



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL CASE NO. 160 OF 2014

MAURICE KIBET KOMEN.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

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

JUDGMENT

MAURICE KIBET KOMEN, the appellant herein, was charged in the lower court with three other persons who were employees of Naivas Limited. The other three are *Henry Langat Cheruiyot*, *Paul Thuku Gachora* and *Daniel Mukuha Njau*, who were charged 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 three accused persons, jointly with others not before court, being servants of Naivas Limited, stole 300 bales of Exe Home baking flour of 2kg and 100 bales of Exe Home Baking flour of 1 kg, all valued at KShs. 613, 200 the property of Naivas Limited which came into their possession by virtue of their employment.

For the appellant herein, the offence is carried in the second count and is of stealing, contrary to *Section 275* of the *Penal Code*. The particulars of this offence are that on the 13th day of January, 2012 at Eldoret town, Uasin Gishu County, the appellant jointly with others not before court stole 300 bales of Exe Home Baking Flour of 1kg, all valued at Kshs. 613,200/- the property of Naivas Ltd, which came to his possession by virtue of his employment. To this main count there was an alternative count of having suspected stolen property, contrary to *Section 323* of the *Penal Code*. The particulars hereof been that on the 13th day of January, 2012 at Eldoret Town in Uasin Gishu County, the appellant otherwise than in the cause of stealing dishonestly received one bale of Exe Home Baking Flour of 2 kgs valued 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, *Henry Langat Cheruiyot* was the manager of Naivas supermarket, Eldoret Sokoni Branch. *Paul Thuku Gachora* was the store clerk, while *Daniel Mukuha Njau* was the Assistant Manager. The appellant herein was allegedly the proprietor of Sunrise Wholesalers, located near Moi Teaching and Referral Hospital in Eldoret.

Henry Langat Cheruiyot had ordered for the allegedly stolen bales of flour 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'an'ga* 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 of Exe Home Baking Flour, 1kg packet – 100 bales and 2kgs packets – 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 *Paul Thuku Gachora* told him that the unga had been sold. The invoice was stamped at Naivas supermarket to show that the flour had been received at the place. They were however directed to deliver it to Sunrise Wholesalers near Moi Teaching and Referral Hospital. They went there and met the appellant herein. The flour was offloaded at the place and the lorry driver was given an envelope allegedly containing amount for payment.

PW-1, a Loss Controller Manager at Naivas supermarket was informed of the incident and commenced investigations. He went to the supermarket. *Henry Langat Cheruiyot* had commenced his leave. He was however present when the flour was delivered. *Daniel Mukuha Njau* had stamped and signed the goods receipt note. The record systems were showing the flour had been received at the supermarket, but a physical check established it was not offloaded and stored in the supermarket. It was not there. *Henry Langat Cheruiyot* had approved of the receipt. PW-1 proceeded 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 both reported the case at the police station. 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 appellant herein. They conducted a search and recovered 3 Bales of wheat Flour, 2 of 2kgs packets flour and one Bale of 1kg packets flour. One of the said Bales was identified through a dispatch No. 374417 of which was among the consignment to be supplied at Naivas supermarket, Sokoni Branch. The appellant herein was consequently arrested.

The signed invoice and receipt note were subjected to investigation against known handwriting and signatures of *Daniel Mukuha Njau* and *Paul Thuku Gachora*, respectively, by PW-5, a document examiner. After his examination he was of the opinion that they were made by the said persons. PW-7 investigated the case. He tried to trace *Henry Langat Cheruiyot* but he had gone undergrounds. He was not at his home in Bomet. He is the one who had ordered for the flour. He received invoice from Unga Limited for the supply at a time when he was meant to be on leave. *Paul Thuku Gachora* signed to the effect that he had received the flour, while *Daniel Mukuha Njau* signed the invoice which made Naivas Limited pay for the supply of the flour in question. The appellant herein allegedly received the flour at this wholesale shop and paid for it through the lorry driver, to *Henry Langat Cheruiyot*. The four were then charged.

Henry Langat Cheruiyot, in his brief defence, stated that he was the manager of Naivas supermarket, Sokoni Branch. *Daniel Mukuha Njau* was his assistant. He had applied for leave and on 12th January 2012 handed over duties to *Daniel Mukuha Njau*, with whom they were sharing office. He proceeded on leave 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.

Paul Thuku Gachora in his defence stated 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 one in charge. The one who was in charge is *Similu*, who went underground after the incident in this case. He alleged that he did not sign any document and never saw the Unga Limited lorry driver.

Daniel Mukuha Njau on his part stated that he was handed over duty by *Henry Langat Cheruiyot* when he proceeded on leave on 13th January, 2012. His duty was to work on the back office computers. Records were made by one *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 appellant herein defence is that he was from Nakuru and had been a hawker since 2001. In January 2017 he was in the shop of his friend, one *Peter Chepkwony*. The shop is called Sunrise which is a retail shop. He was not an employee of Naivas Limited and did not steal 300 bales of Unga belonging to Naivas Limited. On 13th January the police picked 300 bales of Unga from the shop he was working in. That is Sunrise. The shop is not his. There were no papers linking him to Sunrise shop. He is not a tall person as was alleged by PW-4. Nothing shows that the recovered Unga was for Naivas Limited. He denied the offence.

The trial court evaluated the evidence and found all the accused persons guilty of the offences charged with. *Henry Langat Cheruiyot*, *Paul Thuku Gachora* and *Daniel Mukuha Njau* were sentenced each to 5 years imprisonment. The appellant herein on the main count was sentenced to serve 2 years imprisonment.

The first three accused persons appealed in Criminal Appeal case no. 155 of 2014 which is already determined. The appellant herein appealed separately in Criminal Appeal No. 160 of 2014 of which is the appeal pending herein. His grounds of appeal are that:-

- (1) He was found guilty of stealing allegedly what got into his possession by virtue of his employment while he was not an employee of the complainant.
- (2) The prosecution failed to prove that he stole goods that got to his possession by virtue of his employment.
- (3) The appellant was not positively identified as one of those who stole the complainant's goods.
- (4) The recovered goods were not positively identified as having been part of the allegedly stolen flour.
- (5) The prosecution failed to prove that the appellant was the proprietor of Sunrise Supermarket.
- (6) The appellant's defence was dismissed without giving reasons.
- (7) The sentence meted against the appellant is harsh given the circumstances.

In determining this appeal, I have found it crucial to start from the charges preferred against the appellant. The main count which is carried as the second count in the charge sheet, in its particulars alleges that, the Bales of flour allegedly stolen by the appellant herein got into his possession by virtue of his employment. The evidence is clear that the appellant herein is alleged to have been the proprietor of Sunrise wholesalers, located near Moi Teaching and Referral Hospital in Eldoret. He is not alleged anywhere to have been an employee of Naivas Limited. The facts of the case to the given extent do not support the preferred charge.

The prosecution made all the effort to avail evidence to show that *Henry Langat Cheruiyot*, *Paul Thuku Gachora* and *Daniel Mukuha Njau* were employees of Naivas Limited. It is therefore baffling why they never found it necessary to get tangible evidence showing that the appellant herein was the proprietor of Sunrise Wholesalers. Any business registration documents, licence, payment vouchers for the bills and orders would have easily established that. No such evidence was availed, apart from the mere unfounded claim that he was the proprietor. The evidence of the investigations officers shows that the supplied Unga at Sunrise wholesalers was paid for. No evidence was adduced to show how much it was paid for. We do not know whether it was for less than the normal wholesale purchase price. There is also no evidence to show that Sunrise wholesalers bought the flour from the wrong source or had reason to know that. Goods paid for sufficiently by the purchaser cannot be claimed to have been stolen by the said purchaser.

The appellant is alleged to have bought 300 bales of Exe Home Baking Flour of 2kgs packets and 100 Bales of Home Baking Flour of 1kg packet. What was allegedly recovered from Sunrise wholesalers is 3 bales of wheat flour, 2 bales of 2kgs packets and one bale of 1kg packet. The particulars of the offence in the alternative count allege the appellant received one bale of Exe Home Baking Flour of 2kgs valued at Kshs. 1,527.96 shillings, having reasons to believe them to have been stolen. These particulars contradict the recovery allegation, which is of 3 bales. What was presented in court is not the allegedly recovered 3 bales. It was alleged most of it was eaten by rats. The alleged batch number which was used to link the allegedly recovered unga to what was allegedly supplied to the appellant was not shown to court on the recovered packets of flour. No tangible evidence was adduced to show the recovered flour was for Naivas Supermarket. There was no explanation on why only 3 bales out of the allegedly 400 bales supplied were recovered. We were not told of any effort by the investigating officer to establish where the rest were. It is evident that the case in relation to the appellant herein was poorly investigated and charges poorly drafted. The charges are not supported by the available evidence and the available evidence does not establish the preferred charges beyond reasonable doubt. Though the appellant contradicted himself in his defence when he said he was a hawker and later that the flour was got in the shop he was working in, the law is clear that he ought not be found guilty on weakness of his defence but rather on the strength of the prosecution case. The onus is always on the prosecution to establish the charge beyond reasonable doubt. On the aforementioned grounds, I do find the appeal merited. It is allowed. The conviction and the sentence are hereby quashed, and the appellant set free unless otherwise lawfully held.

S. M GITHINJI

JUDGE

DATED, SIGNED and DELIVERED at ELDORET this 2nd day of October, 2019.

In the presence of:-

- (1) Mr. Nyekwei for appellant
- (2) Ms Busienei for State
- (3) Ms Abigael - Court assistant

Mr. Nyekwei :- We pray for release of security and discharge of the surety.

COURT:

The said application is allowed.

SIGNED

S.M GITHINJI

JUDGE

2/10/2019