REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CRIMINAL APPEAL NO. 46 (E055) OF 2021

(Appeal arising out of conviction and sentence of Hon. C.M. Kesse (Principal Magistrate) in Kitale Chief Magistrate's Court Criminal Case No. 2722 of 2016 delivered on 27th February 2020)

CHARLES KISAKA SHITAKWA.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant, **Charles Kisaka Shitakwa** and **Peter Koinange Mayenda** were jointly charged with the offence of **breaking into a building and committing a felony** contrary to **Section 306 (a)** of the **Penal Code**. The particulars of the offence were that on the 15th day of June 2016 at NATIONAL MUSEUM KITALE within Trans Nzoia County, they jointly with others not before court broke and entered a building namely Gallery and committed therein a felony namely stealing of a gramophone and a colonial military sword all valued at Kshs. 1,300,000.00 the property of NATIONAL MUSEUM KITALE. The Appellant was charged further with an alternative count of **failing to prevent the commuting of a felony** contrary to **Section 392** of the **Penal Code** as read with **Section 36** of the **Penal**

Code. The particulars of the offence were that on the 15th day of June 2016 at NATIONAL MUSEUM KITALE within Trans Nzoia County being a watchman of a museum by knowing that the person designed to commit a felony failed to prevent the committing of a felony namely stealing of a colonial military sword and a gramophone all valued at Kshs. 1,300,000.00 the property of NATIONAL MUSEUM KITALE. When the Appellant was arraigned in court, he pleaded not guilty. After full trial, the Appellant was acquitted on the main charge under **Section 215** of the **Criminal Procedure Code** but convicted on the alternative charge. He was fined Kshs. 30,000.00 or in default two (2) years imprisonment.

The Appellant is dissatisfied with the conviction and sentence of the trial magistrate and has filed a Petition of Appeal. The grounds in support of the Appeal are that the trial court erred in holding that the gallery keys were handed over to the Appellant yet the Prosecution failed to produce the handover document. He faulted the trial court for holding that he had access to the gallery. He impugned the decision of the trial court maintaining that the theft was an inside job he was not a party to. He maintained that there was no evidence sufficient to prove that he had been allocated guarding the gallery duties. He posited that there were no inventory or records taken to confirm the actual existence of the stolen items. He stated that the Prosecution did not meet the standard requirement in proving the offence. He finally stated that his mitigation was not considered during sentencing.

During its hearing, parties by consent canvassed the Appeal by way of written submissions. On his part, the Appellant submitted that he was not an employed as a guard. He submitted that he was not issued with the keys to the gallery. He alluded that he was not assigned any duties of guarding the gallery. In the absence of an inventory, it was impossible for the Prosecution to ascertain the stolen items. He stated that no nexus was created between himself and the book produced as maintained by the Appellant. He suggested that the scene was tampered with thereby debauching the evidence of the Prosecution. He raised issued with the fact that two persons initially arrested but later on were to testify as Prosecution witnesses did not testify. Identifying that the theft was an inside job, the Appellant proposed that he be acquitted. He submitted further that the conviction was based on conjectures. For the reasons laid above, he urged this court to find that the Prosecution failed to discharge the burden of proof. Finally, he howled that the trial court failed to consider his mitigation stating that he was a first offender and had worked for the complaint for a long period of time. Consequently, the sentence was grossly excessive.

On the part of the State, Learned Prosecutor Mr. Omooria maintained that the Appellant was guilty of failing to prevent a felony. He submitted that the Appellant had the gallery keys. It was the Appellant's duty to remain vigil to protect the property of his employer. He proposed that the circumstantial evidence pitted out against the Appellant was sufficient to convict him. He stated that the Appellant clearly admitted that he was in possession of the gallery keys. He further admitted that he was on guard duty on the material night. He added that the Appellant, notwithstanding his prohibited access status, aided in commission of the offence since he had the keys. He was further on duty that night. He put forward that **Criminal Case No. 1851 of 2009** had no nexus with the present facts and circumstances. Pointing out that the trial court visited the scene on 28th March 2019, he dismissed the allegation that the absence of inventory or records damaged the Prosecution's case. He urged this court to ignore minor contradictions and gaps (if any) since they did not point to deliberate untruthfulness. He urged this court to treat the allegation that some witnesses were not called to testify and the absence of no inventory or records in the

court record as afterthoughts. He beseeched this court to uphold the conviction and sentence of the trial court imposed on the Appellant.

This court has considered the rival submissions presented by the parties herein. The court has also taken the liberty to look at the trial court's proceedings. This court shall now pronounce itself as follows.

This being a first appeal, it's the duty of this court to re-consider and to reevaluate the evidence adduced before the trial magistrate's so as to reach its own independent determination, whether or not to uphold the conviction of the Appellant. In doing so, this court is required to be mindful that it neither saw nor heard the witnesses as they testified and therefore cannot make any comment regarding the demeanour of the witnesses **(See Njoroge -vs Republic [1986] KLR 19).**

The facts as established by the Prosecution and giving rise to the charges are recorded as follows:

PW1 SHADRACK JUMA, an employee of the Complainant testified that the Appellant was his fellow colleague at the material time. They were employed as guards. He testified that on 14th June 2016, the Appellant took over the shift duty from him; including the handover of the station keys and the gallery section keys. It was his evidence that the 2nd accused person appeared in the premises on that day yet he was off duty. On questioning him on the same, the 2nd accused person retorted "Today I am going to dance using an instrument stolen in the gallery." When PW1 reported on duty the following day, he stated that the Appellant failed to hand over in person. Instead, he was directed, on call, to collect the keys from a certain location. He thereafter proceeded to conduct a round inspection. He discovered that in an unorthodox turn of events, the window to the gallery was open. The door was intact. He then informed the clearer MR. BENJAMIN WAFULA who opened the gallery. They found that two (2) show case glasses were broken. Further observation revealed that a gramophone and a military sword were missing. He immediately informed his immediate supervisors Mr. CHOLE KIZILI and Mr. SHIKALI. During the course of investigations, a number of people were interrogated including himself and the accused persons. The incident was later on reported at the Police Station. It was further his evidence that guards were not allowed to access the gallery. However, the curator was granted access.

CHOLE KIZILI, PW2, the curator of the Complainant testified on site. He received a called on 15th June 2016 from the administrator informing him that a theft occurred in the gallery. He proceeded to the gallery where he found other colleagues including BENJAMIIN WAFULA. It was his evidence that the said BENJAMIN WAFULA locked the gallery in the presence of the security guards on the previous evening. He found that a gramophone and a military sword were missing. Their estimated values were Kshs. 1 million and Kshs. 1.3 million respectively. The window was open. The showcase glasses were broken. He testified that experts spent the better part of the day collecting evidence including fingerprint checks. He was however informed on 16th June 2016, no fingerprints were collected. That on the same day, that is the 15th day of June 2016, four (4) staff members, including the accused persons, left the premises with Police Officers. It was his evidence that the Appellant was further in charge of all the keys to the gallery that night albeit no document was presented in evidence confirming this. He stated that he had the spare keys at all times to the keys handed over to the Appellant. He added that the 2nd accused person was not on duty on the fateful day but was spotted within Complainant's premises. He added that based on the size of the gramophone vis-a-vis the window dimensions, the only way the gramophone was removed from the premises was through the door. Relying on the Complainant's Occurrence Book (O.B.) marked PEx.1, PW2 testified that on 14th June 2016, the Appellant reported at 6:00 p.m. for duty after taking over from PW1. The day's report was that the gallery was intact. The O.B. further indicated that the Appellant handed over the keys to PW1 with no incidences to report. However, the handover was not done in person hence un-procedural.

Relying on the staff register PEx.2, PW2 testified that from the records, the Appellant checked out at 7:30 a.m. on 16th June 2016 but that was not an accurate state of facts as PW1 checked in without a handover. He confirmed that guards had no business entering the gallery as the scope of duties was limited purely to securing the premises. He added that PEx.3 (anchor security firm O.B.) was at the preserve of Anchor Group, a security firm company outsourced by the Complainant to beef up security within the Complainant's premises. Two of its guards reported on duty on 15th June

2016 with no incidences recorded. However, no night shift records were in place leaving suspicion on the whereabouts of the night shift guards. It was his belief that the accused persons were involved in the theft of the missing artefacts. He stated that the stolen items have never been recovered. He confirmed that two (2) doors lead to the gallery. He did state that the entire inventory is done at the headquarters while the other inventory, including stock taking, is done at the gallery.

Next, **PW3 BEN WANJALA WAFULA**, curator assistant, was called to the dock. He testified that he reported to work on 15th June 2016 at 7:30 a.m. where he met PW1 to sign the key controls book (excerpt produced and marked PEx.4) which is in the custody of the security guards on duty. The Appellant was the custodian of the book on the material night. He however did not sign on 14th June 2016 on the keys handover. He further disclosed that on the same night, the guards at Anchor Security were ordered by the Appellant to guard other areas. Right before PW3 signed, PW1 informed him that he had not seen the keys. He further disclosed that the window was open. There was no one at the gallery. He then proceeded to open the museum with a bunch of keys. He found particles of cement and a smashed showcase glass. The gramophone was missing. On further inspection, he found that the military sword was missing; its showcase glass broken. Upon notification, PW2 and the administrator came to the scene after they were called. He stated that (4) four persons, including the Appellant, were arrested thereafter. He added that when keys were handed over to the Appellant the previous date, everything was intact. It was his suspicion that the items were stolen at night when the Appellant had possession of the keys. He stated that the items could not have been removed the window.

Thereafter, **PW4, PC CHRISPINUS ALWANYI** conducted his investigations into the incident. Initial investigations inculpated the Appellant and the 2nd accused person. He visited the scene on 15th June 2016 in the company of his colleagues. His findings were that three guards, the Appellant included, were guards on duty on the night of 14th June 2016. Out of those guards, some were outsourced from a company. He discovered that the Appellant was the head of security. He stated the curator PW2, securely locked the premises before handing over the keys to the Appellant on the said date of 14th June 2016. He testified that unknown persons had spoken with the accused persons concerning a pick-up of their can inside the compound. His opinion was that this was an organized crime because the door was intact but the window was broken. Furthermore, the windows were fitted with locks that could not be opened from outside. His opinion was that the culprit gained entry through the main door and broke the window from inside in an attempt to stage manage the offence. The shattered glass was

found on the ground at the gallery. The Appellant was left with the keys. He was further informed that the Appellant ordered other guards to patrol elsewhere in the course of guard duty. He had initially arrested four (4) persons. However, two (2) of the four (4) were culpable. He charged them with the present offence.

When placed on his defence, the Appellant gave sworn testimony. He stated that while in the employ of the Complainant as a security officer, he was on night duty on 14th June 2016 from 6:00 p.m. He stated that PW1 handed over to him. It was his observation that the window at the gallery was open. It ought to have been closed. He guarded the Complainant's premises in the company of three (3) others. He confirmed that the gallery key was handed over to him. He blamed the gallery attendant for the theft. From his view, no incident took place while on duty. He handed over to PW1 the next morning at 7:05 a.m. His opinion was that the theft was an inside job. He could not tell the inventory since they are not allowed to enter the gallery. He produced proceedings in Criminal case NO. 1851 of 2009 DEx.1. Relying on those proceedings, he stated that the court therein acquitted the accused persons for the reason that the theft was an inside job. This case was one on theft at the Complainant's premises. He thus asked the trial court to absolve him from all blame and determine the case as that of Criminal Case NO. 1851 of 2009.

In the present appeal, the issue for determination by this court is whether the Prosecution established to the required standards of proof that the Appellants committed the offence that they were charged with. Put differently, did the Prosecution prove its case beyond reasonable doubt to sustain the conviction and sentence meted out against the Appellant?

What is not in dispute is that the Appellant was working for the Complainant as a security guard. It cannot further be gainsaid that the Appellant was on duty on 14th June 2016 from 6:00 a.m. as the night guard on duty. He participated in the handover and takeover process from PW1. He was to hand over the next morning of 15th June 2016. Furthermore, it is confirmed that the guard keys were in possession of the Appellant that night. The trial court was of the opinion that the Appellant facilitated the breaking in thereby committing the offence of failing to prevent the committing of a felony contrary to **Section 392** of the **Penal Code**. The same is provided as follows:

> **"Every person who, knowing that a person designs to commit or is committing a felony, fails to use all reasonable means to prevent the commission or completion thereof is guilty of a misdemeanour."**

In **Joseph Muriithi Nyaga & 2 others V Republic [2013]eKLR,** the Court set out the conditional threshold as follows:

> **"In order to sustain a conviction, the prosecution must prove "knowledge" of the design to commit or commission of the felony. Thus, the test is not akin to one in negligence cases; it is not enough to show that the accused, 'ought to have known'. But that the person actually knew of the design to commit a felony and failed to prevent it. The fact of knowledge is a question of fact."**

The evidence of the Prosecution must be looked at holistically and not in isolation to conclusively answer this question. As alluded to above herein, the Appellant was present at the Complainant's premises on the night of 14th June 2016. It was on the morning of 15th June 2016 that the inventory was discovered to have been missing and the showcase glasses shattered. The Prosecution witnesses in consonance alluded to the fact that the theft occurred when persons gained entry into the premises through the door. The window break was a red herring to hoodwink investigators into believing that the culprits escaped through it. PW2 further testified that from the dimensional size of the gramophone, it could not have been passed through the window. The only rational conclusion was that it passed through the door. PW4 in corroboration, testified that he observed that the window could not be opened from outside. The delinquent must have gained access though the main door to steal the vestiges.

It was regurgitated that it was the duty of the guards to ensure that the safety of the gallery is intact. Further, any observation deviating from the norm would be notified to their supervisors. The Appellant raised no conclusive rebuttal or countermand on these duties. He instead relies on an earlier decision that absolved guards on duty for the reason that they were sacrificial lambs. This defence must be rejected for the simple reason that every case must be looked at on its own within its circumstances.

This court finds the evidence of the Prosecution overwhelmingly watertight. The evidence of the shattered glass was found by PW1 and PW3 on the morning of 15th June 2016. It is apparent that the suspect gained access other than from the window. Indeed a theft occurred. It further appears that the same occurred when the Appellant was on duty as a night guard. It was PW1, the guard who took over, that noticed a strange set of facts and immediately reported to his supervisor. The Appellant claimed that he saw an open window. It remains a mystery as to why he did not report on this yet this was ostensibly unorthodox. In fact, it is because of this open window that PW1 felt it necessary to make a report. Hereafter, the discovery of the missing inventory was made. The Appellant further failed to personally hand over the keys to PW1. He did not speak of this. He further did not deny that he did not follow protocol when handing over keys to the next on duty.

The Appellant in his submissions raised the notion that there were glaring contradictions on the Prosecution's case that would adversely affect the outcome of the trial. This court finds the contradictions minor. The elements to prove the charge were met; the minor contradictions did not go to the root of the Prosecution's case. This court finds that indeed the Prosecution established to the required standard of proof beyond reasonable doubt. The Appellant's appeal against the conviction lacks merit. It resultantly fails and is hereby dismissed.

This court now shall consider the sentence imposed. The trial court considered his mitigation and sentenced the Appellant to a fine of **Kshs. 30,000.00** and in default **two (2) years imprisonment**. **Section 36** of the **Penal Code** provides:

> **"When in this Code no punishment is specially provided for any misdemeanour, it shall be punishable with imprisonment for a term not exceeding two years or with a fine, or with both."**

This court finds that the sentence meted out against the Appellant was not illegal. Since the court finds no reasons to interfere with the conviction, it shall not interfere with the sentence imposed. The sentence shall run from the date of judgment of the trial court. Consequently, the Appellant shall continue to serve the remainder of his sentence unless otherwise ordered.

It is so ordered.

DATED AT KITALE THIS 14TH DAY OF DECEMBER 2021.

L. KIMARU

JUDGE