



**Mungalisi & 2 others v Republic (Criminal Appeal E044 of 2022)
[2024] KEHC 1551 (KLR) (15 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 1551 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CRIMINAL APPEAL E044 OF 2022
A. ONG'INJO, J
FEBRUARY 15, 2024**

BETWEEN

DAN MUSAMALI MUNGALISI 1ST APPELLANT

EDWIN KOECH 2ND APPELLANT

RAPHAEL MIRUKA KASUKU 3RD APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal against the decision of Hon. R. M. Amwayi (SRM),
delivered on 16th March 2012 in Mombasa Criminal Case No.
209 of 2018, Republic v Dan Musamali Mungalisi and 3 Others)*

JUDGMENT

Background

1. The Appellants herein were jointly charged with Ali Abdalla Mohamed (3rd Accused) with the offence of stealing by servant Contrary to Section 281 of the [Penal Code](#).
2. The particulars are that the accused persons on diverse dates between the month of October and December 2018 at Trans Africa Motors Co. Ltd in Jomvu SuB-County within Mombasa County having been employed as supervisors to the said company stole 190 tyres from the company go down all valued at Kshs. 7,332,000/- the property of Trans Africa Co. Ltd which came to their possession by virtue of their employment.
3. In the alternative, the accused persons were charged with fraudulent appropriation or accounting by directors or officers contrary to Section 328 (a) of [Penal Code](#).



4. The prosecution called 5 witnesses and in consideration of the evidence of the 5 prosecution witnesses and the appellants' sworn testimonies on oath, the trial magistrate found the appellants herein guilty for the offence of stealing by servant and fined them KShs. 100,000 each in default to serve 2 years imprisonment.
5. The appellants were aggrieved by the conviction and sentence and she preferred the appeal herein on the following grounds: -
 1. That the learned trial magistrate erred in law and fact by finding that there was sufficient evidence to support the charge of stealing by servant.
 2. That the learned trial magistrate erred in law and fact by purporting to shift the burden of proof to the appellants to explain the whereabouts of the stolen tyres.
 3. That the learned trial magistrate erred in law and fact in failing to appreciate that nothing allegedly stolen was recovered from the appellant or any person at all.
 4. That the legal threshold for convicting the appellants based on circumstantial evidence was not met.
 5. That the decision of the learned trial magistrate is in whole an impropriety.
6. The Appellant sought that her appeal should allowed, he sentence quashed and conviction set aside.

Prosecution's Case

7. PW1, Paul Opiyo Radido, an Assembly Supervisor at TransAfrica Motors testified that the company assembles and sells trucks. He said that between 19th and 20th December 2016, the company received 2 containers of tyres without rims at their godowns. PW1 said that he saw the tyres being offloaded and stored in the godowns though he was not in the group that offloaded and received the cargo. That 47 tyres were used on the assembly line and that they were Delmax tyres which were filled on tractors and prime movers. PW1 said that an audit was conducted and it was established that the tyres were missing. He said that he did not know how many tyres were used between October and December 2017. He said that the 1st accused was their assembly manager, the 2nd accused was in charge of materials handling and godowns, the 3rd accused was the HR manager and the 4th accused was the assembly line coordinator.
8. PW2, Daniel Mwatsuma Mwacheni, the HR Assistant at TransAfrica Motors Ltd, said that he dealt with employee issues from attendance to payroll. He said that there was a day in December 2017 when the company MD Ali Zubedi called him into his office and asked whether he knew anything about stolen tyres. That the MD then told him to investigate. That PW2 contacted the internal auditor and that the auditors did their work and presented the report to the MD who in turn gave PW2 a copy of the report. He said that the report indicated that 197 tyres were missing and that the tyres were in the godown. He said that the keys to the godown were kept in the godown and that the premises were manned. He said the plant manager deals with movement of tyres from the godown to the assembly line and that goods leaving the premises must have a gate pass and a delivery note.
9. PW3, Salim Sallali Salim, the internal auditor at TransAfrica Motors said that on 23.12.2017, the MD requested him to do an audit of tyres in the godown. He said that the in-charge of the warehouse gave the MD a report but the MD was not satisfied with the report. That he requested PW3 to look at stock balances which indicated 82 tyres. He said that their report and that of the in charge did not tally. That they proceeded to do a physical count which showed that 47 tyres were in the godown. That the records showed that only 3 tyres had left the godown although they expected 179 tyres in the godown.



- That PW3 did his report and forwarded it to management. That he was later called to Changamwe Police Station to record a statement. PW3 said that he had a report for the period 1.10.17 to 31.12.17 – ExP1, a report for 1.10.17 to 31.12.17 for different tyres – ExP2, a report for 20.8.17 to 31.12.17 for Michelin Tyres – ExP3, and a report dated 1.10.17 to 27.12.17 for Detmax Tyres – ExP5. PW3 said he knew the accused persons but had no issues with them.
10. PW4, Fayaz Fauz Rudin, the material handling co-ordinator at TransAfrica Motors Ltd, said that he supervises the unpacking process, security quality and quantity, and deals with supplies. PW4 said that he keeps a document called packing list and it is both a hard and soft copy, and that previously, there was no recording of movement within the godown. He said that the material handling manager keeps the keys to the godown and that they learnt of missing tyres in December 2017. PW4 said that they have fork lift drivers who are answerable to the material handling manager and that PW4 got involved in this case during the audit. He said that his role was minimal and that nothing was missing from his department.
 11. PW5, No. xxxx PC Charles Nyakundi from DCI Changamwe, testified that on 10.1.2018, a report was made at Changamwe Police Station by one Raj from TransAfrica Motors Ltd for loss of tyres. That 239 tyres had been bought, 47 were found in the godown yet they had only done 2 trucks and a total of 179 tyres were missing. PW5 said that after getting the report, they proceeded to the company and interrogated the staff. That they were informed that the HR manager was the one in charge of the keys to the warehouse and that Mr. Ali was the HR manager while Mr. Kasuku was the in charge of material holding. That they asked the company to conduct an audit and it was established that 134 tyres were missing. PW5 said that the warehouse manager and the HR manager informed them that the missing tyres had been used on units. That after the audit, they found that 97 tyres were missing. That when they failed to explain the deficit, they arrested the depot manager, the material holding supervisor, the HR manager, and the supervisor.

Defence Case

12. The appellants gave their testimonies on oath. DWI, Dan Musamali Mungalitsi, said that the bonded warehouse is a facility where the government allows one to bring products without being taxed. That the bonded warehouse is certified by the bonded officer from KRA and if something went missing in the bonded warehouse, the bonded warehouse officer would be responsible. He said that between October and December 2017, he had travelled to Nairobi though he was working at TransAfrica Motors. He said that at the godown, he was in charge of the fork lift and personnel which moved the tyres. He said that people access the godown in groups depending on the section and that the keys to the godown are kept by the security and the bonded warehouse officer.
13. DW1 said that in order to get anything from the bonded warehouse, one must get authority from the bonded warehouse officer. That one had to get a gate pass, delivery note and register, and that a number of documents had to be signed. He said that the compound had CCTV cameras which were manned by 3rd parties, that the premises had a wall and an electric fence, and that if one got out of the premises, they had to be searched. DW1 said that there were inquiries on stock balance which he gave out and that on 9.1.18, he received a letter from the Assistant HR that there were missing parts within his department.
14. DW2, Phanel Miwika Kasuku, said that he worked with TransAfrica Motors and that his job as an assembler entailed assembling parts provided as per the manufacturing instructions. He said that material handling entailed receiving parts, checking, verification and distribution. He said that between October and December 2017, tyres had been stored in the warehouse and there was a person who used



- to make the requisition, and the tyres were picked by forklift operator and transported to assembling line where he would deal with them. He said that it was not possible for tyres to get lost.
15. DW3, Ali Abdalla Mohamed, said that he worked with TransAfrica Motors as the HR manager as at the time of the alleged offence and his duties were a bridge between the employer and employee, to look after the welfare of the employees and renovation of the company premises. He said that he was not aware who used to receive the goods and that he did not know where the 190 tyres were kept. He said that the keys to the whole plant were kept by Dan Mwachino the HR clerk. He said that he did not have authority to authorize movement of any parts to any person. He said that he did not sign any delivery or any gate pass and that he had no idea how goods were received from the warehouse to the assembly point.
 16. DW4, Edwin Koech who worked as a process engineer with TransAfrica Motors said that his duties were to work with overseas suppliers on technical issues. He said that tyres form part of assembling units, that he did not make any requisition and that his job entailed inspecting the assembly to confirm that the same was done as per specifications. He said that he never had access to keys to the godown.
 17. The appeal herein was canvassed by way of written submissions.

Appellant's Submissions

18. The appellant's counsel submitted that the Respondent did not prove its case beyond reasonable doubt. He said there were too many doubts in the prosecution's case to warrant a conviction of the appellants. It was argued that PW1 who was heading the section where the tyres were used and stored claimed that it was only after the audit that he learnt of the missing tyres. He said that he also learnt of the missing tyres from the letter that had been written by the HR. The appellants' counsel complained that although the premises had CCTV cameras, the Respondent failed to produce the footage to confirm how 190 tyres could have been stolen where there were such cameras. He said that the weight of the tyres could not allow the appellant to carry them unless they used a lorry to take them away. PW1 also said that tyres could only leave the go down with a gate pass and that employees are always searched when they come in and go out of the premises.
19. The appellant also questioned how the managing director Ali Zubedi knew that the tyres were missing or were stolen before the audit was done as instructed by PW2 to arrange for the audit to be carried out. The appellants claimed foul play on the part of the managing director. The appellant also questioned why the plant manager who deals with the movement of tyres from the go down to the assembly was not charged. It was also argued that PW2 confirmed like PW1 that he did not see any of the accused persons steal the tyres. It was also stated that the keys to the go down were kept at the HR's office and no report had been made that the key to the go down was lost or the go down was broken into. Moreover, the go down was being opened and closed by security guards. The appellants also contended that there was no evidence that any one of them had keys to the go down.
20. PW3, the Internal Auditor, Salim Salali Salim who produced 5 internal audits showing the loss of 190 tyres from the warehouse but the said reports did not bear his name and it could not be ascertained whether he was the author. He said the report was in violation of Section 35 of the Evidence Act. It was also argued that the appellants were neither the HR or assembly security who were in charge of the keys to the go down.
21. Concerning PW4, it was submitted that none of the accused persons is a fork lift driver and if they had to leave the go down/warehouse with a tyre, they would have required a gate pass and the CCTV camera at the perimeter wall could have captured them leaving with a tyre. That PW4 also stated that he did not see the accused persons stealing tyres and he was shocked that tyres were lost.



22. Regarding PW5, PC Charles Nyakundi, it is submitted that the said witness arrested the appellants because they could not explain the deficit of tyres at the warehouse and not because he could prove that they had stolen. It was submitted that the appellants were neither auditors or security at the premises and therefore they could not explain the deficit of the tyres. It was further argued that PW5 erroneously concluded that the appellants were in charge of the tyres when he did not question them on their job description.
23. The appellants also faulted the prosecution for closing their case before calling an external auditor.
24. The appellants faulted the trial magistrate for relying on circumstantial evidence when the threshold for convicting the appellant on circumstantial evidence was not met.
25. Respondent did not file submissions

Analysis and Determination

26. This being the first appellate court, it is guided by the principles in *David Njuguna Wairimu v Republic* [2010] eKLR where the court of appeal held: -

“The duty of the first appellate court is to analyze and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions.”

27. After considering the grounds of appeal, records of the trial court and submissions, the issues for determination are: -
 - i. Whether there was sufficient evidence to support the charge of stealing by servant
 - ii. Whether the burden of proof of explaining the whereabouts of the stolen tyres was shifted to the appellants
 - iii. Whether the legal threshold for convicting the appellants based on circumstantial evidence was not met
 - iv. Whether the decision of the learned trial magistrate is in whole an impropriety
28. The allegations of theft of tyres from the godown was raised by the Managing Director, Ali Zubedi, who instructed PW2, the HR Assistant to investigate. The HR Assistant contacted PW3, the Internal Auditor, Salim Sallali Salim who on interrogation of employees at the godown established that 197 tyres were missing and he prepared 5 different reports for the different types of tyres. The reports were however not signed or dated and he confirmed that it was not possible to ascertain who was the maker of the said audit reports.
29. From the audit reports, PW3 has made reference to documents from which the audit was carried out but those documents were not produced in court to confirm that the tyres were received into the godown by specific officers of the company and that they were under the custody of the appellants or any other officer of the company who ought to have been liable for their release from the warehouse/ godown.



30. From the judgment of the trial magistrate, it was established that the prosecution relied entirely on circumstantial evidence that there was no direct evidence showing the appellants were seen or found stealing or that they were found in possession of the stolen tyres or that they were found with money linked or suspected to be proceeds of the stolen tyres. The trial magistrate having found that the evidence of the prosecution was circumstantial needed to have ensured that the evidence adduced by the prosecution witnesses was incompatible with the innocence of the appellants and incapable of explanation against any other reasonable hypothesis than that of their guilt. The presumption that the 2nd and 4th accused persons made orders for the assembling of parts and that the 1st accused person approved the same is not shown to have been founded on any evidence that the prosecution adduced.
31. Assuming that the 2nd and 4th accused persons made orders for assembling of parts and the same was approved by the 1st accused prompting the 3rd accused to open the warehouse, then it would be expected that documentation to that effect are produced in court and the driver who moved the tyres using the fork lift and deliver to the 2nd and 4th accused person should have been called to testify and produce the delivery documents.
32. The trial magistrate said that the appellants never reported that the tyres were missing and they said they did not have knowledge of the missing tyres until they were told of the same. She said that for the tyres to be removed from the warehouse, all the accused ought to have been aware as they were all linked to the chain of getting the tyres or to parts of the warehouse. One had to trigger another for the parts or the units to be removed from the warehouse. That in order to remove the tyres from the warehouse, all accused persons had to be involved in that process. The assertion by the trial magistrate shifted the burden to the appellants when it was incumbent upon the prosecution to prove that the tyres were missing and that the appellants were culpable of stealing them.
33. In conclusion, this court finds that the appeal has merit, conviction is quashed and sentence set aside.

**DATED, SIGNED AND DELIVERED IN OPEN COURT/ONLINE THROUGH MS TEAMS,
THIS 15TH DAY OF FEBRUARY 2024**

HON. LADY JUSTICE A. ONG'INJO
JUDGE

In the presence of: -

Ogwel- Court Assistant

Mr. Ngiri for the State

Mr. Mwabonje Advocate for the Appellants

1st Appellant present in person

2nd Appellant present in person

3rd Appellant present in person

HON. LADY JUSTICE A. ONG'INJO
JUDGE

