



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CRIMINAL APPEAL NO 86 OF 2019

EDWARD KAIRITHIA MIKWA APPELLANT

VERSUS

REPUBLIC RESPONDENT

(An appeal from conviction and sentence by C.Obulutsa (CM) in Eld CMCrC No 4848 of 2017 delivered on 17/05/2019)

JUDGMENT

1. **EDWARD KAIRITHIA MIKWA** (the appellant) was convicted on a charge of stealing by servant contrary to section 281 of the Penal Code, whose particulars stated that on diverse dates between 6th and 9th December 2017, along **Mombasa-Eldoret highway**, being a driver of motor-vehicle **KBR 231 K**, owned by **MODERN COAST BUILDERS AND CONTRACTORS**, jointly with others not before the court stole 303 bags of wheat worth Kshs 1,212,000/- which came into his possession by virtue of his employment. He denied the charge, and after a trial in which prosecution called ten witnesses, and the appellant was the sole defence witness, he was convicted and sentenced to serve 3 years imprisonment
2. **JUMA NYUNDO BAYA (PW3)** the operations manager at **MODERN COAST** told the trial court that on 2/12/2017, he prepared a list of trucks which were to load at Mackenzie warehouse, and among them was vehicle registration **No KBR 331K 2e7183**, which was driven by the appellant. The vehicle was loaded on 5/12/2017 with a consignment of 328 bags of wheat, and the appellant signed the consignment note and the indemnity note.
3. The appellant was paid his allowance and commenced his journey – the destination being **UGANDA**. On 9/12/2017 he received a call from the branch manager one **MR NZAU**, that the truck had caught fire. He instructed **NZAU** to go to the scene, and later learnt from him that only police officers and firemen were at the scene, and the driver was safe, but part of the cargo was missing. **PW3** visited the scene with the aim of finding eye witnesses to the event, but got none
4. On 8/12/2017, **STANLEY MUTAI (PW4)**, a mechanic at **MODERN COAST** was assigned to repair a lorry at **MODERN COAST in ELDORET**, so he got a lift from the appellant up to **BURNT FOREST** as the appellant had told him he was not going beyond that point. At 2.00am, he got a call from the appellant that the motor vehicle was on fire. **PW4** called **JULIUS**, the company's branch manager, and they proceeded together to the scene. They found the appellant at the scene, and noted that only the vehicle's cabin was burnt.
5. **JULIUS KYALO (PW1)** the company's branch manager told the trial court that on 9/12/2017, he received a call from the car tracking personnel to the effect that driver named **BASILI** (whom he identified as the appellant) had called to report that a **MODERN COAST** vehicle was on fire at **TURBO**. Shortly, the company's mechanic called to give similar information. **PW1** tried to call the driver, but did not reach him. He proceeded to the scene and found that the fire had already been put out. He found police officers who have a camp near the scene, and who informed him that they were attracted to the scene by screams. **PW1** noted that that the tarpaulin on the side of the door had been opened, and the appellant was sleeping on the ground. The appellant claimed that the cargo had been stolen at the scene, so he was arrested.
6. **SALIM ALI SALIM (PW2)**, a tracking officer at **MODERN COAST** told the trial court that the vehicle which was loaded with 328 bags of maize left Mombasa for Uganda on 7/12/2017. It was his evidence that the driver was not authorized to make stops along the road nor travel at night. From his tracking records, when the appellant got to **Sachangwan**, he drove 55metres off the road, then stopped, before proceeding with his journey, and making other stops at **Mau Summit, Cheptiret** and at 1.00 am he stopped at **Leseru**. He got to Turbo at 2.00 pm, and it was then that the vehicle got burnt.
7. **CPL SONGOK (PW9)** of Turbo police station who was assigned duties over the matter, told the trial court that he found the appellant at the scene, and the vehicle's cabin was burning- he also saw about 10 bags of wheat. The appellant said he was transporting 300 bags of wheat when there was a frontal tyre burst which led to the fire. **PW9** and other officers sent for the fire brigade. When he checked inside the

vehicle, he did not see any bags of wheat, and became suspicious, so he detained the appellant and handed him over to CID. On cross examination this witness stated as follows:

“The cabin was on fire. We found a few people around. They wanted to loot. There were some sacks on the ground. The lorry was empty”

8. **PC DAVID ONYANGO (PW6)** of scenes of crime Eldoret visited the scene and took photos of the burnt vehicle, He pointed out that the trailer had 22 bags of wheat

Eventually, the vehicle was assessed by **JOHNSON MAINA (PW5)**, a motor vehicle assessor.

9. PC Mukambi (PW10) who took over the investigations, testified that the appellant could not explain where the bags of wheat had gone to as only 20 bags were recovered, nor could he explain the numerous stops he had made along the way except to say that he had slept at **SACHANGWAN and CHEPTIRET** as he was not allowed to travel at night.

10. Upon being placed on his defence, the appellant confirmed that he was employed as a driver with the said company and had left **MOMBASA** with 328 bags of wheat, and made a stop at **MLOLONGO**, and another brief stop at **BURNT FOREST**. On his way at **KISOCHAI** he hit some unmarked bumps on the road which sparked off the fire in the cabin just as he got to **JUA KALI** area at 2.00am. He denied suggestions that he was off-loading the wheat along the way, saying the members of the public who joined him at the scene to help fight the fire, begun looting his cargo. However, he acknowledged that it was not possible for looters to take off with the many bags of wheat within 10 minutes. On cross examination, he stated that the police arrived an hour after the vehicle had started burning. He also denied claims that the company had a policy banning night travel.

11. In his judgment, the trial magistrate pointed out that according to the appellant, on reaching **KOSICHEI** area, the lorry hit an unmarked bump, causing the electrical system to short-circuit, and cause fire to the cabin. He stopped and members of the public gathered, and after trying to put out the fire, engaged in looting the cargo. However, the prosecution case was that at the time of the fire, only 30 bags of wheat were found, and their suspicion was that the appellant off-loaded or caused to be offloaded the rest of the cargo in unclear circumstances, and he was using the fire as a diversionary tactic.

12. The trial court referred to the tracking record printout which showed the truck's journey which showed that the appellant made several stops and diverted off the main highway on 7/12/2017 near **MTITO ANDEI**, driving off for about 1km at an un-named road, this conduct was repeated at **SIMBA AREA, MLOLONGO, KAMANDURA, SOUTHERN BY-PASS, AND OLD NAIROBI ROAD AT NAKURU**. The court observed that this was repeated the next day in **Nairobi**, with multiple switching off of the engine, and the same happened along the **NAKURU-ELDORET** highway. Further, that at **JUA KALI ROAD IN TURBO**, the engine was switched off from 8th to 9th December 2017, and there was also an indication of tampering with the SLM switch. On 8/12/2017, the engine was switched off at near **TURBO** at 23:01Hrs, and not switched on again until 1:29 Hrs on 9th December 2017. The engine was then switched off at 2:06 Hrs without the vehicle moving, and from that point there was evidence of activity of the door being opened and closed, and tampering of the auxiliary and SLM switch with the last reading being at 2:10 Hrs

13. Whilst acknowledging that the evidence was circumstantial, the trial court noted that the version the appellant had given police was that the fire was a result of a frontal tyre burst. That from the evidence of police who arrived at the scene, there was no cargo inside the vehicle, but members of the public wanted to loot the few bags which were on the ground but there was no on-going looting. That whereas the appellant claimed police had to fire their guns to disperse the looters, there were no such claims by the officer who visited the scene. The trial court found that this claim about looting was deflated by the appellants own admission in his defence that the cargo could not have been looted within 10 minutes, nor could the appellant explain the repeated opening and shutting of the door of a vehicle which was stationary

14. The trial court poked holes at the appellant's defence, observing that the photographs of the scene discounted his claims about the existence of an unmarked bump on the road, and even his claims that he had reported a fault on the vehicle were dented by the very job-card he presented which confirmed that the vehicle was checked by one **JOSEPH MAINA** and no remarks were made. The trial court also noted the curious scenario that the vehicle's cabin was burnt more to the bottom side, and the trailer was intact, but recognized that there was no evidence presented as to what caused the fire.

15. In convicting the appellant of the charge, the trial court thus found that:

“The inculpatory facts are the numerous stops along the way, and the lorry being found empty at Turbo. The explanation by the accused is inconsistent with his innocence, and there are no co-existing circumstances to weaken the inference of guilt”.

16. Being aggrieved by the outcome of the trial, the appellant filed this appeal on grounds that:

- a) Prosecution had not proved its case beyond reasonable doubt, and the trial court erred in convicting him on circumstantial evidence, yet all the evidence was based on mere suspicion, which no matter how strong. Cannot form a basis for conviction
- b) The trial court shifted the burden of proof onto the defence
- c) The trial court was biased and disregarded the evidence the defence offered

17. At the hearing of the appeal, **Mr Kagunza on behalf of the appellant referred this court to the case of SAWE v R KLR [2003] 356**

which set out the three elements to be taken into account when confronted with circumstantial evidence, and argued that the evidence could not sustain the charge as the appellant had given reasonable explanations for the stops he made on the way. That in any event, having driven all the way from Mombasa, heading for Kampala, it was permissible and reasonable to make stops on the way for health breaks or to take a rest- yet these were never considered by the trial magistrate who it is submitted shifted the burden of proof onto the defence

18. That the court formed the presumption that the appellant converted the wheat to his own use, without any evidence, as he was not found with the wheat or otherwise. It is contended that there were numerous contradictions on the evidence offered by prosecution, which ought to have been resolved in favour of the appellant, and lead to his acquittal.

19. Counsel also faulted the trial court for failing to give the appellant the option of a fine instead of a custodial sentence, which is described as manifestly excessive.

20. In opposing the appeal, **Miss Okok** on behalf of the DPP submits that the prosecution discharged the burden of proof beyond reasonable doubt and there was evidence showing that the appellant made many stops on the way, and even diverted off the highway at **Sachangwan**, and at **Turbo** the larger quantity of the cargo was missing. While acknowledging that no one saw the appellant stealing the bags of wheat, the circumstances inculpably pointed to his complicity and no one else. That the defence was not strong enough to rebut the prosecution case

21. As for the sentence, the State urged this court not to interfere with it taking into consideration the value of the property lost, as in any case, the offence carries a maximum sentence of 7 years, and the appellant only got a 3-year imprisonment

22. There was no dispute that the appellant left Mombasa with over 300 bags of wheat destined for Kampala, Uganda. It was also not disputed that the vehicle's cabin caught fire, and when police got to the scene the greater part of the cargo was missing. If as the appellant confirmed, there was no way in which the looters could've carried off the cargo within such a short time before the police arrived, then the question is what happened to the cargo in such a short while if part of it had been off-loaded along the way? Was the luggage carted away by looters?

23. Although the appellant claimed that police arrived to find the looters carting away the goods, and had to shoot in the air to disperse them, this finds no corroboration whatsoever from the police officers who visited the scene. What they found was an attempt to loot what had been off-loaded the vehicle. If the cargo was in the truck covered by a tarpauline, then what explanation did the appellant offer for having all the cargo on the ground?

24. Whereas it would be unreasonable not to expect the appellant to make some stops along the way as he made his journey, the appellant apparently got off the highway several times, and offered no explanation for that deviation? Indeed, no one saw what happened to the bags of wheat, and the prosecution's case was pegged on the prevailing circumstances. In **R v Kipkering arap Koske & another 16 EACA 135 (1949)** the court held-

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

This was reiterated by the trial court to the effect that the conviction of the appellant was based on circumstantial evidence. The test to be met in a case whose reliance is based on circumstantial evidence was laid out in the case **Sawe vs Republic [2003] KLR 364**, where the Court of Appeal stated thus:

“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. There must be no other co-existing circumstances weakening the chain of circumstances relied upon. The burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence remain with the prosecution. It is a burden which never shift to the party accused.”

25. In the present instance, the chain of events is so strong and defy any other reasonable hypothesis, and the trial court did not err in law or fact, in arriving at the conclusion it did. As for the sentence, under section 281 of the Penal Code stealing in instances where the offender is a clerk or servant, and the thing stolen is the property of his employer, or came into the possession of the offender on account of his employer, he is liable to imprisonment for seven years. Taking into account the value of the property involved, and the trust accorded to the appellant, I find that the sentence was neither harsh nor excessive, and I decline to interfere with it. The upshot is that the conviction was safe and is upheld. The sentence was legal and I confirm it. The appeal is hereby dismissed.

E-Delivered and dated this 15th day of May 2020

H.A. Omondi

JUDGE