REPUBLIC OF KENYA

IN THE HIGH OF KENYA

AT NYERI

CRIMINAL APPEAL NO. 290 OF 2007

CONSOLIDATED WITH CR. APPEAL No. 294 of 2007

MESHACK MUGO MUCHIRI

FRANCIS KARANI NJOGU.....APPELLANTS

VERSUS

REPUBLIC..... RESPONDENT

(Appeal from the conviction and sentence of the Resident

Magistrate's Court at Karatina (Hon.B.Kimemia) delivered

on the 13th July, 2007 in Criminal Case No.1477 of 2004)

JUDGMENT

1. **Meshack Mugo Muchiri and Francis Karani Njogu** the appellants herein were charged with the offence of stealing by servant contrary to **Section 281** of the **Penal Code.** The particulars of the offence are that between the nights of 9th and 10th day of September, 2004 at Ndima Tea Factory in Nyeri County they jointly stole two alternators, two starter motors and two chloride exide batteries from motor vehicles reg.no. KAQ 285U and KAQ 286U all valued at Kshs.421,721/- the property of Ndima Tea Factory.

2. The alternate charge was that of Failing to Prevent a Felony contrary to Section 392 of the Penal Code; the particulars of the offence are that on the same date and at the same factory the appellants being watchmen guarding the motor vehicle parking yard of the said factory failed to use all reasonable means to prevent the commission of a felony namely stealing.

3. The prosecution called a total of six (6) witnesses to prove its case and after the trial the appellants were acquitted on the main charge but were found guilty on the alternate charge; the trial court proceeded to convict them and the sentence meted out was eighteen (18) months imprisonment.

4. Being aggrieved by the conviction and sentence, the Appellants filed their respective Petitions of Appeal; the grounds of appeal filed in both appeals are similar and are summarized as follows;

(i) The prosecution failed to prove its case to the desired threshold;

(ii) The prosecution failed to call crucial witnesses;

(iii) The trial court rejected the appellants defences without giving good reasons.

(iv) The sentences were manifestly harsh and excessive;

5. At the hearing of the appeal the appellants were unrepresented and relied on their written submissions; whereas Mrs Gicheha was the Prosecuting Counsel for the State and she made oral submissions.

APPELLANTS' SUBMISSIONS

6. The appellants submit that they were not on the same shift but on different shifts; the 1st appellant was on duty on 9th September, 2004 from 10.00pm to 6.00am; the 2nd appellant worked from 2.00pm of 9th September, 2004 till 10.00pm.

7. The practice during the time of handing over which was contained in the evidence of **PW4** was that incoming watchman when handing over must first confirm that everything was in order; if any anomaly was found the watchman would not sign the Watchman Book until the anomaly was reported;

8. The 1st appellant properly handed over on the 10/09/2004 to **PW5** who went around the factory and no anomaly was detected; **PW2** the head mechanic reported the theft between 11.30am to midday to **PW5** ; the theft was detected after the appellants had both left the factory and other people had come to work at the factory;

9. **PW6** during re-examination confirmed that he could not tell the time when the offence took place; but he nevertheless charged the two (2) appellants because the offence was committed under cover of darkness; he gave no explanation as why **PW5** was made a prosecution witness yet he was the one on duty at 6.00am when the felony was established;

10. That the prosecution failed to prove its case beyond reasonable doubt and the trial court delivered a contradictory judgment and erred in convicting them; both appellants prayed for justice;

RESPONDENT'S SUBMISSIONS

11. In response counsel started by stating that the appellants were convicted on the alternate count and sentenced to eighteen (18) months imprisonment and they had since served and completed their terms;

12. The appellants were employed as watchmen by KTDA at Ndima Tea Factory; on the material date that is 9/09/2004 the 2nd appellant Francis Karani reported for duty at 2.00pm with his shift ending at 10.00pm; that his evidence was that when he took over he inspected the property and found no anomalies;

13. The 1st appellant took over from the 2nd appellant at 10.00pm and left at 6.00am; his evidence was that he inspected the compound and the motor vehicles before taking over;

14. **PW2** a mechanic was informed by one of the drivers who had noticed something dangling from the motor vehicle; he checked all the motor vehicles in the compound and discovered missing parts from two motor vehicles; his evidence was that on the previous day he left work at 5.10pm and that all the vehicles were intact when he left duty; that the theft occurred between 6.00am and 6.00pm and the two appellants were on duty between those hours; the stolen parts were worth Kshs.450,000/-; and he reported this to the management;

15. On further inspection a hole in the fence was discovered; the hole was 50 metres from where the watchmen sat; the factory rested on half an acre and was not too vast to notice any movement and activities taking place; that every shift was manned by one watchman for eight (8) hours each;

16. That the appellants could not say that they did not notice the hole in the fence and that it was their duty to report and to protect and guard the factory; and to also prevent theft of the factory's property which they failed to do;

17. Their failure to account shows that they slept on the job and are therefore culpable for the theft that occurred; they failed in the duty they were employed to do and exposed the factory;

18. Counsel prayed that the appeal be dismissed.

ISSUES FOR DETERMINATION;

19. After reading the appellant written submissions and hearing the Respondents oral submissions this court has framed the following issue for determination;

(i) Whether the prosecution proved its case to the desired threshold;

ANALYSIS

20. This court being the first appellate court it is enjoined to consider the entire evidence on record, re-evaluate and re-assess it and arrive at an independent conclusion bearing in mind at all times that this court did not have the opportunity or benefit of hearing and seeing the witnesses as they testified. Refer to the case of **Okeno vs Republic (1972) EA 32.**

Whether the prosecution proved its case to the desired threshold;

21. This court proceeds to re-evaluate the evidence adduced by the prosecution witnesses; it is the prosecution's case that the theft of the motor vehicle parts occurred between 6.00am and 6.00pm and that the two appellants are guilty as they were the ones on duty between those hours; in that the 1st appellant was on duty on 9th September, 2004 from 10.00pm to 6.00am; the 2nd appellant worked from 2.00pm of 9th September, 2004 till 10.00pm when he handed over to the 1st appellant;

22. The discovery of the missing parts was made by **PW2** the head mechanic and this was at about 9.30am and he immediately reported this to **PW5** who in turn reported it to **PW1** the acting Factory manager;

23. After carrying out investigations **PW6** the investigating officer arrived at a decision to arrest and charge the appellant; his reason being that the incident occurred under cover of darkness and it also happened during their watch; it is interesting to note that during re-examination he confirmed that he could not tell the time when the offence took place; but he nevertheless charged the two (2) appellants;

24. It is this courts considered view that the appellants were arrested merely on suspicion due to the fact that they were on duty that night; there is no evidence adduced by the Investigating Officer **(PW6)** that establishes that the theft had actually taken place on the nights and time that they were on duty;

25. The evidence of **PW2** is that the discovery of the missing parts was made at about 9.30am; the 2nd appellant worked from 2.00pm till 10.00pm when he handed over to the 1st appellant; the 1st appellant was on duty from 10.00pm to 6.00am; the mere evidence of the presence of a hole in the fence is inconclusive because there was no evidence of any investigations or interrogation of other members of staff carried out by **PW6**; particularly **PW5** and the other members of staff who had already reported to work from 6.00am to the time of discovery of the hole and the theft; there are sufficient doubts raised particularly on time and access;

26. It is apparent from his evidence that **PW6** did not do any ground work to eliminate the possibility that the theft could have been carried out at any other time other than that night; it could have occurred that very morning after the 1st appellant had left; the trial court in its judgment acknowledges the fact that no one saw or witnessed the appellants stealing and none of the six (6) prosecution witnesses connected the appellants to the commission of the offence; the appellants were also not found in possession of any of the stolen items;

27. The above notwithstanding the trial court acquitted the appellants on Count 1 but proceeded to draw an inference on the alternate count and proceeded to convict them; and it stated as follows in its judgment;

> ***" It is clear that PW.V took over from Accused 1 at 6.15am who had been on duty on that night with Accused 2. The both accuseds stated that they were on duty and Accused 2 reported at work at 9.55pm taking over from Accused 2 and they went round to check and worked till 6.00am when PWV took over at 6am and the clerk arrived at 6.52am. I therefore draw an inference that the theft must have occurred between 6pm and 6am due to the nature offence, which would require time and PW V was alone from 6.15am to 6.52am and wouldn't have had sufficient time to carry it out."***

28. This courts considered view is that that the trial court erred by drawing an inference and speculating which cannot be a basis for conviction; the evidence of **PW6** was that he that he could not tell the time when the offence took place; he also gave no explanation as why **PW5** was not charged yet he was the one on duty from 6.00am to the time when the theft was discovered;

29. Further the evidence on record is that before the 1st appellant left duty both he and **PW5** did their inspection and found that everything was in order; the trial court goes ahead to explain why the day watchman could not have been involved and the reason given is because he was operating singularly and was unable to cope; yet the appellants were also on duty singularly and operating in unfavorable conditions and are accused of failing to carry out their duties without due diligence expected of them as watchmen;

30. This court opines that from the evidence adduced there is doubt raised as to when the incident of theft occurred and there was a likelihood that it may have occurred during **PW5'**s watch; and it is trite law that where there is any doubt raised then the accused person must be given the benefit of the doubt;

31. This court is satisfied that the total evidence offered by the prosecution witnesses was not enough to sustain the conviction of the appellants; the case was not properly investigated; this court finds that the prosecution failed to prove its case to the desired threshold;

32. This ground of appeal is found to have merit and is hereby allowed.

FINDINGS & DETERMINATION

33. In the light of the forgoing this court makes the following finding;

(i) The prosecution failed to prove its case to the desired threshold;

(ii) The appeals are found to be meritorious and are hereby allowed.

(iii) The convictions are hereby both quashed and are both acquitted on the charge of failing to prevent the commission of a felony; both sentences are hereby set aside; both appellants be set at liberty unless otherwise lawfully held.

Orders accordingly.

Dated, Signed and Delivered at Nyeri this 5th day of April, 2018.

HON.A.MSHILA

JUDGE