



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARSEN

CRIMINAL APPEAL NO.72 OF 2018

REPUBLIC.....APPELLANT

VERSUS

JOHN MACHARIA NDUNGU MWARI.....RESPONDENT

(Appeal from Original Conviction and Sentence in Criminal Case No. 191 of 2016 of the Principal Magistrate's Court at Hola Law Court-A. P Ndege, PM dated 15th June, 2017)

CORAM: Hon. Justice R. Nyakundi

Mr. Mwangi for the State

The Respondent in person

JUDGMENT

The respondent was charged with stealing contrary to Section 268 (2) (e) as read with Section 275 of the Penal Code. The particulars of the offence were that on 3rd June, 2016 between 7:00 a.m and 8:00 am along Bura /Village ten road in Bura Sub County within Tana River County stole Kshs.350,000/- the property of **Abdi Maoni Abdullahi**.

Aggrieved by the sentence and the conviction of the trial court, the appellant lodged an appeal on the following grounds:

- 1) That the learned trial magistrate erred in law and fact by failing to appreciate that the prosecution had proved its case beyond any reasonable doubt.**
- 2) That the learned trial magistrate erred in law and fact by addressing his mind to issues that were not in dispute.**
- 3) That the learned trial magistrate erred in law and fact by failing to appreciate the weight of the evidence presented by the prosecution.**
- 4) That the learned trial magistrate erred in law and fact by failing to place the Respondent on his defence given the evidence that was tendered by the prosecution.**
- 5) That the learned trial magistrate erred in law by acting as defence counsel for the Respondent.**

Background

(PW1) Abdi Abdullahi stated that on the 2nd day of June, 2016 he had sold his goats in Mombasa for Kshs.252,000/- and that he put the money in an envelope. He said that he added some money from his shop totaling to an amount of Kshs.350,000/-. On the 3rd day of June, 2016 he put the money in a paper bag preparing to go to the bank at KCB Hola branch. He tied the money in his motorcycle and proceeded to the stage. He informed court that he was called by **Hassan Mohammed** that his goat had disappeared, that he decided to change plans and go there. He told the court that when he looked on the motorcycle the money was missing. That someone had cut the straps. He stated that he retraced his steps from where he had come from. On 05.06.2016 he received report from **Saman Aden** who told him that another mzee known as **Bishar** had found money and had gone to the police with the money. He informed court that he had gone to the O.C.S but no money had been taken there. He stated that he did not see any other motorcycle as he went to village 10. The police recorded his statement

and he was later called that Kshs.40,000/- was recovered by **Mzee Macharia**. He said that they stay together in Bura. He Confirmed that he did not see **Mzee Macharia** as he went to village ten and that he was riding his motorcycle with no passenger.

On cross examination, he stated that he saw him at Manyatta and not village 10. He also stated that the accused did not steal from him. He confirmed that he did not say that the accused stole on 3.06.2016, he missed the money when he arrived at Village 10. He did not report to the police on that day. That they did not have a grudge with him. He lost the money on 3.06.2016 and that there was no way he could have picked the money on 2.06.2016. He also confirmed that he did not know if the accused knew had money.

(PW2) James Muchiri Mwangi informed the court that he has a shop where he sells makaa at Bura Manyatta. That on 4.06.2016 while at his shop he saw a police land cruiser. The O.C.S and Macharia came and he informed them that he had given him the money. That the previous day he had come to him and told him that he had found some gold and that he suspected it belonged to the makaa people. He further told him that if he heard anyone asking, he should inform him (the accused). He also said that he did not ask him what kind of gold he had found. He informed the court that he knows the accused as mzee in Manyatta doing business and that they do not do business together. He also stated that the O.C.S had told him to return the money **Macharia** gave him but he said that he had not given him any money.

On cross examination, he confirmed that the accused came to him at around 9:00 a.m on 03.06.2016 and not 02.06.2016 and informed him that he had found something which he suspected belonged the charcoal businessmen.

(PW3) Joseph Muchiri informed court that he works at Tawakal Clinic and that on 03.06.2016 he was at his place of work at around 11:30 a.m when one **Mr. Macharia** came and told him that he had collected gold. He further informed him that if he heard anyone who had lost it, they should be directed to him. He informed him that he had known him for ten years. That on 06.06.2016 he had been arrested and he went to see him.

On cross examination, he confirmed that he accused later told him that it was money.

(PW4) Hellen Wambui informed court that she is a business woman operating lodging and hotel. That on 4.06.2016, **Macharia** came to her and asked her whether there were people who had slept in her lodging. He further told her that he had collected dollars and was looking for the owner but she did not take him seriously as she thought he was joking. She did not take any interest in the matter.

(PW5) Abdi Alliwo informed court that he knew **Macharia** who is a fellow farmer. That on 03.06.2016 he called **Macharia** on the phone and asked him to come to the shop to ask him about issues of the farm since he was a chairman. He stated that the accused told him that he had collected some money in a box but he told him to stay with the money. He told the court that the accused said that he would wait for the owner to come and identify it. That on 05.06.2016 he was called to the station to say what he had heard from the accused. He further said that the O.C.S had called them after **Macharia** had named them at the station.

On cross examination, he confirmed that the accused called him to his shop to ask about farm issues. He told him that he had collected some money.

On re examination by the prosecution, he stated that the accused is the one who told him the money was in a box but he did not wait to say how much it was.

(PW6) Mohamed Abdi stated that he was an accountant at Tana River County and that on 03.06.2016 his father lost some money and he came to inform him. He told him that he had lost it Village 10 and that he later went to Village 10. The amount lost was Kshs.350,000. He further told the court that on 4.06.2016, they received report that the money was collected by the accused. He also said that the O.C.S informed them that they had collected Kshs.40,000/- and had given the owner for which he was given Kshs.4,000/- by one **Muchiri** who was the owner and charcoal dealer. That they went to **Muchiri** to confirm but **Muchiri** denied. He also stated that the accused then said he had used the money. That he had used part of the Kshs.40,000/- he had said he had. He told the court that he came with Kshs.22,000/-, he had used Kshs.18,000/- and that he came with Kshs.8,000/-later. He also told the court that a search was conducted in his house and Kshs.106,000/- was seized.

(PW7) Beatrice Chelangat No. 96450 stationed at Bura Police Station stated on 06.06.2016 at around 1415 hrs he was instructed by the O.C.S to accompany them in a search for money from **Macharia's** house. She told the court that she was in the company of **CPL Ndunda, IP Muthama** and **CPL Kenga**. She further told the court that she including the accused's wife entered the bedroom and she recovered some money in a metallic box which she handed over to **CPL Mutua**. She also stated that she found a handbag containing some money in a rubber band. That in the wardrobes one of the jackets had some money in thousand shillings notes. That the accused entered the house as they were searching. **CPL Mutua** took the inventory of the recovered money.

She informed the court that the complainant and his son were present and a total of Kshs.102,655/- was recovered from the house. That they took the money and kept it as exhibit. That the accused had informed them that the money belonged to his wife **Scholastica**. She also stated that the accused told them that he did not know of any money in the house.

On cross examination, the accused stated that he did not know of any money in his house and that he initially refused for the search to be conducted. It was also confirmed that the money was counted in his presence and the accused said the money was not his. That the wife did explain how she kept the money but she did not account for some Kshs.20,000/-

(PW8) CPL Peter Mutua No.62375 from DCIO Bura performing investigation duties informed court that he recalled on 03.06.2016 at around 9:00 a.m he was at Bura town when he was approached by the accused, **John Macharia** who came and greeted him and asked him if someone picks something from the ground how long he should stay with it. He later inquired what he had picked and he informed him that he had picked money while on his way to Village 10. He later asked him the amount and he said that it was over Kshs.100,000/- without elaborating the actual amount. He stated that he later asked him where the money was and he said that it was at home. That they parted ways

after telling him to avail the money to the police station.

That on 06.06.2016 he got a call from D.C.I.O **IP Mithamo** who wanted him to accompany him from town to the home of **Macharia** for a search concerning the money. It was at this point that he realized that the owner had made a report at Bura Police Station.

That upon reaching the accused's home, the O.C.S called the accused to find out his whereabouts and he later found out that he was at Magiri Complex house in a meeting. He also informed court that they picked him and accompanied him to his house which was at the time locked. That he called his wife to ask where the keys were and one of the tenants emerged and brought the keys. The O.C.S later informed him why they were there, that they wanted to search the house for money that had been stolen. That the accused argued with them and inquired whether we had a search warrant, the O.C.S explained to him that they did not need one for what they were looking for.

He stated that **PC Chelagat** did a search inside one of the rooms in the presence of the accused's wife. That inside a box with the wife's clothes, they found a black polythene bag with Kshs.2,965/- in notes and coins. In the same box, they found Kshs.14,100/- that was separately there.

He also stated that in the wardrobe there was a basket with a black bible and inside the bible they recovered 2 bunches of money. The first was Kshs.40,000/- tied with a rubber band and the other was Kshs.22,000/- which was inserted in another page. They therefore recovered Kshs.62,000/- from the basket. He said that from the accused's jacket which was inside the wardrobe, they recovered Kshs.23,600/-

He further informed court that that they did not recover any other amount and that he later called the accused for them to prepare the inventory of what was recovered in his house. That all of them signed the inventory. He also stated that the wife tried to justify where the money had come from, that some was from church, business or for club but there was no evidence to prove this. That they took the accused, the inventory including the wife to Bura Police Station. They were later charged with the offence before court. The total amount recovered was Kshs.102,665/-. He further said that the O.C.S told him that some money was taken to him by the accused that he had picked, an amount of Kshs.40,000/-

He further testified that the wife informed them that Kshs.14,100/- was for VEVA church where they used to worship, Kshs.20,000/- was hers, Kshs.2,965/- was youth offering that was being kept by her daughter, Kshs.42,000/- was money for her business and Kshs.23,600/- for women club where she was a treasurer.

(PW9) CLP Caxton Ndunda No. 233496 O.C.S Bura informed court that on 05.06.2016 he was at the station when the complainant came accompanied with his son and complained that on 03.06.2016 he lost money while heading to village 10. The total amount lost was Kshs.350,000/-

He further informed him that someone told him that Macharia had picked the money and brought it to the station. He stated that he went with him to the occurrence book office and perused the date of 02.06.2016 until 05.06.2016 but there was no such report. He later looked for **Macharia's** number and called him to come to the station. Upon getting to the station, he asked him if he picked money and he responded that he picked Kshs.40,000/- at Village 10, that a charcoal dealer dropped it from a sack. The accused informed him that he picked it and took it to the chairman of the charcoal dealer called **Muchiri** who later gave him Kshs.4,000/- and thanked him for his honesty.

He also stated that he asked the accused to take him to **Muchiri** who denied being involved in the matter. He later asked **Macharia**, the accused to clarify and he said that he had Kshs.40,000/- at his home, they went with him to the house, he said he had Kshs.22,000/-, that he had spent Kshs.18,000/- which he was to compensate the following day.

He further informed the court that he took Kshs.22,000/- while with **CPL Kenga** and **PC Mburu**. He went to the station and booked a report. That the following day, they went to **Macharia** with other officers including DCIO to search if the money was at his house. They commenced the search and they recovered Kshs.102,665/-, the money was brought to the station and the accused charged at Garissa where he was released on bond. He also said that on 24.06.2016, he (the accused) came with Kshs.18,000/- that was the balance of the Kshs.40,000/-, he took the money and presented it to court as exhibit.

Upon cross examination, he said that the case was at the C.I.D and before he was arrested, the accused had given him Kshs.22,000/- which was recorded in the Occurrence Book. That at the time, he was the one handling the case which he later handed over to the C.I.D.

At the close of the prosecution case, the trial court found that no prima facie case had been established pursuant to the provisions of Section 210 of the Criminal Procedure Code and the charges against the accused were dismissed.

Analysis and determination

In criminal cases before a trial Court one of the fundamental duties of the Court is to establish whether the burden of proof and standard of proof has been discharged beyond reasonable doubt against an accused person. The issue of proof is a matter of evidence. In **R v Subordinate Court of the First Class Magistrate at City Hall {2006} EA 330** it was held that:

“When a person is bound to prove the existence of any fact it is the Law that the burden of proof lies on that person.”

The general provisions on the legal and evidential burden is to be found in Section 107, 108 and 109 of the Evidence Act. It is trite Law that the state or the prosecution in criminal cases has the burden of proof to prove the existence of certain facts that the accused is guilty contrary to the right on presumption of innocence under Article 50 (2) (a) of the Constitution. The state has to discharge any given issue in an offence framed against an accused to create a doubt in the mind of the Court that he cannot be entitled a right of presumption to innocence. In **Woolmington v DPP {1935} AC 462 Lord Sankey** stated in the following terms:

“But while the prosecution must prove the guilt of the prisoner, there is no such laid down on the prisoner to prove his innocence and it is sufficient for him to raise a doubt as to his guilt, he is not bound to satisfy the jury to his innocence. Throughout the wees of the English Criminal Law, one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoners guilty.”

Having stated that, this being a first appeal, this court has a duty to revisit the evidence that was before the trial court, reevaluate and analyze it and come to its own conclusion. Further, the court has to bear in mind that unlike the trial court, it did not have the benefit of seeing the demeanor of the witnesses and the appellant during the trial and can therefore only rely on the evidence that is on record. See **Okeno v R (1972) EA 32, Eric Onyango Odeng’ v R (2014) eKLR.**

I have considered the grounds of appeal, the respective submissions, and the record and the only issue for determination is whether the prosecution proved its case against the appellant.

With the foregoing parameters in mind, I have identified the issues that fall for my determination in this appeal. One is as regards whether the prosecution proved its case beyond reasonable doubt. The respondent was charged with the offence of Stealing Contrary to Section 268 (2) (e) as read with Section 275 of the Penal Code.

The main issue here was, who stole the complainant’s money. The evidence as demonstrated by the prosecution witnesses was both direct and circumstantial evidence. First, one has to consider the elements of the offences the respondent was charged with and convicted by the Learned trial Magistrate. For an accused person to be convicted of the offence under Section 268 of the Penal Code, it is incumbent upon the prosecution to prove that he or she dealt with the property of the complainant fraudulently without any claim of right or converts it into his or her own use, other than the general or special owner thereof. That intention is executed in a manner to deprive the rightful owner of the property permanently.

In **R v Jones (1976) KLR 1** the Court observed that:

“On a charge of theft, it was necessary to prove a fraudulent taking or conversion without claim of right, and a person was deemed to have taken or converted money fraudulently if he did so without a claim of right and with intent to use it at his will, even if he intended to repay the money to the owner.”

Section 268 of the Penal Code defines stealing as follows;

(1) A person who fraudulently and without claim of right takes anything capable of being stolen, or fraudulently converts to the use of any person, other than the general or special owner thereof, any property, is said to steal that thing or property.

(2) A person who takes anything capable of being stolen or who converts any property is deemed to do so fraudulently if he does so with any of the following intents, that is to say—

(a) an intent permanently to deprive the general or special owner of the thing of it;

(b) an intent to use the thing as a pledge or security;

(c) an intent to part with it on a condition as to its return which the person taking or converting it may be unable to perform;

(d) an intent to deal with it in such a manner that it cannot be returned in the condition in which it was at the time of the taking or conversion;

(e) in the case of money, an intent to use it at the will of the person who takes or converts it, although he may intend afterwards to repay the amount to the owner; and “special owner” includes any person who has any charge or lien upon the thing in question, or any right arising from or dependent upon holding possession of the thing in question.

From the analysis of the evidence tendered by the prosecution witnesses before the lower court it is not clear to me that any of the prosecution witnesses gave evidence relevant to the offence that the accused was charged with. **(PW1)** testimony was that he was called by one **Hassan Mohamed** that his goat was lost and with this information he decided to change his way and instead of heading to the bank, he decided to go check on his goat. I also note that **Hassan Mohamed** was never called by the prosecution. It was also his testimony that two days later, he received a report from one Saman Aden who told him that another mzee known as **Bishar** had found money and had gone to the police with the money, **Bishar** was also never called by the prosecution as a witness. **(PW1)** sole testimony was that he did not see the accused on his way to Village 10. This was a conclusion **(PW7)**, **(PW8)** and **(PW9)** arrived at on their own without conducting any investigation to establish if the alleged theft took place or not.

On the aspect of the case of whether failure to call certain witnesses was fatal to the prosecution case? The general principle of law on this issue is whether the trial court or the defence can attribute as to the number of witnesses to be called to establish the ingredients of an offence preferred against an accused person. The burden of proof is always on the prosecution to call such evidence as to prove the ingredients of the offence beyond reasonable doubt.

The question therefore of calling witnesses or not to call to present evidence before a trial court is placed upon the prosecution at all times unless it is shown that the prosecutor has through acts of omission or commission failed to summon a crucial witness to the case. This

proposition was well discussed in the case of *Mwangi v Republic [2008] 1KLR 1134* where the Court of Appeal held:

“Whether a witness should be called by the prosecution is a matter within the discretion of the prosecution and a court will not interfere with the discretion unless it may be shown that the prosecutor was influenced by some oblique motive.”

The respondent herein insists that he picked some money, an amount of Kshs.40,000/-which he alleged that had been dropped by some charcoal dealers. His testimony also points this court to made effort to trace the owner of the money, a summary of the testimonies of (PW2), (PW3), (PW4) and (PW5) is to the effect that he inquired about the owner from the above witnesses.

Based on the evidence that was adduced by the prosecution, the offence of stealing was not supported by the evidence that was presented by the Prosecution. The Court of Appeal in *Yongo vs Republic [1983] KLR, 319* did hold that a charge that is not disclosed by evidence is defective and stated as follows in this regard:

“In our opinion a charge is defective under Section 214(1) of the Criminal Procedure Code where:

(a) it does not accord with the evidence in committal proceedings because of inaccuracies or deficiencies in the charge or because it charges offences in the charge not disclosed in such evidence or fails to charge an offence which the evidence in the committal proceedings discloses; or

(b) it does not, for such reasons, accord with the evidence given at the trial; or

(c) it gives a misdescription of the alleged offence in its particulars.”

This holding was explaining the circumstances when a charge is considered to be defective in substance, so as to guide a court when it is altering the said charge. In order to find out if there was an error made in this respect, one must interrogate the elements of the offence of stealing as stated above as per Section 268 of the Penal Code.

The question to be answered therefore is whether by the act of being in possession of some amount of money there was taking, conversion or possession of the said money by the Complainant.

In that regard I am satisfied that the trial court considered and weighed the evidence to arrive at a decision to dismiss the charges against the accused.

Taking all facts into account and all the issues raised in challenging the Judgement by the trial court I am satisfied that the respondent was properly acquitted of the offence of stealing contrary to section 268 (2) (e) as read with Section 275 of the Penal Code Cap 63 of the Laws of Kenya. There is no merit on the appeal.

It follows therefore that the entire appeal is dismissed. The Judgement of the trial court delivered on 15.6.2017 affirmed.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 15TH DAY OF SEPTEMBER 2021

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R. NYAKUNDI

JUDGE

In the presence of:

1. Mr. Mwangi for the DPP