REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT CHUKA

CRIMINAL APPEAL NO. E004 OF 2020

PETER NKONGE GATUNDU.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(An Appeal from the original conviction and sentence of the Senior Resident Magistrate's Court at Chuka in CMCC No. 454 of 2019 - Chuka delivered on 21st September 2020 by Hon N. Kahara)

J U D G M E N T

Introduction

1. On 21st September 2020, **Peter Nkonge Gatumo** (the Appellant herein) was convicted in **Criminal Case No. 454 of 2019 (Chuka)** of the offence of stealing by a person employed in the public service contrary to **Section 280** of the **Penal Code (Chapter 63 of the Laws of Kenya)**.

2. The particulars of the offence were that on an unknown date in the month of December 2018 at an unknown time at Karimba Chief's office in Maara sub-county within Tharaka Nithi County, being a person employed in the public service as Chief for Karimba location in the Ministry of Interior and Coordination of National Government stole 30 tons of sand and 42 tons of ballast all valued at Kshs. 5,200/= the property of the Government of Kenya which came into his possession by virtue of his employment.

Brief Summary of the Case

3. The prosecution's case was that there was a project for the construction of the Chief's office of Karimba location. Some construction materials that had been bought for the said project consequently went missing. It was the prosecution's case that the Appellant sold sand and ballast to one Harriet Kinyaa (PW3). The Appellant was then arrested and charged with stealing as he did not have any authority to sell the building materials. The matter proceeded to a full trial where a total of 7 (seven) witnesses were called. After a full trial, the Appellant was found guilty, convicted and sentenced to serve four (4) years imprisonment with no option as to fine.

4. Being aggrieved by the said conviction and sentence, the Appellant filed the instant appeal vide a Petition of Appeal dated 25th September 2020 where he raised the following 12 grounds of appeal. THAT:

i. The learned magistrate erred in law and fact in finding that the prosecution had proved their case beyond reasonable doubt.

ii. The learned magistrate erred in law and fact in relying on contradicting evidence of the prosecution to convict the Appellant.

iii. The Appellant relied on a defective charge to convict the accused.

iv. The learned magistrate erred in law and fact in not finding the ingredients of stealing had not been proved against the Appellant.

v. The learned magistrate erred in law and fact in "heavily relying on" the evidence of the assistant chief who is "hell bent" to take over the Appellant's position as the area chief.

vi. The learned magistrate erred in law and fact in relying on contradicting evidence over the quantity of stolen goods and proof of the same.

vii. The learned magistrate erred in law and fact in not finding that it is the third parties mentioned in the proceedings who stole or benefited from the scam and the appellant was just an "escape goat" to enable the assistant chief get his post.

viii. The learned magistrate erred in law and fact in relying on the evidence of the assistant chief who is naturally biased against the appellant (his boss).

ix. The learned magistrate relied on uncertified photocopies and unprocedural mode of production.

x. The learned magistrate erred in law and fact in meting harsh sentence against the appellant in the circumstances.

xi. The learned magistrate erred in law and fact in not giving the appellant an option of fine or non-custodial sentence bearing in mind the "petty" sum involved Kshs. 5,200/= compared to the billions being stolen from the government coffers.

xii. The sentence meted was excessive in the circumstances.

5. In the end, the Appellant's prayer is for the instant appeal to be allowed and that he be set free unconditionally.

6. On 15/03/2021, this court ordered that the appeal be disposed of by way of written submissions. The Appellant filed his written submissions on 8th April 2021 while the Respondent filed their written submissions on 1st May 2021.

Submissions

7. The Appellant submitted that the evidence tendered by the prosecution witness was contradicting in terms of the quantities of sand and ballast that were stolen. The Appellant further questions how the prosecution arrived at the value of Kshs. 5,200/= as being the value of the materials that were stolen. In addition, the Appellant submitted that the key witness is the incumbent assistant chief who is eyeing to be a chief and hence not a neutral witness. The Appellant further alleges that the ingredients of stealing were not proved to the requisite standard and finally faulted the trial court for meting out a sentence that was excessive and harsh in the circumstances.

8. In opposing the appeal, the Respondent submitted that the charge sheet was not defective as it clearly disclosed the offence and its particulars. The Respondent further submitted that the said value of the stolen goods was an estimated figure which was arrived at by considering the purchase price of the stolen materials. On the allegation that PW2, the assistant chief, was the key witness and was biased because he was eyeing the Appellant's position, the Respondent submitted that the said PW2 could not be said to be the key witness since there were other witnesses like PW3 who the Appellant allegedly sold the stolen sand and ballast to. The Respondent further stated that the Appellant's allegation of bias against PW2 was never brought out during PW2's cross-examination or during the Appellant's defense and as such, the Respondent submitted that the same should be treated as an afterthought.

Issues Arising for Determination

9. Considering the issues raised and submitted on by the parties herein, it is my view that the main issues arising for determination in this appeal are:

i. Whether the charge sheet was defective;

ii. Whether the prosecution proved the case of stealing to the required standard; and if so,

iii. Whether the sentence meted was harsh and excessive.

Analysis of Issues

10. This being a first appeal, this court is mandated to analyse and re-evaluate the evidence afresh in line with the holding in the case of **Odhiambo vs Republic Cr. App No. 280 of 2004 (2005) 1 KLR** where the Court of Appeal held that:-

> **"On a first appeal, the court is mandated to look at the evidence adduced before the trial afresh, re-evaluate and reassess it and reach its own independent conclusion. However, it must warn itself that it did not have the benefit of seeing the witnesses when they testified as the trial court did and therefore cannot tell their demeanour."**

11. The Court of Appeal in the case of **David Njuguna Wairimu V. Republic [2010] eKLR**, cited with approval the decision in **Okeno v. R [1972] EA. 32** in which the Court of Appeal for East Africa laid down what the duty of the first appellate court is and set out the principles that should guide the first appellate court as follows:

> **"The duty of the first appellate court is to analyse the 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 appellant 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."**

12. This court has been called upon to make its own findings and draw its own conclusion as the court in **Okeno v. R** *(Supra*) stated: -

> **"It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions."**

13. Below is an analysis of the identified issues.

i. Whether the charge sheet was defective

14. Ground of appeal no. 3 is dealt under this head.

15. The Appellant contends that the charge sheet relied on by the trial court to convict him was defective. In determining whether a charge sheet is defective or not, the Court of Appeal in **Sigilani –vs- Republic (2004) 2 KLR, 480** held as follows:-

> **"The principle of the law governing charge sheets is that an accused should be charged with an offence known in law. The offence should be disclosed and stated in a clear and unambiguous manner so that the accused may be able to plead to specific charge that he can understand. It will also enable the accused to prepare his defence".**

16. On the other hand, **Section 134** of the **Criminal Procedure Code** provides for what the components/ingredients of the charge sheet constitute as follows:-

> **"Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged".**

17. In the case of **Isaac Omambia v Republic, [1995] eKLR, the** Court of Appeal considered the ingredients necessary in a charge sheet and stated as follows:

> **"In this regard, it is pertinent to draw attention to the following provisions of S. 134 of the Criminal Procedure Code which makes particulars of a charge an integral part of the charge: Every charge or information shall contain, and shall be sufficient if it contains a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence."**

18. Looking at the charge sheet in question, it is clear that the Appellant was charged with "STEALING BY PERSON EMPLOYED IN THE PUBLIC SERVICE CONTRARY TO SECTION 280 OF THE PENAL CODE." The charge sheet clearly spells out the statement of the offence that the Appellant was charged with. The said offence is also known in law as **Section 280** of the **Penal Code** provides that:

> **"If the offender is a person employed in the public service and the thing stolen is the property of the Government, or came into the possession of the offender by virtue of his employment, he is liable to imprisonment for seven years."**

19. The charge sheet also contained the particulars of the offence. The theft was alleged to have been committed on an unknown date in the month of December 2018. The items alleged to be stolen were identified and quantified as "…30 tons of sand 42 tins of ballast all valued at Kshs. 5,200/=." It was clear from the charge sheet what charge the Appellant was supposed to meet. There was no ambiguity.

20. The Court of Appeal in **Peter Ngure Mwangi v Republic [2014] eKLR,** quoted the **Isaac Omambia case** with approval and further stated that:

> **"A charge can also be defective if it is in variance with the evidence adduced in its support. Quoting with approval from Archbold, Criminal Pleading, Evidence and Practice (40th Edn), page 52 paragraph 53, this Court stated in YONGO v R, [198] eKLR that:**
>
> > **"In England it has been said: An indictment is defective not only when it is bad on the face of it, but also:**
> >
> > **(i) when it does not accord with the evidence before the committing magistrates either because of inaccuracies or deficiencies in the indictment or because the indictment charges offences not disclosed in that evidence or fails to charge an offence which is disclosed therein,**
> >
> > **(ii) when for such reason it does not accord with the evidence given at the trial."**

21. The Court of Appeal in the **Peter Ngure's case** *(supra)* was further guided by the case of **Peter Sabem Leitu v R, Cr. App No. 482 of 2007 (UR)** where the Court held that:

> **"The question therefore is, did this defect prejudice the appellant as to occasion any miscarriage of justice or a violation of his fundamental right to a fair trial? We think not. The charge sheet was clearly read out to the appellant and he responded. As such he was fully aware that he faced a charge of robbery with violence. The particulars in the charge sheet made clear**

reference to the offence of robbery with violence as well as the date the offence is alleged to have occurred. These particulars were also read out to the appellant on the date of taking plea. The fact that PW1 was not personally robbed and did not also witness the robbery did not in any way prejudice the appellant."

22. The main defect pointed out by the Appellant is that the quantities disclosed in the charge sheet were more than the total ordered for the project yet the said project was allegedly almost complete. According to the Appellant, 7 tons of sand and 40 debes of ballast were bought for the project. The Appellant thus faults the prosecution for charging him based on a charge sheet that was purportedly erroneous with regard to the quantity of goods stolen.

23. From the record, PW7 produced as P.Exh 2 a Local Purchase Order (L.P.O.) dated 24th October 2018 which itemized the building materials that were to be supplied for purposes of completing the subject project. Although the said exhibit was a copy and not the original L.P.O., the Appellant never objected to the production of the same. According to the mentioned L.P.O., the materials bought included 7 tons of building sand worth Kshs. 15,000/= and 40 debes of ballast worth Kshs. 9,800/= and the same were delivered on 24th October 2018 as per the delivery note dated the same 24th October 2018. It is therefore true that the charge sheet was inconsistent with the evidence adduced as the Appellant was charged with stealing 30 tons of sand and 42 tins of ballast yet only 7 tons of sand and 40 debes of ballast had been bought for the project.

24. The Appellant's other line of attack against his conviction is that the quantities of goods stolen as particularized in the charge sheet were inconsistent with the quantities stated by the different prosecution witnesses. As earlier stated, the quantities indicated in the charge sheet was 30 tons of sand and 42 tins of ballast. On the other hand, PW1 indicated that the total amount that had been bought for the project was one lorry of sand and 40 tons of ballast. It was also PW1's testimony that the project was at its completion stage. According to PW3, her son told her that the Appellant sold 1 pickup of sand and 20 tins of ballast to him. In contrast, PW5 stated that he ferried around 30 tons of sand in 2 pick-up trips from Matini Chief's Camp to PW3's homestead. He also carried one trip of ballast in the pickup. As per PW6's testimony, the Appellant sold half lorry of sand and 42 debes of ballast. PW7, the investigating officer, testified that they found 3 tons of building sand and 30 tins of ballast at PW3's home. There is certainly glaring inconsistencies in the evidence adduced in support of the prosecution's case with regards to the quantities of the materials alleged to have been stolen.

25. The Appellant submitted that the variance between the charge and the evidence with regard to the quantities of the stolen goods rendered the charge sheet defective. It is not clear whether there was any other order made for the supply of the building materials for the project in question. That notwithstanding, **Section 267(1)** of the **Penal Code** provides that **"Every inanimate thing whatever which is the property of any person, and which is movable, is capable of being stolen."**

26. It is trite that the prosecution bears the burden to prove the charge and every particular beyond any reasonable doubts. What the court has to consider is whether the failure by the prosecution to prove what was stolen has cast reasonable doubts on the prosecution's case. I hold that reasonable doubts were cast as to what the Appellant's alleged to have stolen. The accused is alleged to have stolen 30 tons of sand and the prosecution relies on evidence which proves that the complainant had only bought seven (7) tons. He is then alleged to have stolen 42 debes of ballast and the prosecution presents evidence to show that only forty (40) debes of ballast were stolen. These aside, contradictions abound as to what was stolen. I am of the view that since the evidence adduced did not support the charge, the prosecution failed to prove the particulars of the charge beyond any reasonable doubts. No evidence was tendered to prove how the value stated in the charge sheet was arrived at as that value is not supported by the documentary exhibit tendered court.

27. I am minded that an error in the valuation of the goods stolen does not vitiate a charge. In **Ogaro v Republic [1981] eKLR** the Court of Appeal held as follows:

"Under section 267(1) of the Penal code, every inanimate thing whatever which is the property of any person, and which is movable is capable of being stolen. A file is capable of being stolen. The omission to prove the value of the thing stolen is not fatal to the charge inasmuch as section 137 (c) (i) of the Criminal Procedure Code provides that if the property is described with reasonable clearness in a charge or information it shall not be necessary (except when required for the purpose of describing an offence depending on any special ownership of property or special value of property) to name the person to whom the property belongs or the value of the property. We can and do take judicial notice that a file is worth at least Kshs 1."

28. Section 382 of the **Criminal Procedure Code** provides as follows:

"382: subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:

Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings."

29. In **Jackson Mwanzia Musembi v Republic [2017] eKLR** the court relied on the case of Uganda Court of Appeal in **Twehangane Alfred v Uganda- Criminal Appeal No 139 of 2001, [2003] UGCA, 6**, where the court noted that it is not every contradiction that warrants rejection of evidence. There the court stated:

"With regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected.

The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case."

30. In this case, the charge sheet did disclose a specific offence which the Appellant understood and pleaded to. The consideration is whether the omissions on the charge sheet occasioned a miscarriage of justice. I hold that a miscarriage of justice was occasioned as at the end of the day, it is not clear what was stolen. Secondly, the contradictions on the charge and the evidence are deliberate and disclose attempts to mislead the court with lies. There is no dispute that no particular witness was called to prove that it is indeed the accused who stole the sand and the ballast. There was no eyewitness account. The prosecution relied on:

i. Admissions by the accused; and

ii. Hearsay evidence

31. I will proceed to analyse these two issues.

Admissions by the accused

32. Admissions are regulated by Part II of the Evidence Act (Cap 80 of the Laws of Kenya). **Section 17** of the **Evidence Act** defines an admission as:

"… a statement, oral or documentary, which suggests any inference as to a fact in issue or relevant fact, and which is made by any of the persons and in the circumstances hereinafter mentioned."

33. Section 25A (1) of the Evidence Act provide as follows:

"A confession or any admission of a fact tending to the proof of guilt made by an accused person is not admissible and shall not be proved as against such person unless it is made in court before a judge, a magistrate or before a police officer (other than the investigating officer), being an officer not below the rank of Chief Inspector of Police, and a third party of the person's choice."

34. Section 18(1) of the **Evidence Act** provides that statements made by parties to a suit or their agent is deemed as admission. The Section is coined in following terms-

"Statements made by a party to the proceeding, or by an agent to any such party, whom the Court regards in the circumstances of the case as expressly or impliedly authorized by him to make them, are admissions."

35. In this case, PW1 testified that when he went to the site, the Appellant admitted to having sold some of the sand. PW2 corroborated PW1's testimony by stating that when the Appellant was called to the scene, he said that "he had sold the sand and ballast to Harriet Kinyua". The Appellant never acknowledged the truth of that assertion either in his statement or before court. It remains that such acknowledgement of guilt by the Appellant was only made to PW1 and PW2. It is my view therefore that testimonies of PW1 and PW2 as regards what the Appellant admitted to at the scene do not have the evidentiary value of admissions in line with the above stated provisions of the Evidence Act. In the circumstances, it is my view that the trial court erred in placing reliance on the alleged admissions by the accused.

36. That said, the other evidence that the prosecution relied on was hearsay evidence which I have considered below.

Hearsay Evidence

37. In **Kinyatti v Republic [1984] eKLR**, the Court of Appeal defined hearsay evidence as follows:

"4. Hearsay or indirect evidence is the assertion of a person other than the witness who is testifying, offered as evidence of the truth of that asserted rather than as evidence of the fact that the assertion was made. It is not original evidence.

5. The rule against hearsay is that a statement other than one made by a person while giving oral evidence in the proceedings is inadmissible as evidence of a stated fact.

6. Hearsay evidence may be admitted if the statement containing it is made in conditions of involvement or pressure and within proximity but not exact contemporaneity as to exclude the possibility of concoction or distortion to the advantage of the maker or the disadvantage of the accused.

7. The evidence of a statement made to a witness by a person who is not called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is not admissible when it is proposed to establish by the evidence, not the truth of the statement, but the fact that it was made.

8. Some seemingly hearsay evidence may be proved to be original evidence when the fact that it was made, as distinct from its truth by taking the following into account:

(a) was the statement made or not

(b) it is releveant to an issue, regardless of whether it is true or false

(c) if it affects the credit of a witness by either being consisted or inconsistent."

38. Hearsay evidence is not original evidence. It is indirect evidence. As a general rule, hearsay evidence is inadmissible. This is drawn from **Section 63** of the **Evidence Act** which explicitly provides that oral evidence must be direct. In this case, PW3 asserted that his son bought the sand and ballast that was found in her homestead from the Appellant. PW3's son was however not called to give his evidence. In the circumstance, PW3's testimony is no more than mere hearsay evidence to the extent she only reported to the trial court what her son told her. She was not present when the sand and ballast were purportedly bought or when they were transported to her homestead.

39. As stated above, the prosecution failed to establish what was stolen and that it was the Appellant who stole it. The materials were found in the homestead of PW3 and yet the prosecution ruled her out as a suspect. Neither PW1 nor PW2 was able to shed any light as to how the construction materials went missing. The only eyewitness account was that of PW5 who testified to the fact that it is him and PW3's son who transported the sand and ballast up to PW3's homestead. His testimony remained that of a single witness and the trial court ought to have cautioned itself of the danger of relying on the testimony of a single witness to prove a fact. The testimony of PW 5 was the word of the witness against that of the appellant. The PW3 never adduced evidence that PW5 is the one who took the said and ballast to her home. The prosecution did not adduce evidence to prove that any sand or barrast was stolen. The said sand and barrast were not exhibited in court. I am aware that due to the nature of the exhibit it could not be produced in court if indeed the exhibits were there. The prosecution could have applied to have the court go to scene and view the exhibits. Short of that the prosecution could have called the scenes of crime personnel to take photographs and present them in court see ***Andria Nahashon Mwarish- v- Republic (2016) eKLR.*** It was therefore possible for the prosecution o corroborate the evidence of the witnesses that indeed this sand and barrast was removed from the Chief's office. There was also no evidence that police recovered the exhibits and returned them to the Chief's office or to the police station. It is good practice for photographic evidence to be obtained in a bid to preserve evidence, courts should encourage photographic evidence especially where the evidence cannot be produced in court. Failure to produce the exhibits in court left a lacuna in the prosecution case. It is my view that failure to produce the recovered stolen items which witnesses talked about before the court in one way or the other cast doubts in the prosecution case. The trial magistrate erred by holding that the charge was proved beyond any reasonable doubts and yet she did not see the alleged stolen items. This cannot be wishes away since the appellant had alleged that PW1 & 2 vested interest his seat and there was evidence that PW3 who is said to have bought the said barrast had ordered from the said payment of the said materials to be paid to PW2 by PW3 and indeed the payment was made through Mpesa. The trial magistrate ignored the evidence and guessed that the number was for an Mpesa agent when the guess was not supported by evidence. The appellant denied that he stole. What was stolen was not presented to the trial court. The finding by the trial magistrate was against the weight of the evidence.

In addition, it is my view that the learned trial magistrate erred in requiring the Appellant to produce proof that he was not present when PW5 was carrying the materials, as this was tantamount to shifting the burden of proof from the prosecution to the Appellant. It is trite that in a criminal trial, the prosecution bears the burden of proof throughout the trial. This recognizes the constitutional right of an accused person to be presumed innocent until prove guilty. The right to fair trial under **Article 50 of the Constitution** gives an accused person the right not to give incriminating evidence and the right to remain silent. The appellant did not have the burden to prove his defence of alibi. It is well settled that the legal burden of proof in criminal matters never leaves the prosecution's backyard. In the case of **H.L. (E) Woolmington -v- DPP 1935 AC 462 PP 481** held as follows on the law on legal burden of proof in criminal matters-

> ***"Throughout the web of the English criminal law one golden thread is always to be seen, that is, the duty of the prosecution to prove the prisoner's guilt…….. no matter where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained. The trial magistrate erred in shifting the burden of proof on the appellant."***

From the foregoing, it is my view that several doubts abound the prosecution's case. The benefit of those doubts must be decided in favour of the Appellant.

Conclusion

40. In conclusion, it is my view the conviction of the Appellant herein was not based on sound evidence.

I order that the conviction be quashed, the sentence be set aside, and the appellant be set at liberty unless he is otherwise lawfully held.

Dated, signed and delivered at Chuka this 22nd day of July 2021.

L.W. GITARI

JUDGE

22/7/2021

Judgment has been read out in open court.

L.W. GITARI

JUDGE

22/7/2021