



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL CASE NO. 155 OF 2014

HENRY LANGAT CHERUIYOT1ST APPELLANT

PAUL THUKU GACHORA2ND APPELLANT

DANIEL MUKUHA NJAU3RD APPELLANT

VERSUS

REPUBLICRESPONDENT

(An Appeal from the Ruling of the Principal Magistrate Honourable A. Alego in Eldoret Chief Magistrate's court Criminal Case No. 402 of 2012 dated 10th October, 2014)

JUDGMENT

The three appellants herein were charged jointly with others not before court with the offence of stealing by servant contrary to *Section 281* of the *Penal Code*.

The particulars of this offence are that on the 13th day of January 2012 at Eldoret town in Uasin Gishu County, the appellant herein jointly with others not before court, being servants to Naivas Limited, stole 300 bales of Exe home baking flour of 2kg and 100 bales of Exe Home Baking flour of 1kg all valued at Kshs. 613,200/- the property of Naivas Limited which came into their possession by virtue of their employment.

There was a 4th accused person who did not appeal, who in the second count was charged with the offence of stealing, contrary to Section 275 of the Penal Code. His name is *Maurice Kibet Komen*. The particulars of this offence are that on the 13th day of January, 2012 at Eldoret town, Uasin Gishu County, the accused jointly with others not before court stole 300 bales of Exe baking flour of 2kgs and 100 bales of Exe home baking flour of 1kg all valued at Kshs.613,200.00 the property of Naivas Ltd, which came into his possession by virtue of his employment.

To this count there was a preferred alternative count of having suspected stolen property contrary to Section 323 of the Penal Code. The particulars hereof being that on the 13th day of January, 2012 at Eldoret town in Uasin Gishu county, the 4th accused otherwise than in the cause of stealing dishonestly received one bale of Exe home baking flour of 2kgs values at Kshs. 1,527.96 having reasons to believe it to have been stolen.

The prosecution case is that at the time of commission of the alleged offences, the 1st appellant was the Manager of Naivas supermarket, Eldoret Sokoni branch. The 2nd appellant was the store clerk, while the 3rd appellant was the assistant manager. The 4th accused person who did not appeal, was the proprietor of Sunrise Wholesalers, located near Moi Teaching and Referral Hospital in Eldoret.

The 1st appellant had ordered for the allegedly stolen bales of Unga to be supplied by Unga limited to the said supermarket. PW-2 an employee of Unga Limited, who was at the time the driver of a lorry Registration number KAQ 353 E, was given an invoice SLS 20096637 for supply of 400 bales of Unga to Naivas supermarket, Sokoni Branch. The vehicle was loaded with the bales of wheat flour and weighed. However, this particular witness had an urgent pressing matter. He informed his boss and another driver, namely *Peter Ng'ang'a* was assigned the work of delivering the flour. PW-3 and PW-4 who were loaders at Unga limited, together with the said driver, delivered the flour. It was 400 bales Exe home baking flour, 1kg – 100 bales and 2kg 300 bales. When they got to Naivas Supermarket, Sokoni Branch, the lorry driver gave the invoice to PW-3 to hand it over at the receiving bay. He did so, and the second appellant told him that the unga had been sold. The invoice was stamped at the Naivas supermarket to show the flour had been received there. They were however directed to

deliver it to Sunrise Wholesalers near Moi Teaching and Referral hospital. They went there and met the 4th accused person. The flour was offloaded there and the lorry driver was given an envelope allegedly containing amount for payment.

PW-1, a Loss Control Manager at Naivas supermarket was informed of the incident and commenced investigations. He went to the supermarket. The 1st appellant had commenced his leave. He was however present when the flour was delivered. The 3rd appellant had stamped and signed the good received note. The systems were showing the flour had been received but the physical check established it was not offloaded and stored in the supermarket. It was not there. The manager, first appellant, had approved of the receipt. He went to Unga Limited to investigate where the flour had been taken. PW-3 and PW-4 led him to Sunrise Wholesalers. He went back to Nairobi and returned in company of the chairman. They then reported the case at the police. PW-6 in company of *Corporal Owaga*, together with the complainant and two employees of Unga Limited, went to Sunrise Wholesalers on 20th January, 2012. They met the proprietor, the 4th accused person.

They carried out a search and recovered 3 bales of wheat flour, 2 bales of 2kg flour and 1 bale of 1kg flour. One of the bales was identified through dispatch No. 374417 of which was among the consignment to be supplied at Naivas supermarket, Sokoni Branch. The 4th accused was consequently arrested. The signed invoice and receiving note were subjected to investigation against known handwriting and signatures of the 3rd and 2nd appellants respectively, by PW-5, a document examiner. After his examination he was of the opinion that they were made by the said persons, the 3rd and 2nd appellants herein. PW-7 investigated the case. He tried to trace the 1st appellant but he had gone underground. He was not at his home in Bomet. He is the one who had ordered for the goods in question. He received invoice from Unga Limited for their supply at a time when he was meant to be on leave. The second appellant signed to the effect that he had received the good, while the 3rd appellant signed the invoice which made Naivas supermarket pay for the supply. The 4th accused received the flour at his wholesale shop and paid through the lorry driver, to the 1st appellant. The four were then charged.

The 1st appellant in his brief defence stated that he was the Manager Naivas supermarket, Sokoni Branch. The 3rd accused was the assistant manager.

He had applied for leave and on 12th January 2012 handed over duties to the 3rd appellant, with whom they were sharing office. He then proceeded to his rural home in Bomet. Through the Daily Nation of 1st February 2012 he learnt about the incident in this case. He went to the CID office Eldoret. He was however charged.

The second appellant defence is that he was a store clerk at the supermarket. He was in charge of stores upstairs where sugar was stored. The flour was stored in stores downstairs of which he was not the in charge. The one who was in charge, Simule, went underground after the incident in this case. He did not sign any document and never saw the Unga Limited lorry driver.

The 3rd appellant stated he was handed over duty by 1st appellant when he went on leave on 13th January, 2012. His duty was to work on the back office with computers. Records were made by *Paul Mwai* in the computers. He signed the invoice on 17th January, 2012. *Paul Mwai* had received goods on 16th January, 2012. *Maurice Sebule* was physically receiving the goods. He went underground. An invoice would show what had been ordered. Receiving note is what acknowledges receipt.

The 4th accused who did not appeal stated he was an employee at Sunrise Wholesalers. He was not the proprietor. There is nothing to show the recovered Unga was for Naivas supermarket.

The trial court weighed the evidence and found all the accused persons guilty of the offences charged with. The appellants herein were sentenced to serve each 5 years imprisonment while the 4th accused was sentenced to 2 years imprisonment. The three appellants, dissatisfied with the said conviction and sentence appealed to this court. I have evaluated the evidence adduced in the lower court, the judgment passed, sentences meted against the appellants, grounds of appeal and submissions by both sides. The issues identified by the trial court as issues for determination, if were all established by the prosecution beyond reasonable doubt, were not adequate to lead to the conclusion that the appellants were guilty of the offence charged with. These issues are:-

- (a) Were the appellants in employment at Naivas supermarket?
- (b) Were they on duty on 13th January 2012 when the alleged offence took place?
- (c) Was there any goods purchased from Unga Ltd to Naivas Limited worth Kshs. 613,200/=?
- (d) Were the goods received and delivered at Naivas Sokoni branch?
- (e) If not, where did the Unga go?

The question as to who was actually involved, among the appellants, in diverting the Unga from Naivas supermarket to Sunrise wholesalers, which is a crucial issue, was not flagged out as an issue for determination. Actually, this is the only issue which this court need determine, given that the other identified issues of which are also necessary, are not in dispute and were well established beyond reasonable doubt.

The evidence of PW-3 shows that the second appellant is the one who told him that the goods had been sold. He is also the one who gave him the invoice. The evidence of PW 5 shows that the receiving documents were signed by the second appellant and the 3rd who were the store clerk and the Assistant Manager, respectively. It is not in dispute that the 1st appellant was on leave at the time. He had handed over duty to the 3rd appellant on 12 January 2012 a fact which is confirmed by the 3rd appellant. He signed no document involved in the said consignment save for just ordering for it. There is no evidence connecting him with the said offence. Though PW-7 alleged he received the amount paid by the 4th accused for the flour, such evidence was not founded on evidence adduced and its source was not disclosed. It is therefore unreliable evidence given that PW-7 was not an eye witness but the investigating officer. The same applies to his allegation that

the 1st appellant was on duty on 13th January 2012 when the offence was allegedly committed, though meant to be on leave.

I find existence of a strong possibility that the 1st appellant was not involved in commission of the said offence, given that there is no reliable evidence to the contrary. I resolve the doubt in his favour and is therefore acquitted of the same. He should be released forthwith unless otherwise lawfully held.

For the other two there is reliable evidence linking them to the offence. They dealt with PW-3 and PW-4 and signed the documents showing receipt of the flour and then diverted it to Sunrise wholesalers. The court was right in finding them guilty of the offence. The offence carries a sentence of upto 7 years imprisonment. 5 years imprisonment was within the law and given the value of what was stolen, a deserving sentence. I find no cause for interfering with the same. The appeal against the two is unmerited and is hereby dismissed.

S. M GITHINJI

JUDGE

DATED, SIGNED and DELIVERED at ELDORET this 9th day of April, 2019.

In the presence of:-

(1) Mr. Kigamwa for appellant

(2) Ms Mumu for State

(3) Mr. Mwelem - Court assistant

Court:

Second and third appellants were out on bond pending appeal. The said bond is vacated. The period of which they have been out on bond pending appeal will be excluded in calculation of the 5 years sentence.

S.M GITHINJI

JUDGE