



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CORAM. D. S. MAJANJA J.

CRIMINAL APPEAL NO. 19 OF 2020

BETWEEN

JOHN KAMAU MWANGI.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal against the original conviction and sentence of Hon. S. A. Ogot, SRM dated 7th February 2020 in Criminal Case No. 708 of 2018 at the Magistrate's Court at Limuru)

JUDGMENT

1. The appellant, **JOHN KAMAU MWANGI**, was charged with stealing by servant contrary to **section 281** of the *Penal Code*. The particulars of the charge were that between 28th October 2017 and 1st November 2017 at Karirana Estate in Limuru Sub-County in Kiambu County being a sales coordinator stole processed tea worth Kshs. 1,123,710.00 the property of the said Karirana Estate by virtue of his employment.
2. He was also charged with conspiracy to commit a felony contrary to **section 393** of the *Penal Code*. It was alleged that between 28th October 2017 and 1st November 2017 at Karirana in Limuru in Kiambu County jointly with others not before the court conspired to commit a felony namely stealing of processed tea worth Kshs. 1,123,710.00.
3. The appellant was convicted of stealing by servant and sentenced to pay a fine of Kshs. 150,000.00 in the default to serve two years' imprisonment. The appellant now appeals against conviction and sentence on the grounds set out in his amended petition of appeal filed on 6th October 2020 and the written submissions filed on 18th November 2020. The gist of the appellant's appeal is that the prosecution failed to prove the ingredients of the charge beyond reasonable doubt and that the trial court only considered one ingredient. That the trial court misconstrued evidence against and shifted the burden of proof arriving and relied on circumstantial evidence at the wrong conclusion. The appellant also contended that the prosecution case had inconsistencies and finally that the sentence was unlawful and harsh. The respondent stated it would rely on its written submissions, however there are no submissions on record.
4. As this is a first appeal, I am required to review all the evidence and come to my own conclusions as to whether to uphold the conviction and sentence bearing in mind that I neither heard nor saw the witnesses testify in order to assess their demeanour (see *Okeno v Republic* [1972] EA 32, *Kiilu and Another v Republic* [2005] 1 KLR 174). In order to proceed with this task, it is necessary to outline the evidence emerging before the trial court.
5. The complainant's production supervisor, Mary Kariuki (PW 2) stated that her duties included packaging and dispatching tea for sale. She outlined the procedure for dispatch and stated that the production supervisor receives orders from the company sales co-ordinator which they load onto the customer's vehicle with the assistance of a security officer as a witness. She then signs the dispatch and forwards it to the accounts office where an invoice is prepared. That the invoice is then taken to the factory manager to sign together with the dispatch book. Afterwards the sales co-ordinator gives the customer a copy of the dispatch note while they retain carbonated copies. She stated that the dispatch note is signed by the production supervisor, factory manager, security officer and driver who collects the tea but that the sales co-ordinator was not required to sign any documents.
6. PW 2 testified that on 28th October 2017 she received an order of 30 cartons of tea variant ESTB 200 but that there were only 24 cartons weighing 27kg which she loaded with the assistance of PW 7 onto a Nissan Pickup Registration No. KAG 240G (the vehicle) being driven by Josephat Kerori (the driver) from Cleanshelf. On the 30th October 2017 the same driver returned and collected 133 carton weighing 992kg witnessed by PW 7. On 31st October 2017 the same driver returned and collected 100 cartons weighing 1000kg and witnessed by PW6. On 1st November 2017 the same driver returned and collected 100 cartons weighing 1000kg however the tea was retained on the basis that

Cleanshelf did not order the tea. She told the court that the police were called and that the driver was detained. PW2 produced the dispatch delivery notes for the 4 days that the driver had come to collect tea.

7. Grace Wangui Mburu, PW3, was the Chief Accountant at Karirana Tea Factory. She outlined the procedure of raising an invoice. She stated that there were customers like Cleanshelf who collected their orders themselves. That the sales co-ordinator receives orders from customers as he deals directly with customers. The sales coordinator then goes to the finance department to have the invoice raised. That the finance department relied on dispatch notes to raise the invoice which the chief accountant approves.

8. PW 3 testified that on 28th October 2017 they received a dispatch note for Cleanshelf who was a credit customer. That an invoice of Kshs. 63,000.00 was raised and the tea was released. On 30th October 2017, two dispatch notes were received and they raised invoices for Kshs. 364,610.00. On 31st October 2017, they received a dispatch note and raised an invoice for Kshs. 353,100.00. PW 3 told the court that as Cleanshelf had reached their credit limit, she told the appellant to inform the customer that they required to bring a cheque. On 1st November they received a dispatch note for Cleanshelf and since a cheque had been brought, an invoice of Kshs. 343,000.00 was prepared. PW 3 stated that before the driver was released the Sales and Marketing Manager, Kennedy Murimi Miano (PW 4) informed her that the cheque was fake. She said that she later recorded her statement with the police.

9. PW 4 testified that on 1st November 2017, the appellant who was the sales coordinator went to the office with an invoice for Cleanshelf for approval. He asked for a Local Purchase Order (LPO) but the appellant informed him that they had been collecting orders without an LPO as he received orders through a phone call. The appellant further stated that the driver had come with a cheque to pay for previous invoice collected on Cleanshelf's credit account. When the appellant gave him the mobile number used to place the orders, PW 4 called and asked for the LPO used to place the order to facilitate release of the vehicle. PW 4 told the court that the person whom he spoke to on the phone requested him to release the vehicle as he would send the invoice in the course of the day since the LPO was in a different branch. PW 4 became suspicious and called a contact at Cleanshelf Kiambu who informed him that they did not send a vehicle to collect stock. PW 4 then called the security at the gate and ordered that the vehicle should not be released and it was intercepted and returned to the compound.

10. PW 4 testified that he questioned the driver about the deliveries. He was informed that he had delivered them to Kiambu. PW 4 became suspicious as the cheque the driver had brought was drawn on KCB Bank while from previous dealings, Cleanshelf issued cheques from Family Bank. PW 4 accompanied by George Ngoko Ikonya, PW 9, the senior security officer went to Cleanshelf Kiambu branch where they met with the branch manager who confirmed that they never ordered and tea and that the cheque did not emanate from them. PW 4 testified that he was responsible for the transactions between 28th and 31st October 2017. He admitted that during the said dates the invoices had been raised without a LPO but stated that it was not procedural as Cleanshelf raised LPOs through email.

11. Gabriel Kimotho Gitau (PW 10), an account assistant at Karirana, confirmed that he was prepared the invoices involved on the material days and that he saw that everything was in order before issuing the invoice.

12. Tom Okonda Ateku (PW 1), Stanley Kibogo (PW 5) and Emmanuel Mukolo Makam (PW 8) were all security guards at Karirana. They testified that on 1st November 2017, the driver had come to collect tea and that they received instructions from PW 4 not to allow the vehicle to leave the premises. PW 6 and PW 7 were security guards who assisted PW 2 load the tea onto the vehicle on material days. PW 9, a senior security officer, recalled that on the 1st November 2017, PW 4 told them to stop the vehicle and have it return to the office. PW 4 later asked him to accompany him to Cleanshelf where the manager there confirmed that the cheque drawn on the KCB Bank did not belong to them.

13. The Acting Branch Manager of KCB Bank Kiambu Branch, Viola Omasire Mwangi(PW 11), recalled that on 12th October 2018 that after looking at the cheque shown to her by the DCI Limuru, she confirmed that the account number on the cheque did not exist in their books and that the domicile address on the cheque leaf identified the Thika branch and not the Kiambu branch.

14. Inspector Noah Chemweno (PW 12) the investigating officer explained that he carried out investigations. He told the court that he also visited Cleanshelf management who confirmed that they did not have an account at KCB, Kiambu branch. That the cheque was also taken to KCB and a report was compiled by the bank. In cross-examination, PW11 stated that the appellant was charged for failure to follow due process as he took the documents without confirming if the tea was going to the right customer.

15. The appellant in his sworn statement denied the offence. He told the court that orders were normally taken by phone or email. He stated that the orders relating to the current case were made vide mobile no. 0789***395 by someone called Balo who stated that he worked at Cleanshelf Kiambu. The appellant stated that when he received all the orders he followed due procedure as required. He stated that his supervisor, PW 4, oversaw the process and issued the approvals. He testified that his job was to coordinate between sales and the factory as he was not allowed to call customers. The appellant told the court that it was the manager's job to sign the invoices as verification and confirm orders. He stated that he did not know why he was arrested yet he followed all the procedures. and that he wanted 30 cartons of tea. The appellant confirmed to the said Balo that only 27 cartons

16. As I understand, the prosecution case in respect of Count I was that the appellant failed to ensure that the orders from Cleanshelf had an LPO which led to the theft of the tea. The central question is whether the failure to ensure that the orders had a LPO was tantamount to committing the offence he was charged with. It is clear from the evidence of PW 4 that a LPO was not mandatory for all its customers. He further acknowledged that he had approved orders from the same customer on the 28th, 30th and 31st October 2017 without LPOs which he stated was an error on his part and was against company policy. He admitted that if he did not sign the invoices the goods would have never left the premises. It is clear from the evidence that the failure to follow procedure was not squarely on the appellant but also on PW 2, PW 3 and PW 4 who should not have verified the order for lack of a LPO. Quite apart from the fact that stealing on the part of the appellant was not established, there was therefore no basis for the Investigating Officer to decide to charge the appellant for flouting the company procedures while ignoring his superiors who rubberstamped the approvals without following the same due process that the appellant was accused of violating.

17. The trial court in its judgment created a narrative that the theft was conducted with the help of an insider who knew the inner working of

the complainant's processes and reached a conclusion that the appellant was the insider. However, from the evidence on record, it is clear that the investigating officers ignored certain the leads that would probably have led to the recovery of the stolen goods and apprehension of the culprits. They failed to trace the owner of the number who placed the order and who instructed the driver, Josephat Kerori, to collect the goods from the complainant. They further failed to follow leads as to the warehouse where the goods were delivered. In failing to do so, the investigators failed to find evidence connecting the appellant and the theft.

18. Having evaluated the entirety of evidence, I have come to the conclusion that the prosecution failed to prove the charge of stealing against the appellant and that his conviction is not safe.

19. I allow the appeal, quash the conviction and sentence. The appellant is set free unless otherwise lawfully held.

SIGNED AT NAIROBI

D.S. MAJANJA

JUDGE

DATED and DELIVERED at KIAMBU this 9th day of MARCH 2021.

M. KASANGO

JUDGE

Mr Ndolo instructed by Orende and Associates Advocates for the Appellant.

Ms Ngesa instructed by the Office of the Director of Public Prosecutions for the respondent.