



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL APPEAL NO 1313 AND 1101 OF 1998 OF 1998

LINUS RIUNGU.....APPELLANT

NICHOLAS NDEREVA KIBUA

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

These appeals are consolidated. Both appellants were charged with two counts of stealing by persons employed in the public service C/s 280 of the Penal Code.

In count one, it was alleged in the particulars of the charge that, on the 24th day of July, 1996 at Central workshop industrial Area, Nairobi, jointly with others not before court, being persons employed in the public service as clerks in the police Department they stole 20 drums of diesel oil and 10 drums of motor oil valued at Kshs. 47,964.20 the property of the government of Kenya which came into their possession by virtue of their employment.

In count two, it was alleged that on 25th July, 1996, at the same place, jointly with others not before court they stole 40 drums of diesel oil and 20 drums of motor oil valued at Kshs. 95,928.40.

The appellants having denied the offences, the Republic called evidence to prove the same, and after a full trial both were found guilty and convicted. Each was then sentenced to serve 12 months imprisonment on each count. The sentences were ordered to run concurrently.

Being aggrieved by the said convictions, they appealed. I am told from the bar that both appellants were subsequently granted bail pending the hearing and final determination of their appeals.

After setting out the evidence adduced by the prosecution witnesses, the learned trial magistrate found that there was no dispute that the two accused collected the diesel and motor oil as set out in the charges. That led to her finding that the two accused received the subject matter but the same could not be found in the store.

The final part of the judgment of the learned trial magistrate is relevant in so far as it condenses the entire evidence and contains the reasons for making the conclusions that she did. The portion thereof reads as follows:-

“I find that the prosecution evidence is clear and straight forward and there is no doubt that the two accused persons having collected the commodity in question are the only ones who know what became of it. Although the other drivers who collected the commodity were not called as witnesses and although 2 of the witnesses at the store are now deceased, the accused persons do not deny they collected the commodity in question Having received it they cannot account for it but instead they

dealt with the oil in a manner that was inconsistent with the ownership of the oil by their employer and hence deprived him of the commodity whose value is Kshs. 143,992.60. The accused person told the court lies in their defence.

In the circumstances, I find that the accused persons are guilty as charged on both counts and I accordingly convict them.”

It is trite law that stealing entails the movement or transportation of the subject matter alleged to have been stolen. That act must be attributed to the person who is alleged to have committed the same.

There is uncontroverted evidence that it is the two appellants who procured and collected the alleged stolen goods from M/s Agip(K) ltd. The goods were transported by motor vehicles whose registration numbers have been given in evidence. The said goods were off loaded at a yard within the Central workshops in Nairobi Industrial Area.

From that stage, the prosecution was supposed to prove beyond any reasonable doubt that it is the two appellants who then stole the goods from the yard. Two crucial would be witnesses one Mr. Wainaina and Ms Juddy Wanjiru Mburu died before they gave evidence in the trial. The two drivers who drove the motor vehicles that delivered the alleged stolen goods were neither charged nor called as witnesses.

Pw5 I.P. Joyce Bulimu who assisted in the investigations told the court that she tried to find out how the oil left the yard but could not.

Even with that evidence on record, the learned trial magistrate concluded that the appellants are “the only ones who know what became of” the oil. She also concluded that “they dealt with the oil in a manner that was inconsistent with the ownership of the oil by their employer. The burden of had been shifted to the appellants.

With respect, there is no evidence on record to support the said conclusions. Further to the foregoing, the investigating officer was allowed to produce copies of documents as exhibits without laying any foundation for so doing. This was contrary to the provisions of law relating to production of documents.

Finally both appellants gave what appears to be a plausible explanation for he alleged loss of oil in their respective defences. The learned trial magistrate however did not address the defences and in one line dismissed the same by saying “The accused persons told the court lies in their defence.”

In view of the foregoing, I find that the two charges were not proved beyond any reasonable doubt. That being the case, these appeals must succeed. The convictions are therefore quashed and sentences set aside.

The bail terms upon which the two appellants were released pending the determination of these appeals are hereby vacated.

Orders accordingly.

Dated and delivered at Nairobi this 29th day of November, 2001.

A. MBOGHOLI MSAGHA

JUDGE

Mr Githinji for appellants

Miss Nyamosi for the state