



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

APPELLATE SIDE

CRIMINAL APPEAL NO.2 OF 2000

(from Original Conviction and Sentence in Criminal Case No.1977 of 1999 of the Chief Magistrate's Court at Mombasa –Ms L. Mbatia, RM)

**PAUL ODHIAMBO NGOCHE ..... APPELLANT**

**- versus -**

**REPUBLIC ..... RESPONDENT**

**J U D G E M E N T**

Paul Odhiambo Ngoche was charged with the offence of Theft by servant contrary to section 281 of the Penal Code in that between 30th April and 4th May 1999 along Mombasa/Nairobi Highway in the republic of Kenya jointly with another not before the Court being servants to SHAHID PERVEZ BUTT stole 1,820 kilograms of wheat valued at KShs.50,555.55 ct the property of the said Shahid Pervez Butt.

The gist of his offence was that he was charged with the duty of driving his masters lorry carrying a certain weight of wheat from Mombasa but when he delivered the wheat at Thika there was a systematic shortfall in each bag of about 50 kg per bag. He was therefore charged with the theft of this shortfall. PW.1 Shahid Perez Butt, a transporter said accused was his driver and on 30-4-99 drove his vehicle KAD 268 QZB5299. That accused was to load 400 bags each of 90 kg totaling 36 tones to deliver to McNeel of Thika. Accused/Appellant loaded 400 bags and signed for 400 bags but when they reached Thika there was a shortage of 1820 kgms an equivalent of 20 bags, although the bags loaded were the correct number of bags consigned.

PW.2 P.C. Riba arrested appellant at Migori. PW.3 Havis Jarvan who works with MacNeal Millers said they received 400 bags of wheat weighing 90 kg each according to delivery note but on weighing they found shortage. He was not able to say whether the bags were tampered with in any way. PW.4 Githengu Ndungu a tallying clerk with General Cargo Services said he loaded a motor vehicle Reg. No.KAD 268 QZB5299 with 400 bags of wheat. He said "We had weighed" 400 bags of 90 kgs.

In his defence appellant agreed he was a driver but he denied stealing and claimed that he was merely on leave when he was arrested at Migori and charged with stealing.

The learned Resident Magistrate found him guilty saying she found it as a fact that the lorry left

Mombasa with 36000 kg of wheat. She found it should have arrived with the same amount. The Learned Magistrate found through the process of retrospective logic that the total weight delivered should have been delivered so “whatever means were used to steal the wheat, the wheat was indeed stolen.”

The appellant appeals against this conviction on 7 grounds but in his arguments in support one ground stands out. That he did not know whatever he carried and he did not know its weight until when it was weighed in Thika. He says there was no evidence that he was there at the weighing in Mombasa and more he says when he was arrested at his home in Migori he was merely on leave and not running away from arrest.

Miss Kwena Learned State Counsel however supports the conviction and sentence.

I have considered this evidence and the question I have asked myself without getting an answer is whether this appellant took part in the weighing of the quantity of the wheat that he carried to the consignee in Thika. I have failed to find in evidence at what point in time he was handed over the claimed quantity of the wheat as is alleged by PW.1 because PW.4 who is the one who is supposed to have loaded the consignment of wheat never acknowledged Appellant's participation at the weighing process. In my view appellant should have been at the weighing so as to be in possession of the wheat that is considered lost. He says he was given 400 bags and that is what he actually delivered to the consignee.

The balance of weight considered lost cannot be evidence of theft unless there is evidence that that amount of wheat was also given to him.

Before a servant converts his master's goods the goods belonging to his master must have been given to him and placed in his possession. There was no evidence here of that.

Secondly what theft was this. If it was by the driver/appellant taking the wheat from the bags how did he do it. That was not shown. Did he do it by shoveling into the bags, or by opening them up or how did he do it. The prosecution never made any suggestions leave alone proving one. All the evidence then point to the bags themselves having been consigned in short weight and now the career is being blamed. This is untenable. Even the learned Magistrate revealed her bafflement by saying that –

“Whatever means were used to steal the wheat the wheat was stolen”

With grave respect to the Learned Magistrate theft is never committed by proving a balance of a count which this appeared to have been. It could have been committed only if that wheat was actually taken from the bags or in a way converted, and if it was converted it was prerequisite finding by the Magistrate that the bags put in his case were to his knowledge 400 bags of wheat known to him to contain 90 kgs. This was a case where the ingredients of theft by servant was not proved and more the possibility of the 400 bags being loaded in short weight was proved better than any other theory.

I find the appeal succeeds. Conviction quashed and sentence set aside. The appellant is to be discharged from prison forthwith and set free unless otherwise lawfully held.

**Dated this 13th Day of October, 2000.**

**A.I. HAYANGA**

**JUDGE**

Coram: Hayanga J.

Miss Kwena – State Counsel .

Appellant – present.

Order: Appeal allowed.

**A.I. HAYANGA**

**JUDGE**