



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

CRIMINAL APPEAL NO. 49 OF 2020

JAMES KURIA KIMANI.....APPLICANT

VS.

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in the Chief Magistrate's Court at Thika E. Riany, SRM Criminal Case No. 7742 of 2020 dated 24th September, 2020)

JUDGMENT

1. **JAMES KURIA KIMANI (Kuria)** was charged before the Chief Magistrate's Court, Thika, with the offence of stealing by servant contrary to **Section 281** of the Penal Code. After trial he was convicted as charged and was sentenced to pay a fine of Kshs.4 million and in default to serve 5 years of imprisonment. He was aggrieved by the conviction and sentence and accordingly, filed this appeal.

2. The duty of the first appellate court as this Court is, has been restated often by the courts, as it was in the case **ODHIAMBO VS. REPUBLIC CR. APPLN. NO. 280 OF 2004 (2005) IKLR** thus:-

“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 demeanor”.

3. Kuria was an employee of Delmonte Company. He was the warehouse supervisor at that company. The prosecution's case was that 80 pallets of assorted fruit juices valued at Kshs.6,063,105 were stolen by Kuria in the course of his employment by Delmonte.

4. As I begin to re-evaluate the evidence adduced at the trial, I find it convenient to remind myself that the prosecution bore the burden to prove its case against Kuria on the standard of proof beyond reasonable doubt. That standard of proof was discussed in the case **GORDON OMONDI OCHIENG VS. RPEUBLIC (2021)eKLR** as follows:-

“31. And in Bakare v State (1987) 1 NWLR (PT 52) 579, the Supreme Court of Nigeria emphasized on the phrase proof beyond reasonable doubt, stating:

‘Proof beyond reasonable doubt stems out of the compelling presumption of innocence inherent in our adversary system of criminal justice. To displace the presumption, the evidence of the prosecution must prove beyond reasonable doubt that the person accused is guilty of the offence charged. Absolute certainty is impossible in any human adventure, including the administration of criminal justice. Proof beyond reasonable doubt means just what it says it does not admit of plausible possibilities but does admit of a high degree of cogency consistent with an equally high degree of probability.’ (emphasis)

5. The prosecution's evidence was wanting in making it clear the system that applied in the Delmonte Company. The prosecution's case is that the loss of the fruit juices, which were the subject of the charge Kuria faced, occurred in Delmonte's warehouse.

6. Prosecution adduced evidence of four witnesses who were also employees of Delmonte. **Tobias Ouma Mrionage, (PW1)** was a clerk in 2016 he worked as a clerk in the warehouse. Kuria was his supervisor. PW1 stated that Kuria took stock on 2nd November, 2016 and later informed him that “some items were lost from the stock taking”. PW1 said Kuria did not report “to the officials” that loss. The rest of the evidence of PW1 is muddled up but it would seem that there may have been another stock taking which revealed loss of stock which PW1 said Kuria instructed the driver (presumably the fork lift driver) to arrange the stock in such a way leaving gaps in-between to deceive

someone that there was no loss. PW1 said Kuria said the lost stock which was “eaten by wazee – bosses”. PW1 estimated the lost stock to be of the value of Kshs.6million. He however was to later admit that he did not know the number of pallets containing fruit juices that were lost.

7. **Gilbert Otieno Obiero, (PW2)** was the fork lift operator in the warehouse. PW2 spoke of a stock taking done on 5th November, 2016 when Kuria informed him of a deficit in the stock. He said Kuria informed him to create spaces on each row. Kuria told him that he would later explain why he was to leave/create spaces but in PW2’s view that spacing was intended to deceive. However, two other stock takings were done and due to the shortage of 80 pallets of juices the police were informed.

8. **Samuel Onyancha, (PW3)** was the one processing orders, receiving orders and ensuring they were taken to the client. PW3 stated that PW1 reported to him there were products missing at the warehouse and that Kuria had said he lost juices from the warehouse. PW1 informed him that Kuria wanted to cover-up that loss. PW3 in describing the duties of Kuria stated in evidence:-

“His (Kuria) job was to keep stock of finished products. He was to keep and issue stocks with staff under him made of clerks. He (Kuria) reported to me.”

9. PW3 further stated that on 10th November, 2016 stock taking was undertaken which “never revealed much.” It would seem a second stock taking was done on the same date which at first PW3 said revealed a loss of 8 pallets but later said it revealed loss of 80 pallets. On being cross examined PW3 stated:-

“I don’t know when the 80 pallets of juices were stolen. I never saw accused (Kuria) carry juice leaving the compound of the company. No one reported to me that accused was carrying juice from the company premises...”

I never said its accused who stole. I reported to police saying accused was in charge of the warehouse that we had lost some pallets of juices from the company premises...

We hold him (Kuria) accountable or (sic) losses at warehouse.”

10. **Peter Nganga Mwaura, (PW4)** introduced himself as an accountant at Delmonte. He stated that he with other staff from the the finance department did stock taking which revealed shortage. The shortage was valued at Kshs.6 million. Although it will be noted that PW4 said the stock taking was on 28th October, 2016 he produced a report dated 7th November, 2016 marked as exhibit 2. He carried out a recount of stock in the store when irregularities were noted. On 10th November, 2016 “entire stock count” revealed a loss of stock of Kshs.5,927, 991.01. He stated that that loss occurred between March and November, 2016.

11. Kuria gave a sworn defence. He denied the charge. He stated there was stock taking on 7th November, 2016 which did not reveal a shortage. He stated that on 9th November, 2016 he tendered his resignation for the reason that the pay of Delmonte was not good.

12. The re-evaluation of the trial court’s evidence reveals that there was no direct evidence which proved theft by Kuria. Prosecution relied on circumstantial evidence. The Court of Appeal in the case **SAWE VS. REPUBLIC (2003) KLR 364** had this to say on circumstantial evidence.

“In order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt...”

Suspicion, however strong, cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt. As this Court made clear in the case of Mary Wanjiku Gichira v Republic (Criminal Appeal No 17 of 1998) (unreported), suspicion however strong, cannot provide a basis for inferring guilt which must be proved by evidence.”

13. Does the evidence against Kuria meet the above standard? I dare say no. the prosecution’s case is characterised by wholly confused and jumbled up evidence. It does seem that Kuria was in charge of the ware house where PW1 was a fork lift operator and there were two sweepers. Although prosecution’s case is that Kuria was in charge of opening and closing the warehouse the key to the warehouse was however left at the security office. It was left with the in-charge of security at Delmonte. The prosecution’s witnesses confirmed that there are CCTV cameras within Delmonte. Further, that there was security officers who checked goods coming and leaving Delmonte. The prosecution’s witnesses also confirmed that pallets of juices cannot physically be removed from Delmonte without assistance of motorised vehicle. There was no evidence Kuria was seen taking juices from the premises of Delmonte. Indeed, I find what PW3 stated in evidence that, Kuria was accountable for the loss of the juices. That was the only basis Kuria was charged with the offence of theft by servant. But what that evidence perhaps reveals is that Kuria may have been accountable under civil law for the loss of those juices but not under criminal law.

14. With respect, the burden of proof in criminal cases, as stated above in this judgment is borne solely by the prosecution. The accused person is not required to prove his innocence. The trial court erred to convict Kuria on no evidence. This is particularly because prosecution failed to prove that Kuria was the only person with access to the warehouse. It seems the scanty evidence of the prosecution revealed that PW1, the clerk, and PW2, the fork lift operator were required to process client’s orders and to ensure they went to the client. What role in that processing did Kuria play? No evidence was adduced in that regard. As stated before, I found it difficult to appreciate the system of operations of Delmonte in as far as the warehouse is concerned. That in itself leaves doubt in the guilt of Kuria and that doubt must and will be given to the benefit of Kuria.

15. Further, there is the concern of this Court of the very negligent manner of keeping the trial court’s proceedings. Throughout the

prosecution's case, the typist has indicated "torn" where the proceedings are missing. It was difficult to determine why there was such failure to ensure the proceedings were well maintained. To cap it all the vital prosecution's exhibits are also missing.

16. Additionally, the learned magistrate who delivered the judgment of the trial court took over the trial after the close of the prosecution's case and only heard defence of Kuria. Although Kuria's advocate, prior to the defence hearing, did state that the case can proceed from where it stopped the record in the proceedings does not show that the learned trial magistrate informed Kuria of his rights under **Section 200(3)** of the Criminal Procedure Code. This failure was fatal because the provisions of **Section 200(3)** are mandatory and failure to comply with those provisions vitiates the trial. **Section 200(3)** of the Criminal Procedure Code provides:-

"(3) Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be re-summoned and reheard and the succeeding magistrate shall inform the accused person of that right."

17. The Court of Appeal had this to say of that **Section 200(3)** in the case cited by the High Court in ***CECILIA MUTHONI MUIRURI VS. REPUBLIC (2017) eKLR*** as follows:-

"Let me add that the Court of Appeal has severally delivered itself on this piece of law as in the case of HENRY KAILUTHA NKAIRICHIA & ANOTHER V. REPUBLIC[2015] eKLR- Cr. App. No. 21 of 2013, CA sitting at Meru, viz

'All of these decisions declare that the provisions of Section 200 (3) [of the Criminal Procedure Code] are mandatory and a succeeding Judge or Magistrate must inform the accused person directly and personally of his right to recall witnesses. It is a right exercisable by the accused person himself and not through an advocate and a Judge or magistrate complies with it out of statutory duty requiring no application on the part of an accused person. Further, failure to comply by the court always renders the trial a nullity.' (emphasis added)

18. In view of the above discussion I find this appeal is merited and I find the prosecution failed to meet the criminal standard of proof. The circumstantial evidence of the prosecution did not suffice because there were co-existing circumstances that weakened and destroyed the prosecution's case. On my consideration of the trial court's evidence I am tempted indeed to agree with what Kuria stated in his submission that in having him prosecuted Delmonte were looking for a "scape goat".

19. In the end, the appellant's appeal against conviction succeeds and accordingly, this court allows the appeal by **James Kuria Kimani**. His conviction is hereby quashed and his sentence is hereby set aside. I order **James Kuria Kimani** to be set free unless otherwise lawfully held.

RULING DATED AND DELIVERED AT KIAMBU THIS 14TH DAY OF OCTOBER, 2021.

MARY KASANGO

JUDGE

Coram:

Court Assistant : Ndege

For the Appellant: appellant in person

For the Respondent : Mr. Kasyoka

COURT

Judgment delivered virtually.

MARY KASANGO

JUDGE