I have no doubt about his guilt of the offence of stealing...”

The appellant was not among the four people who went to collect the tyres from the complainant. He was not also one of the two people who returned to the complainant for more tyres on the same date.

The appellant was not the owner of the lorry that carried the tyres to a godown in the Industrial Area. Neither was he the one who removed the same to Eastleigh where some were subsequently recovered. He happened to be an employee in the shop where the said tyres were recovered. The owner of the shop was never charged.

In the extract of the judgment I have cited above, the learned trial magistrate found the appellant guilty of the offence of stealing. The charge faced by the appellant was different. In any case, even if the charge were that of theft, there is no evidence whatsoever to sustain the same.

Finally, the burden of proof is always on the Republic to prove the charge against an accused person. The said burden never shifts. However, that is exactly what the learned trial magistrate did in arriving at the conviction of the appellant. This has led to a miscarriage of justice.

The learned counsel for the Republic concedes this appeal. With respect, I agree.

For the foregoing reasons, this appeal hereby succeeds. The conviction is quashed and sentence set aside. The appellant shall be set free forthwith unless otherwise lawfully held. Orders accordingly.

Dated and delivered at Nairobi this 13th day of June, 2001

MBOGHOLI MSAGHA

JUDGE