REPUBLIC OF KENYA

IN THE HIGH COURT

AT MACHAKOS

CRIMINAL APPEAL NO. 42 OF 2016

CONSOLIDATED WITH

CRIMINAL APPEAL NO. 38 OF 2016

EVANS ANGWENYI................1ST APPELLANT

RICHARD OYONDI................2ND APPELLANT

VERSUS

REPUBLIC....................................RESPONDENT

(An appeal arising out of the conviction of Hon. E.K. Too SRM delivered on 9.6.2016 and sentence of J.A. Agonda (SRM) delivered on 23.6.2016 , in Criminal Case No. 928 of 2014 in the Senior Principal Magistrates Court at Mavoko)

JUDGEMENT

1. Evans Angwenyi and Richard Oyondi the Appellants herein, were jointly charged together with 3 others with one count of the offence of stealing by servant contrary to section 268 (1) as read with Section 281 of the Penal Code. The particulars were that the appellants on 3rd August, 2014 at Superior Homes Limited at Athi River District within Machakos County, jointly stole 380 pieces of twisted metal bars, all valued at Kshs 159,000/- the property of Superior Homes Limited which came into their possession by virtue of their employment.

2. The Appellants were also charged with the alternative count of Neglect to prevent a felony contrary to Section 392 of the Penal Code. The particulars were that the appellants on 3rd August, 2014 at Superior Homes Limited at Athi River District within Machakos County, being security guards at Superior Homes Limited, failed to prevent the commission of the offence of stealing where 380 twisted metal bars valued at Kshs 159,000/- were stolen.

3. The Appellants were arraigned in the trial court on 6.8.2014 when they pleaded not guilty to the charges. They were tried, convicted of the alternative count and sentenced to serve 6 months under probation which was to be supervised by the probation officer Athi River Sub - County.

4. The Appellants being aggrieved filed the present appeal. The 1st appellant appealed against the conviction and sentence while the 2nd Appellant appealed against the conviction.

5. The 1st Appellant's grounds of appeal are stated in his Petition of Appeal dated 5th July 2016 and filed on the same day. The 2nd Appellant's grounds of appeal are stated in his Petition of Appeal dated 23rd June 2016 and filed on the same day.

6. In summary, the 1st Appellant alleges that the trial magistrate did not consider the evidence that he raised and in particular his assignment and smooth handover of duties; that the magistrate erred in law and fact in failing to take into consideration his defence. The 2nd Appellant appealed against conviction only and in his petition of appeal he also alleged that the trial magistrate did not consider the evidence that he raised and in particular his assignment and smooth handover of duties; and that the magistrate erred in law and fact in failing to take into consideration his defence.

7. The Appellants' learned counsel Omwenga-Arasa and Co Advocates filed joint written submissions dated 14th January, 2019. Learned counsel raised three issues for determination, *to wit*; wrongful conviction against the appellant, need to lift the criminal record occasioned against the appellant and the best interest of justice. On the first issue, it was argued that from the proceedings of the trial court and the

witnesses called by the prosecution, nothing has been shown that clearly pinpoints that the appellants were aware of the theft and failed to prevent it. Therefore in the premises of Section 111 of the Evidence Act, the prosecution failed to meet their legal burden of proof and therefore this court was urged to admit the request to quash the appellants' conviction. It was also submitted on the 2nd issue that Under Article 165(6) and (7) of the constitution as well as Section 362 of the Criminal Procedure Code the court has jurisdiction to exercise revisionary powers and in this regard the court ought to lift the criminal record that has been occasioned on the necks of the appellants. On the third issue, learned counsel contended that the appeal be allowed in the best interest of justice and reliance was placed on the decision in **Joseph Ndungu Kagiri v Republic (2016) eKLR** in this regard.

8.. The Respondent filed submissions on 17th April, 2019. Learned Counsel in the said submissions raised two issues for determination, to wit; whether the conviction was wrongful and secondly whether the court has mandate to lift the criminal record occasioned on the appellants. On the first issue, counsel submitted that the appellants were tried and convicted under Section 392 of the Penal Code as there was evidence to establish that the appellants knew of the design to commit a felony and failed to employ all reasonable means to stop the commission or completion of the said felony. According to counsel, the evidence was that of Pw-2 the Human Resource Manager at Superior Homes who testified that the appellants were employed as security guards and that the theft occurred on the night of 23.8.2014 when the appellants were on duty for the night shift. Further that Dw1 and Dw4 admitted that they were at work on the material day and appeared unaware of what transpired on the said day. Counsel submitted that in line with the provisions of Section 392 and 36 of the Penal Code, the appellants were not vigilant and alert while on duty and the only explanation for the failure to notice the theft must be that they left the premises unguarded or slept on the job which is enough to establish the offence of neglect to prevent commission of a felony and in this regard urged the court that the appellants were correctly convicted and sentenced. On the 2nd issue, counsel submitted that the criminal record is kept with the directorate of criminal investigations and the police would be best suited to expunge the record once an offender is acquitted. Similarly that under Article 165 of the Constitution, the court exercises supervisory jurisdiction over the subordinate court, tribunal or quasi-judicial bodies and not the Kenya Police or Directorate of Criminal Investigation. Counsel concluded that the appeal lacks merit and should be dismissed and that the conviction and sentence be upheld.

9. As this is a first appeal, I am required to re-evaluate the evidence tendered in the trial Court, and come to an independent conclusion as to whether or not to uphold the convictions and sentences. This task must have regard to the fact that I never saw or heard the witnesses testify (see **Okeno v Republic [1973] EA 32**).

10. From the foregoing submissions and evidence, I find that the issue raised in this appeal is whether the Appellants' conviction for the offences of neglect to prevent a felony was based on sufficient and satisfactory evidence. **Section 392** of the Penal Code sets out the offence of failing to prevent the commission of a felony in the following terms.

> **"392. Neglect to prevent felony**
>
> **Every person who, knowing that a person designs to commit or is committing a felony, fails to use all reasonable means to prevent the commission or completion thereof is guilty of a misdemeanour."**

11. PW1 in this regard was Nicholas Njogu who testified that he was the material controller at the complainant's premises and that on 4.8.2014 he noticed that there were track marks at the gate and established that they were of Y8 metals that were removed at the gates that were being manned by the security guards. He later established that there were 380 pieces of Y8 metals valued at Kshs 159,600 missing. He reported the incident and investigations were commenced. The appellants were later arrested. On cross-examination, he testified that he kept the keys to the stores and that Sunday was not a working day but he was at work on Sunday to prepare a report. He testified that the store was not broken into and that he was not aware that deliveries were made on the 3.8.2014 and he saw the appellants manning the gate. On re-examination, he contradicted his evidence and testified that he saw no lines at the gate. No exhibits were produced.

12. Pw2 was Janet Kitoyi who testified that she was the human resources manager and that she was told that metals were missing and she did stock taking and noticed that the metals were at a variance of 380 pieces of Y8 valued at Kshs 159,600/-. Further that she saw marks at the gate and it appeared that the metals were pulled from the store to the gate and two guards were arrested. She produced the attendance register for the guards and their CV's. On cross-examination, she testified that the appellants were in the third shift from 8.OO pm to 6.OO am and in addition there were handing over books; handing over involved checking that everything was alright and that the keys to the stores were kept by the store keeper but that the store was not broken into.

13. As regards Pw3, the name is not indicated in the proceedings because the page containing his details is missing. However what is available, showed that an incident was reported and the investigating officer was given the names of persons who were on duty on the night of the theft and thus the appellants were arrested. A stock theft report dated 4.8.2014 was prepared by the company and presented to the police. The said report indicates that on 4.8.2014 the company had 380 pieces less of Y8 steel bars. On cross-examination, he testified that Mr. Njogu (Pw1) kept the keys to the store and that nothing was recovered from the appellants. The court found that the appellants had a case to answer and were put on their defence. They elected to give sworn testimonies.

14. Dw1 was Richard Oyondi, who testified that he was in the evening shift on 3.8.2014 and handed over in the morning after which he went home. He testified that he received a call at 3 pm that a theft had occurred at night and he was surprised. He testified that he had been working with the company for 8 years and that he wondered what Pw1 was doing at work on Sunday.

15. Dw2 was William Saningo Tegero who testified that he knew nothing about the charges.

16. It is not clear who Dw3 was for the details are not indicated on the record for the page is missing. However what is available is that Pw1 had been seen at the company store and had left at 6.30 pm.

17. Dw4 was Evans Angwenyi who testified that he was assigned duties at the workshop on 3.8.2014 and he worked from 8 pm until 6 am and left for his home. He testified that he was called at 3 pm and informed that there had been some theft but he however denied the theft.

He testified that he was unaware as to why Pw1 was left to do the counting alone. On cross-examination, he testified that he guarded the place where he was assigned alone and he could not see the store. The defence closed their case and the appellants were acquitted of the charge of theft. However the trial court observed that "it is clear that the property of the company was stolen" and it was the duty of the appellants to prevent the said theft and thus were convicted of the charge of neglect to prevent a felony.

18. The prosecution brought evidence of a stock theft report. I have looked at the said stock theft report that seems to have made a conclusion that 380 pieces were missing and there is no indication of a delivery note or an inventory or the stock records being referred to so as to show an itemized list of the stock movement for the material period. However, the report indicated that the value of the lost stock is Kshs 159,600/- and this corresponds with the amount on the charge sheet that the appellants faced.

19. In this regard, it appears that the evidence relied upon by the prosecution of theft and neglect to prevent commission of a felony was purely circumstantial. The law concerning circumstantial evidence was laid down in ***Ndurya v R*** **[2008] KLR 135** by the Court of Appeal where it was held that before convicting someone on the basis of circumstantial evidence, the court has to be sure that there are no other co-existing circumstances which would weaken or destroy the inference of guilt. Similar holdings were reached in ***Sawe v Republic*** **[2003] KLR 364** and ***R v Kipkering arap Koske and Another*** **16 EACA 135**.

20. In the present appeal, there was no evidence produced of any Y8 metals ever being received by Pw1 and there is no evidence of any recordings to that effect, bearing in mind that he was in charge of the store. I would have expected evidence from witnesses to positively identify the existence of the goods and corroborated by receipts or delivery notes that have not been tendered in evidence. Therefore it is possible that nothing was stolen or that the metals do not even exist. From the evidence, I find that the court rightly acquitted the appellant as on the main charge of stealing by servant contrary to section 268(1) as read with section 281 of the Penal Code.

21. With regard to the alternative count, I am not satisfied that there is sufficient evidence on record for an inference of guilt on the part of the appellants, bearing in mind the requirements as to proof by circumstantial evidence enunciated in the foregoing authorities(supra). It is possible that the evidence of Pw1 and Pw2 are doubtful and this being a criminal matter, the standard of proof has to be met in order to sustain a conviction. In the circumstances the alternative count was not proved beyond reasonable doubt and that the conviction was unsafe. Suffice to add that the guards daily attendance registers produced did not reveal any discrepancies as they were duly signed and left no trace of any guard having been out of duty. It is highly likely that the appellants were blamed on grounds of suspicion. However suspicion however strong should not found a conviction in the absence of corroborating evidence. There was clearly some doubt created regarding the appellant's involvement in the crime and hence the benefit of such doubt should have been resolved in their favour.

22. In the result I find the appellants appeal has merit. The same is allowed. The conviction is hereby quashed and the sentence is set aside. The Appellants are set at liberty forthwith unless otherwise lawfully held.

It is so ordered.

Dated, Signed and Delivered at Machakos this 11th day of June, 2019.

D.K. KEMEI

JUDGE