



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MAKUENI**

**CRIMINAL APPEAL NO. 289 OF 2017**

**DAVID MUSYIMI.....APPELLANT**

**-VERSUS-**

**REPUBLIC.....RESPONDENT**

*(From the original conviction and sentence of Hon. M.M Nafula (SRM)*

*in Tawa Senior Resident Magistrate's Court Criminal Case No. 386 of 2015*

*delivered on 11<sup>th</sup> July 2017)*

**JUDGMENT**

1. David Musyimi the Appellant and two others were charged with the offence of stealing contrary to section 275 of the Penal Code. The particulars were that during the night of 2<sup>nd</sup> and 3<sup>rd</sup> August 2015 at Ngoluni market, Waia location in Mbooni East district within Makueni county, the Appellant with others jointly stole eighty-six bags of maize valued at Kshs.232,200/=, the property of **Stancelaus Mutua. Count II** was giving false information to a person employed in the public service contrary to section 129(b) of the Penal Code. The particulars were that on 3<sup>rd</sup> August 2015 at Ngoluni police post in Waia Location, Mbooni East district within Makueni county. the Appellant informed Julius Kariuki, a person employed in the public service as a police officer that 86 bags of maize valued at Kshs.232,200/= had been stolen from his petrol station information he knew or believed to be false intending thereby to cause the said Julius Kariuki to use his lawful power to the annoyance of **Stancelaus Mutua.**

2. After a full trial, the learned trial magistrate acquitted the Appellant on the 2<sup>nd</sup> count but convicted him and his co-accused on the first count and ordered them to pay Kshs.232,200/= to the complainant.

3. Aggrieved by that decision, the Appellant filed this appeal and listed 7 grounds as follows;

- a) That, the trial magistrate erred in law and fact in finding that the prosecution had proved the offence of stealing when both circumstances and evidence practically failed to link and connect the Appellant to the offence.*
- b) That, the trial magistrate erred in law and fact in not finding that the facts and evidence did not implicate the Appellant.*
- c) That, the learned trial magistrate erred in failing to find and hold that the prosecution did not prove their case beyond reasonable doubt.*
- d) That, the learned Magistrate having correctly found that there was no eye witness who saw the person who took away the 86 bags of maize erred in holding that the Appellant played a role in the theft of maize.*
- e) That, the learned magistrate wrongly analyzed and misapprehended the law and arrived at the wrong finding.*
- f) That, the trial Magistrate wrongly applied section 175 of the Criminal Procedure Code and converted her criminal Court into a Civil Court by ordering the Appellant to pay the complainant Kshs.232,200/=.*
- g) That, the trial Magistrate erred in Law and fact in ordering the Appellant to pay the complainant Kshs 232,200/= being the value of 86 bags of maize when there was nothing on record to show that the subject matter namely maize was infact 86 bags and its value was Kshs 232,200/=. There were no delivery notes or receipts to show the quantity and value of the*

*maize allegedly stolen.*

4. Directions were given that the appeal be canvassed through written submissions. The Appellant complied and filed his submissions but the State, which had also undertaken to file submissions, elected to rely on the evidence on record.
5. **The prosecution called three (3) witnesses. PW1 Stancelous Mutua** is from Kalawa and is in the business of selling cereals. He testified that on 23/07/2015, he had made arrangements with Geoffrey Muasya (*3<sup>rd</sup> accused in trial court*) to buy maize. They met and proceeded to buy maize using motor bikes. They bought 46 bags from Mbumbuni and it was ferried using the Appellant's motor vehicle KCB 250G.
6. They took the maize to the 1<sup>st</sup> Appellant's petrol station in Ngoluni. They bought 40 more bags and took them again to the said petrol station. The Appellant told him to put the maize there as it was safe. The maize was to be there till Monday. Joseph Mwanzi (*2<sup>nd</sup> accused in trial court*) was the petrol attendant.
7. PW1 then proceeded to Nairobi and returned to Ngoluni on Sunday and found the Appellant's vehicle parked at the petrol station. He met with the Appellant and then returned to sunset hotel to spend the night. On the next day, he met with the Appellant and they proceeded with their journey. After about 15 kms, PW1 enquired about the loaders but no one answered and upon getting to the petrol station, he realized that the maize was missing.
8. Joseph, the petrol attendant, denied any knowledge of whoever had taken the maize. The Appellant and PW1 reported the matter at Ngoluni police post and a police officer accompanied them to the scene of crime which had been swept and there were no traces of maize. He had discussed about a maize milling company at Masii with the Appellant. The Appellant proposed that the insurance company be pursued for compensation. He also said that they had unsuccessfully tried to settle the matter out of court.
9. In cross examination he mentioned Joseph's cap which was produced as EXB1. It had been with Joseph and also Muasya who were both the Appellant's co-accused. He said it was Muasya who had introduced him to the Appellant with whom he did business. Further he had kept maize at the petrol station after the Appellant told him it was guarded 24 hours.
10. **PW2 P.C Julius Kariuki** of Ngoluni police post testified that on 03/08/2015, he received a report from PW1 and Appellant about stealing of 86 bags of maize at Kuwait filling station. PW1 told him that he was doing maize business with the Appellant and they had stored some maize at the Appellant's petrol station. That the Appellant had agreed to transport the maize as PW1 was not a resident of the area. He also said that Dorcas Syombua was working in the lodging and had washed the black cap that was recovered at the petrol station.
11. PW1 also told him that he (pw1) was in constant communication with the Appellant. Further on 02/08/2015, he had seen the Mitsubishi lorry parked at the petrol station and later at 11:00pm, he saw it parked at a different station. That the approximate value of the maize was Kshs.232,200/=.
12. On cross examination, he stated that nobody assisted him with investigations and he recorded his statement by himself on 03/08/2015. That he recorded a case of theft in the Occurrence Book. He said PW1 complained that his maize had gotten lost while the Appellant complained that maize was stolen from his petrol station.
13. He confirmed that in the investigation diary, PW1 did not say that it was the Appellant who stole his maize. The maize was not recovered and he agreed that a black cap is worn by so many people in Kenya. He stated that he connected the Appellant to the offence because his lorry was at the petrol station and the maize had been parked at the said petrol station. He added that the Appellant agreed to pay PW1. On re-examination, he said that it was PW1 who told him that the cap belonged to Joseph.
14. **PW3 Dorcas Syombua**, testified that in July 2015 she was working at bypass bar & restaurant. On 29/07/2015, she was at the bar doing some washing when two customers arrived to buy drinks when she saw a cap fall off from Geoffrey's head. After one week, PW1 and Geoffrey took the cap. She denied washing the cap. At this juncture, she was declared a hostile witness and on cross examination by the prosecutor, she said that Geoffrey, Joseph and the Appellant were maize sellers and known to her.
15. She stated that the cap got lost at bypass restaurant and she was told to wash it but did not. On 29/07/2015 at 8.00am, Joseph went to the bar while she was still cleaning and dropped the cap and washed it. Later on, Joseph arrived with another guy and took the cap. The said Joseph used to sleep in the lodges within the premises which she used to work. That they dropped a black and striped cap which also had marks.
16. When placed on his defence the Appellant elected to give a sworn statement. He testified as DW1 saying that he is a business person with filling stations and also sells cereals. That Joseph was a petrol attendant at Ngoluni filling station and Geoffrey was his lorry driver. That he got to know PW1 through Geoffrey. On 2<sup>nd</sup> August, 2015 PW1 wanted transport for maize and he gave his lorry to Geoffrey who went with PW1 to get the maize and they collected 40 bags from farmers. There were 46 other bags of maize in his only store at Mbumbuni.
17. It was his testimony that PW1 collected all the maize and took it to Ngoluni where it was put down by two of his workers. He left that place at 2:00 pm and went to his Kalawa filling station with Geoffrey who had a striped shirt with no cap. He said the cap which was produced as an exhibit had been worn by the complainant on 03/08/2015.
18. He woke up at 9.00am and went to Mbumbuni market to meet PW1 and together, they proceeded to Ngoluni and found the maize missing. They reported the matter at Ngoluni police post. He denied there being a watchman at Ngoluni and also sitting down with the complainant for purposes of compensating him. He further denied having a storage facility at Ngoluni.
19. On cross examination, he said he sells cereals and has 4 petrol stations which have spaces. He admitted knowing PW1 and doing business

with him. He also admitted having met with the prosecutor at Jambo paradise hotel for purposes of reconciliation under Alternative Dispute Resolution. He had however, declined the reconciliation process, but was willing to take the court to the petrol station to establish whether there was a storage facility.

### **The Appellant's submissions**

20. The Appellant summarized the grounds of appeal as follows;

a) Whether the circumstantial evidence relied on by the trial court was irrefutable so as to prove the prosecution's case beyond reasonable doubt to warrant a conviction.

b) Whether the trial court was justified in meting out the sentence it did.

21. With regard to circumstantial evidence, the Appellant has cited **Abanga alias Onyango –vs- R Criminal Case No. 32 of 1990 (UR)** where the Court of Appeal stated the principles of testing circumstantial evidence to be as follows:

a) *The circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established.*

b) *Those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused.*

c) *The circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human possibility, the crime was committed by the accused and none else.*

22. The Appellant has also cited **Sawe –vs- R 2003 eKLR** where the Court of Appeal followed the above principles and added that "suspicion however strong cannot provide the basis of inferring guilt which must be proved beyond reasonable doubt". The Appellant contends that the prosecution did not place him at the scene of crime during the pendency of the alleged offence and that PW2's evidence was not that he saw the lorry at the place where the maize had been stored. He submits that it was not enough to base the charges on the fact that the lorry was at the petrol station as it is normal for a lorry to be parked at its owners place.

23. The Appellant also submits that the trial magistrate used suspicion and conjecture to convict him as the only reason advanced was that he was the owner of the petrol station and was at the place of offloading the maize. To buttress this point he relies on **Mwangi & Anor –vs- R (2004) 2 KLR 32** where the Court of Appeal stated;

*"In a case depending on circumstantial evidence, each link in the chain must be closely and separately examined to determine its strength before the whole chain can be put together and a conclusion drawn that the chain of evidence as proved is incapable of explanation on any other reasonable hypotheses except the hypotheses that the accused is guilty of the charge."*

24. On whether the sentence was justified, the Appellant submits in the negative based on his contention that the case was not proved beyond reasonable doubt.

25. The Respondent through Mrs. Owenga submitted that it opposed the appeal and relied on the evidence on record.

### **Analysis and Determination**

26. This is a first appeal and it is now settled that the duty of a first appellate court is to scrutinize the evidence on record, make its own findings and draw its own conclusions giving due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses. See **Okeno –v- R 1972 E.A 32; Simiyu & Anor –vs- R (2005)1 KLR 192.**

27. Having considered the grounds of appeal, entire record and rival submissions, it is my considered view that the following issues arise for determination;

a) *Whether the offence was proved beyond reasonable doubt against the Appellant.*

b) *Whether section 175 of the Criminal Procedure Code (CPC) was properly invoked.*

### **Issue no. (a) Whether the offence of stealing was proved beyond reasonable doubt.**

28. In finding that the offence of stealing had been proved, the learned trial magistrate expressed herself as follows;

*"In as much as all the accused persons in their defence denied they never stole the 86 bags of maize, they know who is the person/persons behind the theft. I say so because the maize got lost at the premises of the 1<sup>st</sup> accused where the 2<sup>nd</sup> accused person was the petrol attendant and the 3<sup>rd</sup> accused person drove the vehicle which transported the maize. All the three accused persons witnessed when the maize was being offloaded at Kuwait petrol station. Having said that, I found that the prosecution proved their case against all the accused persons in respect to the first count." (underlining mine)*

29. The **black's law dictionary 8<sup>th</sup> edition** defines stealing as; "To take (personal property) illegally with the intent to keep it unlawfully".

30. On the other hand, section 268 of the Penal Code defines stealing as;

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

31. This case was purely hinged on circumstantial evidence and the learned trial magistrate appreciated as much. It is not in dispute that the Appellant and Pw1 had engaged in the maize business prior to the incident. It is also clear from the evidence that the maize in issue was offloaded at the Appellant’s petrol station with the consent of Pw1.

32. I however fail to understand how witnessing the offloading could convert anyone into a thief. From the underlined part of the judgment extract (*supra*), even the learned trial magistrate does not seem sure about the person/persons behind the theft yet she proceeded to convict.

33. The investigating officer (PW2) said that he connected the Appellant to the offence because the lorry was at his petrol station. From the evidence, both the lorry and petrol station belonged to the Appellant and I am inclined to agree with the Appellant that there was nothing peculiar about the lorry being parked at the owner’s premises.

34. Further, it was PW2’s evidence that the report about the theft was made by both PW1 and the Appellant. In my view, the Appellant’s conduct of accompanying PW1 to report is inconsistent with guilt.

35. Having re-evaluated the evidence I find that the circumstances taken cumulatively did not form a chain so complete that the only conclusion was that the Appellant had stolen the maize. See **Sawe –v- R (supra)** It was the duty of the Respondent to avail evidence connecting the Appellant with the theft. What was presented was mere suspicion which however strong can never form the basis for a conviction.

**Issue no. (b) whether section 175 of the Criminal Procedure Code (CPC) was properly invoked.**

36. Despite raising it as a ground of appeal, the Appellant did not submit on it and the interpretation is that the ground was abandoned. I however find it worthy of mention in the sense that contrary to the Appellant’s view, section 175 of the CPC empowers Courts to delve into the realm of civil liability with conditions and exemptions. Section 175(2) specifically provides;

*“(2) A court which*

*a) convicts a person of an offence or, on appeal, revision or otherwise, confirms the conviction; and*

*b) Finds on the facts proven in the case, that the convicted person has, by virtue of the act constituting the offence, a civil liability to the complainant or another person (in either case referred to as the “injured party”) may order the convicted person to pay to the injured party such sum as it considers could justly be recovered as damages in civil proceedings brought by the injured party against the convicted person in respect of the civil liability concerned.”*

37. In the instant case however, the offence of stealing was hardly proved against the Appellant and even if it had been, strict proof of the value of the maize would be required in line with section 175 CPC (3)(ii) which provides;

*“(3) No order shall be made under sub-section (2)*

*(a) so as to require payment of an amount that exceeds the amount that the Court making the order is authorized by law to award or confirm as damages in civil proceedings; or*

*(b) In any case where, by reason of;*

*(i).....*

*(ii) the insufficiency of evidence before it in relation to such damages or their quantum.*

*(iii).....*

*(iv).....”*

38. Further reading of the record shows that when the Kshs.232,000/= was not paid the learned trial Magistrate decided to sentence the Appellant to serve three (3) years imprisonment. It leaves one wondering whether payment of Kshs.232,000/= was a sentence or an order for compensation. An order for compensation is not a sentence but an additional penalty.

39. I find the appeal to be merited and I allow it, quash the conviction and set aside the sentence, and/or orders, in respect to the Appellant.

40. He is to be set free forthwith unless lawfully held under a separate warrant.

Orders accordingly.

**Delivered, signed & dated this 10<sup>th</sup> day of December 2019, in open court at Makueni.**

**Hon. H. I. Ong'udi**

**Judge**