



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT HOMABAY**

**CRIMINAL APPEAL NO.36 OF 2019**

**FELIX OTIENO WANYANCHA.....APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

**(Appeal from the Judgment, conviction and sentence of Hon. T. Obutu (SPM) dated and delivered on the 23<sup>rd</sup> October 2019, in the original Homa bay SPMCR No.30 of 2019)**

**JUDGMENT**

**[1]** The appellant; **Felix Otieno Wanyancha**, appeared before the Senior Principal Magistrate at Homa Bay charged with two counts, Viz:-

**i.** Stealing, contrary to Section 268 (1) as read with Section 281 of the Penal Code, in that on diverse dates between 29<sup>th</sup> October 2018 and 5<sup>th</sup> December 2018, at Migori Law Court in Migori County, jointly with others not before court, being an employee of the Judiciary, stole security documents namely title deed No. West Kasipul/Kotieno/Kokech/1262 from Migori Law Court which came into his possession by virtue of his employment.

**Alternatively**, the appellant handled stolen goods, contrary to **Section 322 (1) (2)** of the **Penal Code**, in that on diverse dates between 29<sup>th</sup> October 2018 and 5<sup>th</sup> December 2018 at Migori Law Court in Migori County otherwise than in the course of stealing, dishonestly undertook the disposal of security documents namely title deed No. West Kasipul/Kotieno/Kokech/1262 from Migori Law Court knowing or having reason to believe it to be stolen property.

**ii.** Disposing property under lawful seizure, contrary to Section 125 of the Penal code, in that on diverse dates between 29<sup>th</sup> October 2018 and 5<sup>th</sup> December 2018 at Migori Law Court in Migori County, knowingly disposed security documents namely title deed No. West Kasipul/Kotieno/Kokech/1262 which had been deposited under the authority of Migori Law Court with intent to defeat justice, illegally and unlawfully disposed the document to the surety

**[2]** After pleading not guilty to all the counts, the appellant was tried, convicted and sentenced to a fine of Kshs.40,000/= in default one (1) year imprisonment on the main first count and to a fine of Kshs.20,000/= in default six (6) months imprisonment on the second count.

The default sentences were to run concurrently.

However, being dissatisfied with the conviction and sentence, the appellant preferred the present appeal on the basis of the grounds set out in the petition of appeal dated 5<sup>th</sup> November 2019, and filed herein on the same date, through **Omonde Kisera & Co. Advocates**.

**[3]** The appellant essentially complains that he was convicted on the basis of evidence which was insufficient and lacking in credibility. That, the trial court was biased by its failure to impartially analyze the evidence in its totality and by disregarding the appellant's defence.

At the hearing of the appeal, learned counsel, **MR. O.M. Otieno**, represented the appellant and argued the appellant's case by way of written submissions which were filed herein on 8<sup>th</sup> July 2020.

The Learned Senior Assistant Deputy Public Prosecutor (S/ADPP), **MR.**

**A.O. Oluoch**, represented the State/respondent and opposed the appeal on the basis of the grounds contained in his written submissions filed herein on 13<sup>th</sup> July 2020.

**[4]** The appeal and its supporting grounds have been given consideration by this court in the light of the rival submissions and as is the cardinal norm, the court was required to revisit the evidence adduced at the trial and arrive at its own conclusions bearing in mind that the

trial court had the benefit of seeing and hearing the witnesses (see, **Okeno –vs- Republic (1972) EA 32**)

In that regard, the prosecution case was briefly that the appellant was at the material time employed as a clerical officer at Migori Law Courts and assigned the role of a court clerk.

His immediate superior officer was the Court’s Executive Officer who was **Joseph Mwita Rioba (PW1)**.

[5] The duties of the Executive Officer involved general court administration which encompassed being the custodian of documents received by the Court. Such documents included security documents like title deeds which would normally be received by him/her (Executive Officer) from court clerks for safe custody.

On or about the 26<sup>th</sup> November 2018, Rioba (**PW1**) commenced his leave which was to end on 5<sup>th</sup> February 2019. Prior to that or within that period, he received from the appellant a title deed No. Kasipul/

Kotieno/Kokech/1262 to keep in safe custody.

The receipt of the title deed was actually on the 15<sup>th</sup> December 2018, when his role had already been assigned to his colleague called Edwin Mongare. Apparently, he would occasionally return to his office while on leave and Mongare being in charge.

[6] Upon receipt of the title deed, he (**PW1**) entered it in the appropriate security document register (**P. exhibit 1**) and kept it inside a cabinet in the office. He kept the keys to the cabinet while the keys to the office were left with his deputy Edwin Mongare. However, on 3<sup>rd</sup> January 2019, upon being summoned by his head of station over the whereabouts of the title deed, he found it missing from the cabinet. He could not tell how the title deed left his custody without his knowledge but was required to record a statement with the police.

[7] The title deed belonged to **Micheal Hosea Arende (PW2)** who had deposited it in court as security for the release of one Kennedy Onyango Kawuoneli, who had been arrested and arraigned in court for stealing. He (**PW2**) acted as the suspect’s surety for purposes of his release on bond. However, on the 10<sup>th</sup> January 2019, he was arrested by police officers from Migori in connection with the material title deed. He learnt in the process that the title deed had been stolen from the court and the person whom he had stood surety for had absconded. He was therefore required to record a police statement in which he indicated that the title deed had been taken to him at Oyugis by the suspect who was at the time allegedly in the company of the appellant.

[8] **Blasio Opere (PW3)**, indicated that on a day he could not remember, he met the suspect Kennedy and Micheal (**PW2**) and heard the suspect say that he had returned the title deed. He then saw the appellant holding a brown envelop which was opened by Micheal who confirmed that it contained the material title deed.

**P.C Milton Mwanzia (PW4)**, who was then attached to the office of the Director of Criminal Investigations (DCI) investigated the case and later preferred the present charges against the appellant although he was unable to establish how he (appellant) obtained the title deed from the custody of the Court’s Executive Officer.

[9] The appellant’s defence was a denial and a contention that after approval of the bond, he handed over the material title deed to the Executive Officer (**PW1**) for safe custody in a separate office. That, such titles were normally kept under lock and key with the key being kept by the Executive Officer who admitted having received the title and made no report of its theft. That, he did not take the title to Oyugis as alleged by the surety (**PW2**) whom he only met once at the Migori Law Courts. That, he was sick in the month of December 2018 and took sick leave from 15<sup>th</sup> December 2018 after undergoing surgery at Aga Khan Hospital. It was at the time that he was called and told of missing files.

[10] The appellant implied that he was implicated by the surety (**PW2**) yet the title deed was recovered from him (surety) and not himself (appellant). He contended further that he did not dispose of the title deed and that the appropriate register did not show how it was released. That, this case was a frame up against him courtesy of his superior officers or bosses bent on “fixing” him.

[11] After due consideration of the evidence, the trial court concluded that the prosecution had proved its case beyond reasonable doubt with regard to both counts. The appellant was thus convicted and sentenced accordingly on both counts.

This court, having carefully reconsidered the evidence in its totality, finds that indeed the ingredients of the offence of stealing as stipulated in **Section 268 (1)** of the **Penal Code** and those of the offence of disposing of property under lawful seizure as stipulated in **Section 125** of the **Penal Code**, were duly established through the evidence led by the prosecution witnesses.

Indeed, no dispute arose that the material title deed was unlawfully removed from where it had been kept and unlawfully released to the person who had deposited it in court as security for release on bond of a theft suspect.

[12] The basic issue that presented itself for determination was whether the appellant was identified as the person responsible for the theft of the title deed and its unlawful disposal to its owner while it was in the lawful custody of the court at Migori.

The obligation to link the appellant with the twin offences lay with the prosecution on a standard of proof which is beyond reasonable doubt.

[13] In criminal cases, the burden of proof always remains on the prosecution and as a general rule the accused assumes no legal burden of establishing his innocence except in certain limited cases where the law places a burden on him to explain matters which are peculiarly within his personal knowledge (see, **Mkedeshwa –vs- Republic [2002] 1KLR 461, Chemagong –vs- Republic [1984] KLR 611** and

**Section 111 of the Evidence Act).**

[14] Herein and with regard to the first count, the evidence by the Executive Officer (**PW1**) clearly showed that the title deed was indeed unlawfully removed from his custody. It showed that he was the last person to handle the title deed before its theft was discovered. If anything, he was the prime suspect in its theft either on his own or in collusion with his deputy Edwin Mongare. The suspicion was buttressed by the fact that he received the title deed from the appellant while on leave (i.e. 15<sup>th</sup> December 2018) when he had already effectively handed over his duties to his deputy. He also said that he would occasionally return to his office while on leave and most significantly, he was the holder of the key to the cabinet in which the title deed was stored or kept.

[15] The appellant is not featured anywhere in the evidence as the person who actually removed the title deed from the cabinet which was incidentally not broken to access the title document. There was not even a scintilla of direct or circumstantial evidence in that regard. All that which existed was merely suspicion, suspicion and more suspicion on the basis that the appellant was the person who received the title when it was handed over to the court and on the unproven allegation that he was in the company of the theft suspect who benefitted from the title deed being deposited in court when he (suspect) allegedly handed over the missing title deed to its owner (PW2) at Oyugis.

[16] Such circumstances or transactions in Oyugis had the potential to implicate the owner of the title deed rather than the appellant with its theft while in the custody of the court acting on his own or in concert with others.

If the alleged company or interaction of the appellant with the theft suspect and/or the surety (PW2) were to be treated as circumstantial evidence against the appellant, then it was weak, insufficient and wanting in credibility to be relied upon as proving the appellant's alleged culpability in the theft of the title deed or even its unlawful disposal.

[17] In **Republic –vs- Kipkering Arap Koske & another (1949) 16EACA 135**, it was held that:-

**“In order to justify 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”.** (See also, **Sawe –vs- Republic (2003) KLR 364** and **Mwangi –vs- Republic (1983) KLR 522**).

The evidence by the Executive Officer (**PW1**), the surety (**PW2**) and Blasio (**PW3**) was essentially circumstantial with regard to the theft of the title deed. However, it fell short of linking the appellant with the theft. It could not establish beyond reasonable doubt that the appellant and nobody else, was the person who stole the title deed either acting alone or with other people.

[18] As for direct evidence against the appellant, none existed and any semblance of such evidence was with regard to the unlawful disposal of the title deed through the surety (**PW2**) and Blasio (**PW3**). However, that evidence was inconsistent and contradictory to be worth of any credibility. It also pointed at the two witnesses as being a compliances in the commission of both the first and second counts. It was quite intriguing that the title deed was found with its owner/surety (**PW2**) a few days after its disappearance from the courts custody yet he had all the knowledge that it had not been formally and lawful released to him. His partner in that unlawful transaction was obviously the theft suspect he had stood surety for.

[19] The attempt by the surety (**PW2**) to link or connect the appellant with the theft suspect, was incapable of succeeding due to the incredible evidence adduced by himself (**PW2**) and **PW3**, in support thereof.

In both counts, the prosecution's evidence against the appellant was generally weak, insufficient and incredible to establish that he (appellant) was the person responsible for the unlawful theft and disposal of the material title deed.

[20] If anything, the prosecution trained its guns on the wrong person and ended up firing blank shots as it failed to prove to the required standard that the appellant was involved in the criminal transaction pertaining to the material title deed which was clearly and impliedly attributable more or less to the Executive Officer (**PW1**) and the surety (**PW2**) with a little help from Blasio (**PW3**).

[21] It would therefore follow that the appellant's conviction on both counts by the trial court was neither sound nor safe and is hereby quashed with the sentences imposed upon the appellant being set aside. If the fine imposed was paid, it should forthwith be released to the appellant.

In sum, this appeal is allowed in its entirety.

**J.R. KARANJAH**

**JUDGE**

**16.07.2020**

[Dated, signed and delivered this 16<sup>th</sup> day of July, 2020]