



REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA AT NAIROBI  
CRIMINAL DIVISION

CRIMINAL APPEAL NUMBER 36 OF 2017

BETWEEN

STEPHEN NYANOTI.....APPELLANT

AND

REPUBLIC.....RESPONDENT

*(An appeal from the original conviction and sentence in the Chief Magistrate's Court at Kibera in Cr. Case No. 1623 of 2014 delivered by Hon. A N. Ong'ino (CM) on 10<sup>th</sup> January, 2017).*

JUDGMENT

1. The Appellant herein **Stephen Nyanoti** was charged with the offence of stealing by servant contrary to **Section 268 (1)** as read with **Section 281 of the Penal Code**. The particulars of the same were that on diverse dates between 11<sup>th</sup> day of February and 15<sup>th</sup> day of April 2014 at the National Public Health Laboratories KNH Grounds within Nairobi County, being a laboratory technician stole twenty eight (28) microscopes make Olympia valued at Kshs. 9,600,000/= the property of National Public Health Laboratories Services which came into his possession by virtue of his employment. He pleaded not guilty to the offence. Upon trial, he was convicted and sentenced to pay a fine of Kshs. 2,000,000/= in default to serve two years imprisonment. Aggrieved by his conviction and sentence, he preferred an appeal to this court.

2. The Appellant raised five (5) grounds of Appeal in his Petition of Appeal filed on 31<sup>st</sup> March 2017. He raised further grounds of Appeal in his supplementary Petition of Appeal filed on 31<sup>st</sup> October 2018. The said grounds of Appeal are summarized as follows: That the learned magistrate erred in law and fact by: convicting and sentencing him when the evidence adduced could not sustain a conviction; failing to find that the prosecution did not prove its case beyond any reasonable doubt and thereby lowered the standard of proof; failing to find that there were reasonable doubts in the evidence tendered by the prosecution which doubts ought to have been resolved in his favour and shifting the burden of proof upon him.

Evidence

3. This being a first appeal, it is the duty of this court to reconsider and re-evaluate the evidence adduced by the witnesses before the trial court so as to arrive at its own independent verdict whether or not to uphold the decision of the trial court. In doing so, this court is required to take into account the fact that it neither saw nor heard the witnesses. (See **Okeno v Republic (1972) EA 32**).

4. The Prosecution's case can be summarized as follows: Sometime in the year 2011, the Ministry of Public Health and Sanitation procured binoculars led microscopes from Crown Healthcare at the cost of Kshs. 345,000/= per unit. Crown Healthcare delivered a total of one hundred and sixty six (166) microscopes in two batches. The first batch of one hundred (100) microscopes were delivered on 16<sup>th</sup> May, 2012 while the second batch of sixty six (66) microscopes was delivered later on 25<sup>th</sup> June, 2013. The Appellant signed the delivery notes in respect of both batches as the custodian of the store where the microscopes were kept at the National Public Health Laboratory Services at Kenyatta National Hospital.

5. The microscopes were scheduled to be launched by the Permanent Secretary at the Ministry of Health headquarters on 11<sup>th</sup> February 2014. However, at the time, the Appellant was upcountry attending the burial of his cousin one Wilson Nyakundi. Accordingly, the head of department Mr. Mamo Muro ordered that the door to the store be broken since only the Appellant had the keys to the store where the microscopes were kept. One hundred and sixty six (166) microscopes were ferried to the headquarters for the launch although there was no record of how that was done. The Appellant was present when all the microscopes were returned to the store after the launch.

6. On 15<sup>th</sup> April, 2014, the Appellant applied for his annual leave. However, Mr. Mamo Muro declined to approve his application and instead ordered for a stock taking of the microscopes in the store. The stock taking exercise was undertaken by **Amos Mutinda Kalungu (PW1)** the

procurement officer, **Bernard Sande (PW2)** the medical laboratory technologist, **Robert Onwonga (PW3)** the store man and the Appellant herein who all had access to the store. Upon completion, they discovered that twenty eight (28) microscopes out of the one hundred and sixty six (166) were missing and could not be accounted for. Twenty (20) microscopes were missing from the batch that was delivered first while eight (8) were missing from the second batch.

7. A report was prepared to that effect, signed by the four officers and handed to the head of department. Mr. Mamo convened a meeting in his office immediately thereafter. He informed them that he had intercepted a taxi leaving the compound with a microscope thereby prompting the stock taking. PW1 noted that there were private security guards at the gate and a gate was required for any equipment to leave the premises. He was the one who was tasked with issuing gate passes but he did not issue any for the missing microscopes.

8. **PW4, Penina Mwangeli** a health administration officer at the National Public Health Division in the Ministry of Health stated that the Appellant was employed as a subordinate staff but was later posted to the store. She had however not seen any letter specifically deploying him to work in store.

9. **PW5, PC Fredrick Isiega** of Kenyatta National Hospital Police Post was the investigating officer. He was at the police post on 15<sup>th</sup> April, 2014 when PW1 and PW2 went to report the matter. PW5 proceeded to the store accompanied by one CPL Kauri together with both PW1 and PW2. He noted that there was no breakage. The Appellant opened the store to show them where the microscopes and components had been stored. They interrogated PW1, PW2, PW3 and the Appellant herein and then arrested the Appellant.

10. PW5 obtained several documents in the course of his investigations which he produced in evidence. These were; stock taking report of 15<sup>th</sup> April, 2014 (**exhibit 1**), list for distribution of microscopes (**exhibit 2**), letter dated 10<sup>th</sup> November, 2011 for the award of tender to deliver microscopes (**exhibit 3**), Local Purchase Order (**exhibit 4**), Delivery Note dated 16<sup>th</sup> May, 2012 (**exhibit 5**), invoice dated 16<sup>th</sup> May, 2012 (**exhibit 6**), invoice dated 25<sup>th</sup> June, 2013, (**exhibit 7**), delivery note dated 25<sup>th</sup> June, 2013 (**exhibit 8**), the Appellant's leave form used on 24<sup>th</sup> November, 1992 (**exhibit 9**), the Appellant's letter of appointment as subordinate staff dated 30<sup>th</sup> May, 1988 (**exhibit 10**). He however did not verify whether the signatures appearing on some of the documents indeed belonged to the Appellant.

11. When placed on his defence, the Appellant gave a sworn statement and called one witness. He denied that he had keys to the store and stated that the same were held by PW1 and PW3. He stated that he had never been a store keeper since he was employed. His duties according to his letter of employment included messengerial duties, sweeping and scrubbing of floors, cleaning grounds, wards and mortuary. He denied signing the delivery notes (exhibits 5 and 8) as he was neither the store keeper nor procurement officer. The only work he did within the store area was to clean the store keeper's and procurement officer's offices which were outside the store. Further, he denied stealing any microscope in a taxi and/or signing the stock taking memo (exhibit 1). It was his testimony that he reported for duty on 15<sup>th</sup> April 2014 and found a meeting going on. He was arrested on the same day and put in police custody.

12. **DW2, Ronald Okemo Omoke** was the Appellant's cousin. He confirmed that the Appellant was in Kisii on 10<sup>th</sup> February, 2014 attending the burial of his brother Wilson Nyakundi. They parted ways at 6.00 pm on the same day since the Appellant was travelling to report for duty on the following day.

#### **Analysis and determination.**

13. This Appeal was canvassed by both written and oral submissions. The Appellant's written submissions were filed on 28<sup>th</sup> November, 2018 whilst the Respondent's submissions were filed on 5<sup>th</sup> March, 2019. At the hearing, the Appellant was represented by the learned counsel Mr. Shadrack Wambui whereas the learned State Counsel Ms. Sigei represented the Respondent. My analysis of the evidence drives me to deduce that the only issue arising for determination is whether the Prosecution proved their case beyond a reasonable doubt.

14. It was submitted on behalf of the Appellant that there was no evidence that pointed to the guilt of the Appellant. Counsel that it was suspicious for the head of department to order for stock taking two months after he had ordered the breaking into the store in the absence of the Appellant. It was also suspicious why the head of department had to wait until the Appellant applied for his leave to order for stock taking yet he had been aware that the microscopes were missing all along.

15. The Appellant also wondered why the head of department and the taxi driver who was allegedly intercepted with a microscope were not called to testify. In his view, this was a well calculated cover up scheme by the head of department who seemed to know where the microscopes disappeared to, if at all. He submitted that the two were very crucial witnesses and the failure to call them only left gaps in the prosecution's case.

16. The Appellant further questioned why the inventory allegedly prepared when the microscopes were removed and later returned after the launch, was not produced in court, despite the prosecution witnesses claiming that there was one. In his view, this raised questions as to why due diligence was not done only when he was away attending a funeral.

17. Further, he submitted that PW5 did not undertake a thorough investigation of the case. He stated that PW5 did not assist the court in any way, save to repeat what other witnesses had stated. He argued that PW5 failed to establish how the Appellant may have benefitted from the theft if at all. He was of the view that PW5 should have presented CCTV video footages or anything to show the Appellant making away with the microscopes since none of the prosecution witnesses said they saw him doing that. He also faulted PW5 for failing to conduct a forensic examination of the signatures purported to belong to the Appellant to remove any doubt.

18. In the Appellant's view therefore, the trial court failed to appreciate the high standard of proof required in criminal cases and denied him the benefit of doubt. Instead, the court unreasonably placed on him the burden of proving his innocence.

19. The Respondent on the other hand submitted that the prosecution ably discharged its burden of proof through circumstantial evidence.

Learned State Counsel submitted that the chain of events leading to the culpability of the Appellant was not broken. She stated that the Appellant being the custodian of the store was accountable for the twenty eight (28) missing microscopes. She also stated that the Appellant's character was questionable and suspicious because he wanted to go on leave yet he knew that the microscopes were missing. In totality, she argued that the Prosecution proved its case beyond reasonable doubt hence the Appellant's conviction was safe.

20. As regards the sentence imposed, the Respondent submitted that the same was legal, proper and lenient. She stated that the Appellant took advantage of his position in the public service to steal items that were meant to offer a much needed health service to members of the public. She therefore urged that the same be sustained as well.

21. My reevaluation of the entire evidence creates no doubt in my mind that Appellant was charged as a scapegoat for sins of other persons within the Ministry of Health establishment. No doubt the Appellant was an employee of the Ministry as a letter of employment was adduced in evidence. Although he was a messenger a cleaner, he was also allocated the duties of store-keeping, specifically where the subject microscopes were kept. The prosecution was obligated to demonstrate that the store was managed to exclusion of all other staff members except the Appellant, an onus they dismally failed to discharge. From the record, it is clear that PW1, PW2, PW3 and the Appellant herein all had direct access to the store at some point even though the Appellant is said to have been the sole custodian of the store keys.

22. Further, it is notable that the store was broken into in his absence on 11<sup>th</sup> February 2014 upon the instructions of the head of department Mr. Mamo and the equipment taken to the ministry of health headquarters for the launch. The prosecution witnesses stated that a total of one hundred and sixty six microscopes left the store that morning. However, there is no record of any documentation prepared at the time to prove that. There is also no evidence on whether the Appellant was aware of the quantity that remained in the store, if any, on that day. Further, the prosecution witnesses stated that the Appellant was present when the microscopes were returned later on the same day. But there lacks the evidence that the Appellant participated in returning the microscopes in the store or not. No documentation again was presented in court to show how the exercise was undertaken and whether the same number of microscopes was returned to the store.

23. In the absence of the above, it is clear that there was no eye witness who saw the Appellant carrying away any microscope from the store. In fact, the person who held key lead to how the microscopes may have been stolen was the head of department, Mr. Mamo Muro who informed PW1, PW2 and PW3 that a taxi had been intercepted while leaving the compound with a microscope. It begs why he was not a key prosecution witness. It also begs why the police did not lead investigations into that direction so that at least even that vehicle that was carrying the goods was intercepted or its driver arrested. Eye brows are further raised by the fact that it was not disclosed what became of the microscope that was seen in the taxi; adding that it could not be established that the Appellant had a link with it.

24. Furthermore, the Appellant's specimen signature was not taken by a document examiner for forensic examination to verify that he had indeed signed the documents purported to have been signed by him. This left doubt as to whether he ever handled the microscopes as alleged by his co-workers.

25. Clearly, this is a case in which the conviction of the Appellant was based purely on circumstantial evidence. Indeed, a look at the judgment of the trial court attests that the court was just but trying to piece up material that could add up to a basis of a conviction as opposed to relying on the evidence adduced and consequently make a concise determination from it.

26. All the same, the circumstantial evidence adduced by the prosecution did not form a complete chain to show that it was the accused and no one else who committed the offence. In so holding, I find solace in the celebrated case of **Sawe v Republic [2003] eKLR** in which the Court of Appeal held that:-

***“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 hypotheses than that of his guilt. There must be no other co-existing circumstances weakening the chain of circumstances relied on. The burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis is on the prosecution and always remains with the prosecution. It is a burden, which never shifts to the party accused.”***

27. In the circumstances, I do find that the prosecution failed to prove their case against the Appellant beyond a reasonable doubt. The conviction was based on extraneous matters and was therefore unsafe. I accordingly quash the conviction, set aside the sentence and that the Appellant be set at liberty forthwith unless otherwise lawfully held. The cash bail of Ksh. 50,000/= that he paid on account of bail pending appeal shall also be refunded to him. It is so ordered.

**Dated and Delivered at Nairobi This 5<sup>th</sup> Day of April, 2019.**

**G.W.NGENYE-MACHARIA**

**JUDGE**

**In the presence of;**

1. Mr Wambui Shadrack for the Appellant.

2. Mr Momanyi for the Respondent.