REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL NO. 174 OF 2018

VINCENT OYULA EKOMBE .....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(*Being an appeal from the a judgment delivered by Hon. F.M Nyakundi, Senior Principal Magistrate on 7th November,2018 in Mumias Criminal Case No. 79 of 2018*)

JUDGMENT

1. **Vincent Oyula Okombe** the appellant was charged with the offence of stealing by servant contrary to section 282 of the Penal Code. The particulars were that the appellant on diverse dates between the 4th day of November, 2017 and the 12th day of January 2018 at Good Morning Company Ltd container deport Matungu Market in Market in Matungu Sub- County within Kakamega County, being a salesman to Good Morning Company stole 262.5 crates of soda, 8.5 dozens of Dasani minerals water, 2.5 crates of minute maid soda, 35 dozens power play energy drink and 197 crates of empty bottles of soda valued at Kshs. 279,675/= the property of **TOO CHEPCHIRCHIR** which came to his possession by virtue of his employment.

2. He denied the charge and the matter proceeded to full hearing whereafter he was found guilty, convicted and fined Kshs. 300,000/= indefault three (3) years imprisonment. There was a further order that should the fine be paid then a total of shs. 279,625/= should be paid to the complainant in line with section 178 of the Criminal Procedure Code.

3. He was aggrieved with the Judgment and has appealed against the whole of it.

4. He has raised the following grounds of Appeal:

a) *THAT he is a first offender*

b) *THAT the Learned Magistrate did not put into consideration that when he came back from Matungu where he had gone to distribute soda, he found already when the container had been opened by whom he suspected to be manager, hence he had the key to the container*

c) *THAT the manager, Mr Silas Kibiwot and watchman, Mr Silas TangaMulesi, might have colluded to steal the crates from the container*

d) *THAT when he came from Matungu, crates of soda were being loaded to a tuktuk which was parked close to the container by the manager assisted by another person*

e) *THAT he was arrested immediately by one AP CplNyakweba, thus he was not given an opportunity to report the incident at the police station*

f) *THAT one person whom he later discovered that was a driver to the tuktuk, was not produced in court to shed more light in this case*

g) *THAT the arresting officer AP Cpl. Nyakweba did not avail himself in court to testify after several adjournments*

h) *THAT due to his ignorance, he did not request for stock taking books during the hearing and determination of this case, hence could have proved that at no time was he involved in theft*

i) *THAT he is the sole breadwinner of his family thus his incarceration leaves them with nobody else as provider.*

5. This is the first appellate court and as such it is guided by the principles set out in the case of **DAVID NJUGUNA WAIRIMU V – REPUBLIC [2010] eKLR** where the court of appeal stated:

> *"The duty of the first appellate court is to analyse and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellant court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions."*

6. In a much earlier decision, the Court of Appeal similarly held in **Okeno vs. Republic [1972] EA 32 that :**

> *"An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination* ***(Pandya vs. Republic (1957) EA. (336)*** *and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion.* ***(Shantilal M. Ruwala Vs. R. (1957) EA. 570)****. 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 finding and conclusion; 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, see* ***Peters vs. Sunday Post [1958] E.A 424****."*

Analysis and determination

7. I have carefully considered the evidence, grounds of appeal and submissions and find the following to be the issues for determination.

ISSUES FOR DETERMINATION

a) Whether the appellant was an employee of the Good Morning Company.

b) Whether appellant stole from PW1's Good Morning Company.

Issue no.(a)Whether the appellant was an employee of the Good morning Company.

8. Section 281 of the *Penal Code Cap 63* provides as follows:

281. Stealing by clerks and servants

'If the offender is a clerk or servant, and the thing stolen is the property of his employer, or came into the possession of the offender on account of his employer, he is liable to imprisonment for seven years.'

9. One of the ingredients necessary to prove the charge of Stealing by servant contrary to *section 281 of the Penal Code* is establishing the fact of employment. (See **D.K Kemei J** in the case of **Humphrey WachiraKarimi v Republic [2019] eKLR).**

10. **PW1 ChepchirchirToo**,testified stating that the appellant worked for her as the depot manager in Matungu. This was corroborated by PW2 **Silas Kibomet**whostated that he was the overall manager of the company and that the appellant used to be his assistant manager before being transferredto manage the Matungu depot. He added that PW1 was their boss**. PW4 PeterWashikaMasika,** stated that the appellant was his workmate at the company. Corporal Maurice Otieno the investigating officer testified as PW5. He stated that his investigations revealed that the appellant worked for the Good Morning Company as a salesman, inShibaledepot and later at theMatungu depot.

11. In his defence and during cross-examination, the appellant admitted that he was employed by the said company as the depot manager at Matungu.

12. I find that the appellant was an employee of Good Morning Company owned by PW1.

Issue no.(b) Whether appellant stole from the PW1's Good Morning Company.

13. Having established that the appellant was an employee of PW1, I now move on to determine whether the appellant stole from his employer on account of his employment.

14. *'Stealing'* is defined by the Black's Law Dictionary 8th Edition as

'To take (personal property) illegally with the intent to keep it unlawfully; To take (something) by larceny, embezzlement, or false pretences'

15. The definition of stealing as found in Section 268 of the *Penal Code CAP 63* is:

> *"A person who fraudulently and without claim of right takes anything capable of being stolen on fraudulent converts to use of any person, other than the general or special owner thereof any property, is said to steal that thing or property."*

16. PW1 **Chepchirchir Too** testified that on 12th January 2018 she was informed by PW4 that there was no stock for soda at the Matungu depot. She instructed PW2 to go and carry out stock taking at the said depot. It is after this exercise that it was discovered that stock worth Kshs. 280,000/- was missing and a report was made to the police. On cross-examination, PW1 stated that it was the appellant who had the keys to the depot and PW2was the overall manager, and was controlling all the other stores including Matungu.

17. PW2 **Silas Kibomet** testified that on 12th January 2018 he conducted an audit at the Matungu depot on pw1's instructions. He noted items worth Kshs. 279,700/- had been stolen. He added that the appellant used to work alone in that place. On cross-examination, he stated that the appellant had the key to the container, but he found it open on the day he came to audit. He denied breaking the door as it was open. He further stated that the tuktuk he was with could not have carried 200 crates at one go. He said that when he first took stock on 14th December 2017, it was in order but when he took it the next time on 12th January 2018, it was wanting. On re-examination Pw2 stated that neither he nor the watchman had any spare keys to the container. Further that there was no report made to the police that he had broken the door or stolen the stock items.

18. **Silas Odongo Malusi** testified as PW3 and stated that he worked at Good Morning Company as a night watchman and that on 12th January 2018 PW2 came to the depot. Both of them noticed that the door to the gate was not locked. On cross-examination, he stated that the appellant did not lock the door of the place and that there was no vehicle which came and took away any item from the depot.

19. PW4 **Peter Washika Masika**testified that he used to deliver stock items to the appellant and the items in PExhibit7 were some of theones he had delivered to him. He was informed by PW2 that those items were lost. On cross-examination, hestated that even though there was no place they signed when he delivered items to the appellant, there was never a complaint to PW2 by the appellant of missing items PW4 confirmed that he had records of the deliveries he made.

20. PW5 No. 54786 Corporal Maurice Otieno testified that he was informed by PW2 that there was a shortage of 180 crates at the Matungu depot worth Kshs. 279,675/-. He investigated and found out that the appellant was the only person who used to get soda and work in the Matungu depot on behalf of Good Morning Company. He added that between 4th November 2017 and 12th January 2018 the appellant was given sodas but he could not account for them. He further stated that he believed the appellant used to receive money for the items but he never remitted them to the company. On cross-examination, PW5 stated that the appellant had stolen 180 crates of different brands together with 197 empty crates and the said crates were never recovered.

21. In his defence, the appellant testified as DW1 and stated that he went to the depot after being called by PW2 and that on arrival, he found the door open and that on inquiring how the door was opened, PW2 told him that it was PW3 who had opened it. He stated further that he had locked the compound and that he did not know where the sodas in the compound had been taken to.He also stated that while at the depot with PW2 he was arrested, held in Mumias Police station custody and then charged.On cross-examination, he confirmed that he used to work alone at the depot.

22. Upon considering the evidence set out above, I find that the weight of evidence is against the appellant. He was the only person who operated the Matungu depot and he was the only one who had the keys to the depot. Looking at a few entries of the stock report (*Pexhibit 6*) for example shows that on 11th January 2018 the closing stock of the 300ml sodas was 184 crates, which by logical standards was supposed to be the opening stock the following day. However, the stock sheet of 12th January 2018 shows that there were no sales yet only 4 crates were found in stock. This meant that 180 crates were missing with no logical explanation from the appellant. Many other items were missing on that date which PW1 claimed totaled Kshs. 279,700/- .There was no explanation from the appellant who was solely in charge of the depot.

23. The evidence against the appellant is inculpatory and incompatible with his innocence. In the case of **Mary Ndunge Muthusi v Republic [2016] eKLR, P. Nyamweya J** held as follows:

> *"I am alive to the fact that the evidence relied upon by the prosecution of the theft of these amounts was 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 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 KipkeringarapKoske and Another 16 EACA 135**."*

24. In the present case the appellant received stock which was found missing. There was no money to confirm any sales. If any sales were made he stole the money since he could not give an account of it.

25. The appellant claimed that PW2 and PW4 were the ones whole broke into the container and stole the sodas and money. There is nothing that stopped him from reporting the same to the Police for investigations. The truth is that his claim had no basis. I am satisfied that the learned trial magistrate analysed the evidence well and made the correct conclusion. I have no reason to make me interfere with the conviction.

26. On the sentence, it is important to note that the offence under Section 281 of the Penal Code Cap 63 carries a maximum sentence of seven years. The learned trial magistrate fined the appellant Kshs. 300,000/- and in default, he was to serve a three year prison sentence. The Court of Appeal, in the case of **Peter Mbugua Kabui v Republic [2016] eKLR** held as follows:

> *"The principles upon which an appellate Court will act in exercising its discretion to review or alter a sentence imposed by the trial court are now old hat. The predecessor of this Court, in the case of **Ogolla s/o Owuor vs Republic, [1954] EACA 270**, pronounced*

itself on this issue as follows:-

"The Court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors". To this, we would add a third criterion namely, "that the sentence is manifestly excessive in view of the circumstances of the case (R - v- Shershowsky (1912) CCA 28TLR 263)." See also Omuse - v- R (supra) while in the case of Shadrack Kipkoech Kogo - vs - R., Eldoret Criminal Appeal No.253 of 2003 the Court of Appeal stated thus:-

sentence is essentially an exercise of discretion by the trial court and for this court to interfere it must be shown that in passing the sentence, the sentencing court took into account an irrelevant factor or that a wrong principle was applied or that short of these, the sentence itself is so excessive and therefore an error of principle must be interfered (see also Sayeka –vs- R. (1989 KLR 306)"

In the more recent case of ***Kenneth Kimani Kamunyu -vs- R. (2006) eKLR,*** *this Court reiterated this principle and stated that an appellate Court can only interfere with the sentence if it is illegal or unlawful."*

27. Upon conviction the appellant gave his mitigation and the trial court called for a probation report which was filed in good time. I have read through the report which is quite detailed and positive. The only issue that was being stressed in the report is that the complainant wanted to be compensated the whole amount at once. No wonder the fine was hefty with an order that 95% of it be paid to the complainant as compensation. Was it then a fine or compensation for PW1?.

28. The probation report shows that the appellant is a married man with seven (7) children six(6) of whom are school going. The youngest was only three(3) months old. The report from the appellant's family and local administration was positive. The demand by the complainant for compensation alone should not have taken precedence over all the circumstances in respect to this matter. This is not to downplay the fact that the complainant lost lots of money in the form of stock.

29. Having considered the appellants' mitigation and the probation report I find that the fine of Kshs. 300,000/= indefault 3 years was too harsh. I do note that he has served ten months in prison. I find this to be sufficient punishment for him. I set aside the whole sentence of Kshs. 300,000/= indefault 3 years imprisonment and the order for compensation being paid from the fine. I substitute it with the sentence of the period already served.

30. The upshot is that the Appeal partially succeeds, and I make the following orders:

i. Appeal against conviction is dismissed and the conviction is upheld.

ii. Appeal against sentence succeeds and the sentence is set aside. Its substituted with a sentence of the period already served.

iii. The Appellant shall be released forthwith unless lawfully held under a separate warrant.

Orders accordingly.

Delivered, signed and dated this 12th day of September, 2019 in open court at Kakamega.

H.I. ONG'UDI

JUDGE