REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HCCRA NO. 2 OF 2020

GEOFFREY MUASYA KIKEMU.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(Being an appeal from the Judgment of Hon. M.M Nafula (SRM) in Tawa Senior

Resident Magistrate's Court Criminal Case No.386 of 2015 delivered on 11th July, 2017).

JUDGMENT

1. **Geoffrey Muasya Kikemu** the Appellant and two others were charged with the offence of stealing contrary to section 275 of the Penal Code. The particulars were that the Appellant and others during the night of 2nd and 3rd August 2015 at Ngoluni market Waia location in Mbooni East district within Makueni county jointly stole eighty six (86) bags of maize valued at Kshs.232,200/= the property of one **Stancelaus Mutua.**

2. The Appellant denied the charge and the case proceeded to full hearing with the prosecution calling three (3) witnesses. The Appellant who was the 3rd accused gave a sworn defence. The court found him guilty and ordered him and his co-accused to pay the complainant Kshs.232,000/= within 7 days which was extended to 18 days. The money was not paid and the trial court sentenced the Appellant to three (3) years imprisonment.

3. Being aggrieved by the judgment, he filed this appeal after obtaining leave to do so. He raises the following grounds: -

a) **That,** the learned trial Magistrate erred in both law and facts in convicting the Appellant but failing to appreciate the fact that the Appellant was not fully informed of all his rights as enshrined in the constitution of Kenya 2010 contrary to Article 49(1)(a) and 50(1)(2)(a)(b)(c)(g)(i) and (3) of the constitution occasioning a serious dereliction of justice.

b) **That,** the learned trial Magistrate erred in both law and facts by convicting and sentencing the Appellant over contradictory uncorroborated and unreliable evidence in breach of the provisions of section 163(1) and (2) of the Evidence Act, hence occasioning serious miscarriage of justice.

c) **That,** the learned Magistrate erred in both law and facts by shifting the burden of proof to the Appellant contrary to the rules of natural justice hence contrary to section 169 of the Criminal Procedure Code.

4. A summary of the prosecution case is that Pw1 **Stancelaus Mutua** who sells cereals had on 23/07/2015 made arrangements with the Appellant to come and buy maize. He travelled from Nairobi on the said date. The Appellant introduced him to the 1st accused (*in the lower court case*). They bought forty-six (46) bags of maize which they stored at Kuwait petrol station belonging to the said 1st accused in Ngoluni. They bought 40 more bags of maize which was stored at the 1st accused's petrol station.

5. He returned to Nairobi where he slept for a day. Early Sunday morning which was the next day he came to Ngoluni. He found the 1st accused's vehicle parked outside the petrol station. He later met with the Appellant outside Sunset hotel, where he spent the night. The next morning, he called the Appellant who was not picking his calls. He however later met the 1st accused and they went together to the petrol station. He found his maize missing and they reported the matter to the police station. The missing maize was valued at Kshs.232,200/=.

6. Pw2 **No. 57710 P.C Julius Kariuki** is a police officer who was attached to Ngoluni police post. He received a report of theft of maize from Kuwait petrol station from Pw1 and 1st accused. He recorded statements and investigated the case. The maize was not recovered. The Appellant was the driver/ loader.

7. Pw3 **Dorcas Syombua** was a worker at Bypass bar and restaurant. She stated that on 29/7/2015 she was in the bar doing some washing when two customers came there to buy drinks. A cap fell off from the Appellant's head. A week later Pw1 and the Appellant came and took away the cap. She denied ever washing the said cap.

8. On application of the prosecution Pw3 was declared a hostile witness. After a brief cross examination, the prosecution did not achieve much and so stood down the witness. The court on its own motion sent Pw3 to prison for 8 days but she remained there from 7th February 2017 – 7th March 2017.

9. The matter was next heard a month later. Pw3 appeared to testify, and was said to be still on oath. This time she said she washed the cap dropped by the 2nd accused in the trial. She even produced a black stripped cap (EXB1). In cross examination she denied washing the cap. In re-examination she said EXB1 looked like the cap she had washed.

10. In his sworn defence, the Appellant said he was the driver of motor vehicle KCB 250J which belonged to the 1st accused. He further said he used to transport maize for Pw1 for sale. The maize would be stored at Kikumbu store which belongs to the 1st accused. On 2/8/2015 him and Pw1 went and took 40 bags of maize from farmers, 46 bags from 1st accused's store and they took a total of 86 bags to Ngoluni market, in the company of Pw1's two workers.

11. The maize was thereafter sieved, and he left the two workers of Pw1 with the maize and he went back to Mbumbuni. He met Pw1 at Kwa Maina's bar at 8:00 pm. From there they went to By-pass bar and they parted ways at 12:30 am. Nduku is the one who served them with drinks. Pw1 gave his cap (EXB1) to Pw3 to wash. He denied the charge against him.

12. In cross examination he said he used to sell maize with Pw1. He confirmed that Pw1 had left maize at the 1st accused's petrol station.

13. The appeal was canvassed by way of written submissions. The Appellant in his submissions has raised two issues namely:

> i. He has served a sentence meant for the 2nd accused (*Joseph Mwanzia Kikemu*) This was a fine of Kshs.10,000/= in default six months imprisonment.
>
> ii. The unlawful forfeiture of his cash bail of Kshs.50,000/= when he was lawfully in police custody. He wants it refunded by the State.

14. The Respondent through learned counsel Mrs. Gakumu opposed the appeal. It is her submission that there was no violation of Articles 49 and 50 of the constitution on fair hearing as the Appellant was released on bond. That he was also always ready to proceed with the case for hearing, which means he had the prosecution evidence with him.

15. She submits relying on the case of **Richard Munene –vs- Rep Criminal Appeal No. 74 of 2016 (Nyeri**) that not all inconsistencies are sufficient to unsettle a case of the prosecution. She adds that the three (3) prosecution witnesses satisfactorily proved the prosecution case, and the defence case was not capable of unsettling it. She did not see any reason for the unsettling of the conviction and sentence.

16. Lastly on the forfeited cash bail she submits that the order of forfeiture was proper as is borne by the record. She states that the Appellant's absence was never explained, to the court.

Analysis and determination

17. This is a first appeal and this court has a duty to re-analyse and re-consider the evidence and arrive at its own conclusion. The court must bear in mind that it did not see or hear the witnesses and give an allowance for that. In the case of **Kiilu & Anor –vs- Rep (2005) I KLR 174** the Court of Appeal had this to say about the duty of the first appellate court: -

> ***"1. An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the Appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions.***
>
> ***2. It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses."***

18. I have duly considered the evidence on record, the grounds of appeal and the submissions by both parties. The Appellant clearly appears to have abandoned his initial grounds of appeal. He makes no mention of any of them in his written submissions.

19. The record shows that the Appellant was granted bond and was indeed released upon approval of his surety. Thereafter he engaged the services of an advocate. The said advocate never raised an issue of not having been served with written statements or not being ready to proceed for hearing. He even had sufficient time to prepare for the defence. The Appellant's first appearance in court was 3rd September 2015 when plea was taken. The evidence of Pw1 was taken on 17th May 2016 which was more than sufficient time for preparation. There is therefore no evidence of violation of any of his rights.

20. The next issue to determine is whether there was sufficient evidence to sustain the conviction. The conviction is not being challenged by

the Appellant, but I have to satisfy myself of its safety.

21. Pw1 **Stancelous Mutua** explained that the Appellant was the driver of the lorry registration No. KCB 250G which he was using in transporting maize. After buying a total of 86 bags of maize and taking them to 1st accused's petrol station he travelled back to Nairobi. The lorry remained behind. This was on 23rd July 2015. He was in Nairobi for one day and returned early Sunday morning and he met the Appellant on that day.

22. He was to go with the Appellant to sell the maize bought on Monday morning. He tried getting in touch with the Appellant in vain. He however met with the 1st accused with whom he went to the petrol station where his maize had been stored. He found all the 86 bags missing and nobody was giving him any explanation.

23. He then reported the matter. It was the evidence of the investigating officer **No. 57710 PC Julius Kariuki** who testified as Pw3 that it is the Appellant who informed the others how Pw1 had gone to sleep and they could go and steal the maize. This was never challenged vide the cross examination.

24. The Appellant in his defence admits that on 2nd August 2015 Pw1 and him bought 86 bags of maize which they stored at Ngoluni market. Pw1 was with his two workers. Time did not allow them to take the maize to Masii market. The two workers were left guarding the maize on Pw1's instructions. He said he later met with Pw1 at a bar and they drunk until very late.

25. The Appellant's evidence was given on oath. All he said was a denial of his involvement in the theft of the maize. He actually blamed it on Pw1's alleged workers. Pw1 was never cross examined by the Appellant's counsel on all these allegations. If indeed it was true that the eighty-six (86) bags of maize were left under the custody of the two workers, its highly doubtful that the Appellant could have remained silent with such vital information especially when he was represented by an advocate.

26. The truth of the matter is that it was an afterthought and properly rejected by the trial court. The Appellant is the one who drove the vehicle which transported the maize as found by the learned trial Magistrate.

27. I am therefore satisfied that the conviction of the Appellant for the offence of theft contrary to section 275 of the Penal Code is safe. He was sentenced to serve three (3) years imprisonment which is the maximum sentence under section 275 of the Penal Code. The Appellant has no issue with this.

Issue of serving another person's sentence

28. From the charge sheet, it is clear that the Appellant herein was only charged with one count (*1st count*) out of the three counts. The rest of the counts involved his two co-accused. The record of the court shows that he was sentenced on only one count and not two counts. A further perusal of the record reveals a few malpractices as follows:

· In the instant case it is clear that two separate committal warrants were issued in respect to Tawa Criminal Case No. 386/2015 in respect of one Geoffrey Muasya Kikemu (*the Appellant).*

· One warrant is dated and signed on 11th July 2017 while the other is dated and signed on 29th August 2017.

· From the record the person who was on 11th July 2017 fined Kshs.10,000/= in default six (6) months imprisonment is the 2nd accused (*Joseph Mwanzia Nzuki*) and not the Appellant.

· To my surprise the original committal warrant dated 11th July 2017 in respect of the Appellant is still in the court file. The question is how the officer in charge G.K prison Machakos received the Appellant on 11th July 2017 in the absence of the original committal warrant.

· Was Joseph Mwanzia Nzuki ever imprisoned in respect to the sentence passed against him on 11th July 2017? Inside the court file is a copy of his committal warrant dated and signed on 15th July 2017 and not 11th July 2017 when he was sentenced. There is a receipt in the court file showing he paid Kshs.8,389/= as fine on 15th August 2017. Where then was he between 11thJuly – 15th August 2017?

29. Upon this analysis I find that the Appellant was unlawfully committed vide the committal warrant signed and dated 11th July 2017. The warrant dated 11th July 2017 is therefore nullified and set aside. I have noted from copies of committal warrants from the Makueni Prison submitted to court that the Appellant is still in prison custody in respect to count **1** and another different matter.

30. I therefore direct that the Appellant be given credit for the six (6) months sentence that he unlawfully served in respect to the illegal committal warrant dated 11th July 2017. The period unlawfully served MUST be deducted from his remaining period in Prison.

31. Last but not least is the issue of forfeiture of his cash bail, which he wants reimbursed by the State. The record shows that the Appellant was released on cash bail of Kshs.50,000/= on 19th April 2016.

32. He failed to attend court on 12th July 2016. The cash was ordered forfeited on 26th July 2016 when he failed to attend court for the hearing. He was re-arrested and arraigned in court on 1st August 2016. When presented to court all that he told the court was that he had been

unwell. There was nothing produced by him to support this allegation of sickness on that day or any other day. He cannot therefore claim to have been unfairly denied reinstatement of his cash bail.

33. The upshot is that the appeal is devoid of merit save for the order that the Appellant's current sentence MUST be reduced by the six (6) months unlawfully served on the basis of an illegal committal warrant.

34. This is the 2nd time I am handling a case from Tawa Law Courts based on an illegal committal warrant. The present Head of Station of Tawa Law Courts MUST ensure that there is diligence in writing and handling of committal warrants. A copy of this judgment should be served on him.

Orders accordingly.

Delivered, signed & dated this 15th day of July 2020, in open court at Makueni.

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H. I. Ong'udi

Judge