REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
APPELLATE SIDE
CRIMINAL APPEAL NO.460 OF 2000

(From Original Conviction and Sentence in Criminal Case No.418 of 2000 of the Senior Resident Magistrate's Court at Voi – E.N. Maina, Ms – S.R.M.)

SAMUEL NGATI MAINA……APPELLANT

=V E R S U S=

REPUBLIC ……RESPONDENT

J U D G M E N T

The appellant was charged with the offence of Stealing by Servant contrary to Section 281 of the Penal code. He was convicted of a lesser offence of attempted theft by servant contrary to Section 389 of the Penal Code. He was sentenced to three years imprisonment. Under Count II and III in the same charge sheet, four other persons were charged with similar offences as well as being charged for alternative charges of handling stolen goods contrary to Section 322(2) of the Penal Code. They were convicted of the charge of attempted theft by servants and sentenced each to three years imprisonment.

The appellant appeals against the conviction and sentence. It is not clear whether the other four accused preferred any appeals or not. The facts of the case are as follows. The appellant was an employee of Shamash & Brothers Ltd as a driver of a m/v Registration No.KAJ 478M. The turn boy of his motor vehicle was called Antony Nyange. Their main duty was to convey various shop goods sold by their employer to various customers in different towns in Kenya. The accused's employer had several other motor vehicles used for the same duties. Sometimes the motor vehicles could be dispatched together.

On 10.5.2000, the accused, driving the above mentioned motor vehicle KAJ 478M and in company of other drivers driving motor vehicles Reg. Nos. KAG 246K, KAJ 561U, KAG 242L and KAK 953H, were dispatched from Mombasa to deliver various goods including rice, to customers up country, including Machakos and Nakuru. Before the motor vehicles left the premises of Shamash & Brothers at Mombasa, the containers in which the goods were in before being transported in the lorries were properly sealed with certain serialized seals which could certainly be detected if tampered with. Delivery notes were handed to the drivers while the keys were handed over to the turn boys. The appellant left Mombasa in the early morning of 11.5.2000, to travel up country. Among the goods he carried in his lorry was rice in bags numbering 375 and weighing 50 or 25kgs.

On the same day of 11.5.2000 at about 6.00 pm an anonymous person telephoned M/S Shamash & Brothers and informed them that their vehicles were at Voi but had been impounded by the police who had found goods which were being transported being stolen. The message was received by one Salim Maalim PW 1 a manager of the firm. He immediately was accompanied by his clerk called Mohamed Rafiki Dosha PW 2 and they went to Voi Police Station where they found their company lorries

impounded. The appellant's lorry KAJ 478M had its container seals broken. So was the seal of lorry Reg. KAJ 651U. KAJ's driver had escaped the police arrest with his turn-boy. When they examined the rice bags they found that the rice in each bag was less than the expected weight. They showed marks or holes from where the rice was siphoned using plastic pipe instruments. At the police station were found appellant and four other people who had been found by the police locked in the lorries. They were apparently the ones who were using instruments to reduce the rice from the official bags and transferring the pilfered rice to alien bags. Ten alien bags were found when the lorry doors were opened. They had been placed near the door of the lorry.

The appellant was later arrested at Caltex Petrol Station several kilometers away. The police suggestion was to the effect that the accused ran away when he saw the police approach scene where the felony was being committed. The accused testified that he had earlier gone to the petrol station to get his turn boy some gum required to mend a puncture. The court will turn to this issue hereafter. And so the appellant and the other four coaccused were convicted of stealing by servant and sentenced to 3 years imprisonment. I will now confine my judgment to the appeal of the appellant.

In convicting the appellant the learned trial Magistrate first went through and noted all the evidence recorded by the prosecution witnesses as well as the defences raised by the persons before his court. What may be called a consideration and weighing of the evidence before he came to a decision, may be said to be found on page 4 of his judgment. The learned trial Magistrate stated:-

> ***"Really the issue for determination is whether this bags of rice had been pilfered from the consignment on transit. In other words was it stolen? The court must also determine whether 1 st accused participate d in the theft, if there indeed there was theft".***

We do agree with her but there were more issues for the court to determine over and above those referred to above. The learned trial Magistrate rightly found that the 10 bags found at the door of lorry Reg. No. KAJ 478M and similarly 9 bags of rice found in lorry Reg. No. KAJ 561U, were indeed pilfered from the main consignment with an intention to steal it if the offenders got the opportunity to do so. It was also right and supported by evidence that the rice intended to be stolen was in transit. The learned Magistrate then proceeded to find that the appellant participated in the process of trying to steal the rice. Was there enough evidence to support this last finding? The appellant was arrested at Caltex Petrol Station and this evidence does not only come from the appellant's evidence in his statement in his defence but also from the prosecution witness especially the police officer who had arrested him. There was a conflict in the evidence as to whether the appellant was at Kasarani where the lorries were impounded from when the police arrived with PW3 who is the one who led them there; or whether the appellant was not there at all, in which case his story that he had gone to Caltex Petrol Station earlier is the probable and believable story. PW4 stating about appellant under Appellant's cross examination (page 12) is the one who alleged that appellant had escaped when the police and PW3 arrived at the scene. PW5, No. 21748 IP Gibson Ngige Waweru testified (page 16) also that appellant was seated outside on a bench but on noticing the police and Vinu PW 3, walked away in between the lorries and disappeared. But PW 3 in his evidence states that when they arrived at the scene he called the appellant whom he knew well. He testified that it was while they were going round and inspecting the vehicles that appellant quietly disappeared not as stated by other witness that he ran away as soon as he saw the police arrive on the scene. In this court's view, whichever way the facts are looked at, there is cumulative evidence from PW 3, PW 4 and PW 5 to the effect that the appellant was present at the scene when the police arrived and that he immediately or soon after, escaped from the scene. His defence that he was not there, at the scene, when the attempted theft was being committed is unbelievable and against the weight of evidence on record. This court supports the rejection of appellant's alibi. It confirms the trial Magistrate's finding that the appellant was present when the offence was being committed and that he knew or ought to have known what was going on. He accordingly was knowledgeable of what was happening and was a full participant of the same.

There are other issues that the trial court had a duty to consider. The appellant's counsel argued that the appellant had raised the defence of alibi but that the trial court made no mention of it or never considered it. He argued that failure to consider and make a finding over the alibi was a fatal error on his part and

that upon the failure alone this appeal must succeed. This court does not agree with the appellant's argument. It is my view that the learned trial Magistrate did not altogether ignore the alibi defence. On Page 4 of the Judgment the trial Magistrate stated:-

> ***"Moreover we are told by PW.3 that he (accused) was at the scene when they arrived but thereafter disappeared. I am satisfied that he knew all that was happening and that he was part and parcel of it."***

By this statement I understand the learned trial Magistrate to be saying that appellant's allegation that he was not at the scene or that he was away at Caltex at the material time is not believable or acceptable to her since there is evidence of PW.3 which states that appellant was present and had only ran away. She may not have specifically taken up the issue by name and disposed of it by specific words. But dealing with it practically she did, and rejecting it she clearly did.

Appellant also raised the ground that there was no evidence to support the charge of attempted theft. The learned trial Magistrate found evidence on the record to the effect that the appellant was a driver who on the material time carried his employers' goods which included rice. At Kasarani, Voi the Police and PW.3 established as a matter of fact that the seal fixed on the container door had been tampered with. The pad-lock had been broken and accused persons (not appellant) were inside the lorry. The rice bags had been tampered with using plastic pipes to pilfer rice. Apart from the official bags containing rice there were found 10 foreign bags made of sisal and containing rice which bags had not been loaded on the lorry from Mombasa. Had the Police not come, the evidence clearly suggested cumulatively that the persons arrested were going to take away the rice in the sisal bags without the knowledge nor consent of the owner who in this case was appellant's employer. But fortunately for the owner of the rice, the accused were stopped on their truck just when they had packed the rice in foreign sisal bags about to take it away. This, in my view, amounted to attempted stealing and the trial Magistrate was properly supported by evidence in the record. I reject this ground of appeal.

It was also argued that the learned trial Magistrate erred in fact by holding against the appellant the fact of running away. Looking at the finding of the learned trial Magistrate once again, I do not see where he held running away or the disappearance of the accused-appellant against him. What I understand the learned Magistrate to have done is to find that he could not accept the appellant's allegation that the appellant was not present at the scene or that he did not participate or know about the commission of the offence because he claims he was not present. The Magistrate rejected the alleged alibi by concluding that the appellant was present until he ran away or disappeared from the scene. He did not to my understanding base his conviction on the fact of the appellant's running away or disappearance. While the principle of law stated in the case of Christopher Mwangi –vs- Republic (1982-88) KAR is correct, it is my finding that it does not apply to the facts of this case.

I further find that the appellant as a matter of fact did not carry the keys to the padlock of the lorry where the container carrying the rice was. The keys as confirmed by PW.1. Salim Maalim, the Manager of Shamash & Brothers, was given to Anthony Nyange the turnboy accompanying the appellant (see Page 4 – cross-examination by appellant). But as confirmed by PW.2 on Page 7 of the evidence and PW.5 on Page 15, the turnboy was there to assist the driver and worked under the driver. There was no way, as the learned trial Magistrate found in his judgment, that the turnboy would take charge of matters when the driver was in charge of the lorry. This court therefore rejects the appellant's argument that the appellant was not in charge or that he did not know what was going on. The totality of the evidence on record proved that the appellant and his turn-boy, and the driver and turn-boy of the lorry Registration KAJ 561U must have conspired to steal from their employer. The manner or modus operandi of both vehicles was similar. It occurred simultaneously. It cannot be easily argued that this occurance was an accident. The persons involved must have consulted each other and proceeded to act with a common intention. The evidence on record leaves no doubt over the issue.

I cannot finish writing this judgment without considering one more issue which was slantingly raised by one of the accused and which the learned trial Magistrate considered in her judgment. The Magistrate stated on Page 4, middle:-

"It is true that the bags in the consignment ought to have been weighed but I do not find that (it was) fatal to the prosecution case as the bags in the consignment have perforation which indicate that they had been perforated or pierced with sharp instruments such as those found in the lorries."

To this, the court would add the facts that foreign sisals bags which were not loaded from Mombasa were found inside the two relevant lorries. They contained rice which on examination clearly came from the official bags. The fact that the official bags were not weighed before they were loaded is not therefore fatal as clearly the accused including the appellant by common intention pilfered rice from the official bags.

It is my considered opinion therefore that the evidence accepted by the trial Magistrate, taken all together, does not leave any doubt that the appellant participated in the commission of the offence charged. The evidence left no doubt to be held in appellant's favour. The trial Magistrate rightly found so. He convicted the appellant. This court confirms the trial Magistrate's finding on conviction.

The maximum available to the Magistrate was 31/2 years being half of the punishment provided in respect of the consummated crime of theft by servant. The trial Magistrate meted 3 years to the appellant. She took into account the fact that the offence has become prevalent. She noted that the appellant was a first offender and that no loss occurred to the employer. While she rightly considered that a custodial sentence would serve the ends of justice, she gave almost the maximum sentence. It is like she gave little consideration to the favourable points given in mitigation. I think a lesser period would have served the deterent purpose she intended.

The appellant has served his sentence since 4.10.2000, a period of a year and almost 2 months. I accordingly revise the total sentence from 3 years imprisonment to 2 years to run from 4.10.2000. It is so ordered.

Dated and Delivered at Mombasa on the 27th Day of November, 2001.

D.A. ONYANCHA

J U D G E