REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT VOI

CRIMINAL APPEAL NO 17 OF 2015

PETER MWOKI…….…….. APPELLANT

VERSUS

REPUBLIC…… RESPONDENT

(From original conviction and sentence in Criminal Case Number 608 of 2014in the Senior Principal Magistrate's Court at Voi delivered by Hon S.M. Wahome (SPM) on 23rd December 2014)

JUDGMENT

INTRODUCTION

1. The Appellant herein, Peter Mwoki,was jointly charged with Bernard Sila Wambua (hereinafter referred to as "the Appellant's Co-Accused") on two (2) Counts. Count I was for the offence of stealing by servant contrary to Section 281(1) as read with Section 281 of the Penal Code. He was also charge with the alternative Count I of handling stolen property contrary to Section 322(2) of the Penal Code. Count II related to the offence of malicious damage to property contrary to Section 339 (1) of the Penal Code.

2. The Appellant and his Co-Accused were both tried and convicted by Hon S.M. Wahome Senior Principal Magistrate. He sentenced each of them to serve two (2) years' imprisonment for each Count.

COUNT I

"On the diverse dates between the month of June 2013 and 5th June 2014 at Musinga Village in Voi area within Taita Taveta County, jointly with another not before the court, being servants to FLORENCE SYOKAU MAKAA stole from the said FLORENCE SYOKAU MAKAA (see the attached list) which came to you by virtue of your employment. "

ALTERNATIVE COUNT II

"On the 30th day of July 2014 at Kathiani area within Machakos County otherwise than in the course of stealing dishonestly retained six iron sheets, knowing or having reason to believe them to be stolen goods."

COUNT II

"On the diverse dates between the month of April 2014 and 5th June 2014 jointly with

another before court willfully and unlawfully damaged three roomed dwelling house build (sic) **with bricks valued at Ksh. 950,000/= the property of FLORENCE SYOKAU MAKAA."**

3. Being dissatisfied with the said judgment, on 26th January 2014, which ought to have been 26th January 2015, the Appellant filed a Notice of Motion application seeking to be allowed to file an Appeal out of time. The said application was allowed and the Petition of Appeal deemed as having been duly filed and served. The Grounds of Appeal were:-

1. THAT he was too remorseful.

2. THAT he was begging leniency despite the offence.

3. THAT he was a first offender and a layman in law.

4. THAT he prayed for the honourable high court to consider his states (sic) **of health he had ulcers problem which put him in trouble day after the other**(sic)**.**

4. On 6th October 2016, he filed his Written Submissions and Amended Grounds of Appeal. The Amended Grounds of Appeal were as follows:-

1. THAT the learned trial magistrate erred in law and facts by failing to consider that the prosecution witnesses failed to prove its case beyond reasonable doubt c/s 109 and 110 of the Evidence Act.

2. THAT the learned trial magistrate erred in law and facts by failing to adequately consider his defence.

5. On 29th November 2016, he filed his Reply to the State's Written Submissions dated and filed on 9th November 2016. He relied on the following Amended Grounds of Appeal:-

1. THAT the pundit trial magistrate erred both in law and facts by failing to consider that the prosecution witnesses failed to prove their case beyond reasonable doubt as required by the law.

2. THAT the learned trial magistrate erred in law and facts by failing to adequately consider his defence which was enough to create doubt on the prosecution's case (sic)**.**

6. When the matter came up on 19th December 2016, both the Appellant and the State asked this court to deliver its Judgment based on their respective Written Submissions. The Judgment herein is therefore based on the said Written Submissions.

LEGAL ANALYSIS

7. This being a first appeal, this court is mandated to analyse and re-evaluate the evidence afresh in line with the holding in the case of **Odhiambo vs Republic Cr App No 280 of 2004 (2005) 1 KLR** where the Court of Appeal held that:-

"**On a first appeal, the court is mandated to look at the evidence adduced before the trial afresh, re-evaluate and reassess it and reach its own independent conclusion. However, it must warn itself that it did not have the benefit of seeing the witnesses when they testified as the trial court did and therefore cannot tell their demeanour".**

8. As can be seen hereinabove, the Appellant had filed as he filed three (3) sets of Grounds of Appeal. Be that as it may, after perusing the pleadings and the Written Submissions by both the Appellant and State, this court found that the second and third sets of the said Grounds of Appeal more or else raised the same

issues. After consolidating the same, this court concluded that that the only issues that was really before it for determination were:-

a. Whether or not the Charge Sheet was defective?

b. Whether or not the Prosecution had proved its case beyond reasonable doubt?

9. The court therefore dealt with the said issues under the following heads.

I. ADMISSIBILITY OR OTHERWISE OF THE CHARGE SHEET

10. The Appellant argued that the Charge Sheet was inadmissible because it failed to disclose the date and time of the alleged offences. However, the State did not address this court on the said issue.

11. Section 137 (f) of the Criminal Procedure Code Cap 75 (Laws of Kenya) relating to the general rule as to description when framing of charges provides as follows:-

> **"…subject to any other provisions of this section, it shall be sufficient to describe a place, time, thing, matter, act or omission to which it is necessary to refer in a charge or information in ordinary language so as to indicate with reasonable clearness the place, time, thing, matter, act or omission referred to…"**

12. Time is a measurement of duration of when an event occurs. It connotes the past, present and future. In the mind of this court, it includes both the day and the hour. The Charge Sheet was clear that the alleged offences occurred on diverse dates between June 2013 and 5th June 2014. It was therefore not necessary for the exact hour or minute to be indicates as the framing of the Charge Sheet was clear that it was not known when exactly the alleged offences occurred. However, there was clarity of the reasonable duration when the alleged offences occurred. The Appellant's argument that the Charge Sheet was inadmissible was therefore misplaced as the said Charge Sheet indicated.

II. PROOF OF THE PROSECUTION'S CASE

13. Turning to the substantive issues, the Appellant submitted that the law provides that a person who asserts a fact must prove the same. In this regard, he placed reliance on the provisions of Sections 109 and 110 of the Evidence Act Cap 80 (Laws of Kenya), the case of **Muiruri Njoroge vs Republic Cr Appeal No 115 of 1982** and the definition of **"an assertion"** given in the Chambers 21st Century Dictionary Revised Edition in which he stated that an assertion has been defined **"as a strong statement or claim and that would need to be proven by evidence."**

14. He contended that he was not an employee of the Complainant herein, Florence Syokau Makaa(hereinafter referred to as "PW 1") as she did not submit in evidence any agreement stating the terms and conditions of the job and the salary or wages he was being paid for the job.

15. He added that she did not also submit in evidence a Title Deed to prove that she owned the land at Kaloleni or produce photographic evidence to show that her house had been damaged as she had alleged, plans from the Ministry of Planning and Housing or the estimate from the engineer to prove her claims.It was his contention that the Learned Trial Magistrate relied on mere allegations with no proof or clear line of reasoning and relied on the case of **Muiruri Njoroge vs Republic** (Supra) in this regard.

16. He further stated that if PW 1's cousin one Vincent Wambua went missing, her allegations could not be proven. It was his contention that PW 1's cousin may very well have been the culprit and he was causing him and his Co-Accused to carry his cross and he ought to have been called to speak the truth.

17. He questioned why PW 1 reported the incident a month after she arrived from the United States of America (USA) on 5th June 2014 and even having gone to Mazeras with him and termed the delay as extra ordinary and averred that it was an afterthought sufficient to have given her time to fabricate the

case against him.

18. He argued that PW 1's evidence and that of Edgar Nyota (hereinafter referred to as "PW 4") and Haron Zuwa (hereinafter referred to as "PW 5") was not sufficient to have sustained the conviction against him. He said that this was because PW 1 was not present when her property was allegedly stolen or house demolished and that both PW 4 and PW 5 never saw him demolish her house. He contended that although PW 4 was a Village elder, he could not have known all the people who had built houses or rented houses in the area as there were so many structures in Voi township.

19. It was his further argument that the Learned Trial Magistrate partially evaluated the evidence in favour of the Prosecution, which prejudiced him. He referred this court to the case of **Okeno vs Republic (1972) E.A 32** where the court therein dealt with the issue of such evaluation.

20. He added that the said Learned Trial Magistrate ought to have weighed both sides of the case as was held in the case of **Oketh Olale vs Republic (1965) E.A.C.A. 555 on page 557** that :-

> **"…a conviction should be based on the weight of the evidence adduced and it is dangerous and unadvisable for a trial judge to use a theory of his/her own canvassed evidence."**

21. It was his submission that the Prosecution did not prove its case beyond reasonable court as was held in the cases of **DPP vs Woolmington (1935 UKJ L 1** (sic) and **Festus Mukati Murwa vs Republic [2013] eKLR** and that he ought not to prove his innocence as was held in the case of **Cr Appeal No 1 of 1994 Stephen Mungai Macharia** (unreported). He therefore urged this court to allow his Appeal as the Learned Trial Magistrate had misapprehended himself on the evidence that was adduced before him.

22. He relied on the case of **Chemagong vs Republic (1984) KLR** in which it was held that **"it was an established principle that an appeal court like the present one will not normally interfere with the findings of fact by the trial court, unless it is based on no other evidence or an** (sic) **misapprehension of the evidence or the magistrate is shown demonstratably** (sic) **to have acted on wrong principles in reaching the findings."**

23. On its part, the State submitted that although the Appellant had contended that he was not PW 1's employee, George Mayaka Nyabati (hereinafter referred to as "PW 3") and PW 4 had confirmed that the Appellant was one of the people who were working in PW 1's farm. It added that PW 1 used to reside in the USA but owned a house next to Ngutuni Lodge and had employed the Appellant and other workers to oversee construction of her house while she was abroad.

24. It questioned why the Appellant had searched for a house for PW 1 if he was not her worker as he had contended and he was not related to her. It also wondered why he had introduced PW 1 to Stephen Mwakale Ali (hereinafter referred to as "PW 2") as his boss.

25. It argued that the fact that PW 1 did not produce any receipts to confirm ownership of the items said to have been stolen did not mean that the Appellant did not steal from her and that in any event, some of her items were recovered at his house while others were found at his Co-Accused's house as was confirmed by PW 5.

26. It added that the Appellant and his Co-Accused together with other unknown men rented a house from PW 2 and that on 3rd May 2014 at around 4.00pm, they brought a canter loaded with household goods and moved out of the said house after five (5) days. It pointed out that the Appellant went back to PW 2 and informed him that he wanted to rent a house for his boss.

27. It also pointed out that PW 3 testified that on the same 3rd May 2014, the Appellant and his Co-Accused approached him and offered to sell to him sixty three (63) posts, chain link and barbed wire which they told him PW 1 wanted to sell. In addition, it stated that PW 4 had testified having seen the Appellant remove sheets from PW 1's house and together with his Co-Accused,pack numerous items in a pickup in the same month of May.

28. It also stated that PW 6 recovered some stolen items belonging to the PW 1 from the Appellant's home at Ukambani where he had informed PW 2 he was moving to. It was its submission that the fact that the Appellant moved into PW 2's house in the month of May 2014 when PW 1's goods were stolen was not just a mere coincidence.

29. In respect of Count II, the State contended that PW 3 and PW 5 had told the Trial Court that in the month of May, he witnessed the Appellant demolishing PW 1's house and that when they spoke to the Appellant, the Appellant informed them that they had been instructed by PW 1 to demolish her house.

30. It was its argument that although PW 1 did not adduce in evidence documents to prove that she was the owner of the house that had been demolished, it was clear from PW 3's, PW 4's and PW 5's evidence that PW 1 was the owner of the said house and moreover, PW 4 was a Village elder who knew members of his community.

31. It was its submission that the Prosecution had proven its case beyond reasonable doubt and that the Learned Trial Magistrate having properly evaluated the evidence and the defence that was adduced by the Appellant herein, the Appellant's Appeal ought to be dismissed.

32. It urged this court not to interfere with the sentence that was meted upon the Appellant because the maximum sentence for stealing by servant was seven (7) years while the offence of malicious damage had a maximum sentence of five (5) years imprisonment. In added that the Learned Trial Magistrate had had due regard to the Appellant's mitigation that he was a first offender and consequently, a sentence of imprisonment for two (2) years for each Count was appropriate.

33. This court carefully combed the evidence that was adduced before the Trial Court with a view to determining which side the truth of this matter lay. It was the Appellant's word against that of PW 1 as to really what transpired in this matter. According to PW 1, she relocated to the USA in 1996 from where sent the Appellant's Co-Accused money for the construction of a house on land she had purchased near Ngutuni Lodge in 2009. She left the Appellant, his Co-Accused and Vincent Wambua the duty of looking after her said property.

34. When she returned home from the USA and visited the farm on 5th June 2014, she found that it was all bush and there was no house, no fence or gate and her property that included beds, clothes, wardrobe, mattresses, blankets, shoes, wheelbarrows amongst many other worth over Kshs 7,000,000/=, was missing.

35. She stated that they recovered four (4) iron sheets that had been removed unlawfully from her house from the Appellant's house, one (1) teddy bear, one (1) bed and one (1) mattress from his Co-Accused's house and a small bed, four (4) plastic chairs, one (1) mattress, chicken wire, one solar battery and one (1) solar converter from Vincent Wambua's house who went into hiding. As at the time of the trial, his whereabouts were still unknown. The Appellant then took them to PW 3's house where they recovered the chain link and barbed wire.

36. PW 2 confirmed having seen several items which included mattresses, solar battery, executive chair amongst other items being brought into the house the Appellant, his Co-Accused and another person had rented and then pack the same items in a pickup.They informed him that they were taking the items to Ukambani, a fact he reiterated during his Cross-examination. He stated that the Appellant was the one who came and requested for a house for his boss who was coming from abroad. During Cross-examination by the Appellant herein, PW 2 stated that the Appellant had told him that he was taking the items to Ukambani.

37. In his Examination-in-Chief, PW 3 stated that the Appellant told him that he was relocating to Mtwapa and that he paidhis Co-Accused a sum of Kshs 6,000/= for a chain link, sixty three (63) posts and barbed wire that theysold to him.

38. In his Examination-in-chef, PW 4 testified that around May 2014, he heard noises that sounded as if

people were removing iron sheets in the neighbouring compound and on reaching there he found the Appellant, his Co-Accused and one Anthony putting the iron sheets in a Pick Up. He said that he saw speakers, beds, gates, timber among other items and that the Appellant told him that PW 1 had instructed them to remove the items. In his Cross-examination, PW 4 was categorical that the Appellant was PW 1's employee as he had known him for many years.

39. PW 5 also corroborated PW 3's evidence that the Appellant had told him that they were relocating to Mtwapa and that they had been instructed by PW 1 to demolish the house, which he said they had done several times. He said that he stored a few of PW 1's items in his house for them and when the police came, he gave them the doors and pieces of iron sheets. In his Cross-examination, he confirmed having been paid by PW 3 to remove the posts, barbed wire and chain link.

40. No 73423 PC Joshua Koffa (hereinafter referred to as "PW 6") was the Investigating Officer. He tendered in evidence the recovered items which PW 1 identified as belonging to her. He corroborated PW 1's evidence regarding what was recovered from the Appellant's and his Co-Accused's house as well as items that were recovered from PW 3's and PW 4's houses. In his Cross-examination, he stated that they recovered six(6) iron sheets from the Appellant's house.

41. In his sworn evidence, the Appellant confirmed that he was PW 1's employee and that his Co-Accused told him that she had told them to move to Kaloleni. On 25th July 2014, he had an argument with her and he left for his home at Machakos. He stated that police came and arrested him on 29th July 2014 on allegations that he had stolen her iron sheets.

42. This court carefully combed through the evidence that was adduced and established that it was undisputed that the Appellant and his Co-Accused were PW 1's employees, that items were removed from her property and that she was the owner of the subject parcel of land.

43. Although this court considered the Appellant's submissions that PW 1 did not submit in evidence documents to prove her ownership of the subject property or that her house was demolished or that he was her employee, it found the same to have been irrelevant and immaterial in the circumstances of the case herein. This is because the Appellant did in fact admit in his sworn evidence that he worked for PW 1 and that fence materials to wit chain link, poles and barbed wires belonging to PW 1 were recovered at Machakos.

44. It was not therefore necessary for PW 1 to have adduced the Title Deed in evidence to prove that the land was hers and that there was a house at the said land because items such as mattresses, beds, kitchenware amongst other items that the Appellant's Co-Accused testified that PW 1 told him to remove from her house could not have been stored in an open place. It is expected that the said items could only have been inside a structure in the PW 1's property.

45. In addition, although there was no photographic evidence to confirm that indeed a house once stood in PW 1's land, this court was persuaded to accept that a house existed because her evidence that her house was demolished was corroborated by PW 3, PW 4 and PW 5 who all alluded to the Appellant and his Co-Accused having demolished her house. It would not have been expected that a teddy bear, beds, mattresses or plastic chairs that were recovered from his Co-Accused and PW 1's cousin could be lying around in a compound without them being in a house.

46. After carefully analysing the evidence that was adduced in the case herein, in **HCCRA No 12 of 2015 Benson Sila Wambua vs Republic** which was being heard alongside this case, this court had found that the Appellant therein demolished PW 1's house and removed her items from her property without her instructions.

47. That notwithstanding, in his own right, the Appellant herein could not get off the hook for the reason that he interacted closely with PW 2 when renting the house for PW 1 and he was positively identified by PW 2 as having been one of the people who moved several household goods into the rented house and told PW 5 that he was relocating to Mtwapa at PW 1's instructions.

48. However, in the event this court was found to have arrived at a wrong conclusion regarding the existence of house in PW 1's land, it was nonetheless hesitant to accept the Appellant's version of what really transpired because he gave PW 2, PW 3, PW 4 and PW 5 contradictory and/or inconsistent explanations on why they were demolishing PW 1's house, why they were removing PW 1's items from her property, why they moved into a rental house and why they moved out of that rental house to a different rental house all within the same month and the same month that PW 1's items were removed from her property.

49. In addition, the fact that PW 3 confirmed having paid a sum of Kshs 6,000/= for sixty three (63) posts, chain link and barbed wire which were found in his possession and three (3) wooden doors were recovered from PW 4 which PW 1 confirmed were hers and removed without her instructions was evidence of malicious damage to her property.In the absence of any evidence to the contrary, this court was inclined to accept PW 1's evidence that the Appellant maliciously damaged her property.

50. Turning to the offence of stealing by servant, this court was satisfied that the Appellant's guilt was proven by the recovery of the iron sheets from his house at Machakos. As several other personal items were recovered from the houses of his Co-Accused, Vincent Wambua, PW 3 and PW 4 and PW 5 had in fact witnessed them removing the iron sheets from PW 1's house, production of a receipt to prove ownership of the said iron sheets was unnecessary as his conduct was reflective of his guilt of having committed the alleged offence.The corroboration of PW 1's evidence by PW 2, PW 3, PW 4 and PW 5 satisfied this court that the Appellant did steal her property in his capacity as her servant.

51. The fact that he was arrested on 29thJuly 2014 did not necessarily mean that PW 1 reported the matter a month after the incident. Indeed, 29thJuly 2014 was the day he was arrested and not the date for reporting of the incident as he had contended. His submission regarding the delay by a month was irrelevant for the reason that PW 2, PW 3 and PW 4 saw him with the items that PW 1 identified as hers.

52. Having considered the Written Submissions by the parties and the case law that they each relied upon, this court came to the firm conclusion that the Prosecution proved its case beyond reasonable doubt. The Learned Trial Magistrate considered the Appellant'sdefence in which he admitted during his Cross-examination that the chain link, poles and barbed wires belonged to PW 1.

53. While this court could not ascertain the veracity of his claim that his Co-Accused informed him that PW 1 had told him that they could give her property to neighbours or burn them, it was certain that he took her property without permission and this action fell within the definition of "stealing by servant."

54. The fact that some of PW 1's property was also recovered from Vincent Wambua's house after he went missing persuaded this court to believe that that recovery was closely connected to the recovery of PW 1's property in the Appellant's house leading this court to make an inference that he was guilty of the offence of stealing by servant.

55. In the premises foregoing, all the Grounds of Appeal were not successful and the same are hereby dismissed.

I. SENTENCING

56. Section 268(1) of the Penal Code Cap 63(Laws of Kenya) provides as follows:-"**A person who fraudulently and without claim of right takes anything capable of being stolen, or 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."**

57. Section 281 of the Penal Act stipulates as follows:-

"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."

58. The import of the penalty is that a Trial Court cannot sentence a person convicted to the offence of stealing by servant to imprisonment to not more than seven (7) years. The sentence of two (2) years was therefore proper and in accordance with the law.

59. In respect of the offence of malicious damage, Section 339(1) of the Penal Code provides as follows:-

"Any person who wilfully and unlawfully destroys or damages any property is guilty of an offence, which, unless otherwise stated, is a misdemeanour, and is liable, if no other punishment is provided, to imprisonment for five years."

60. Before the Learned Trial Magistrate read out the sentence herein, the Appellant said the following in mitigation:-

"I pray for leniency. I have a family that depends on me. I have only one parent."

61. The Learned Trial Magistrate then recorded the following:-

"I have considered the mitigation by the accused. In Count I, each accused is sentenced to two (2) years imprisonment. In Count II, each accused is sentenced to two (2) years imprisonment. Right of appeal 14 days (sic) **explained."**

62. It was the considered opinion of this court that the Learned Trial Magistrate exercised his discretion judiciously when he sentenced the Appellant and his Co-Accused to two (2) years for each Count they had been charged with.

63. This court saw no reason to interfere with the decision that was arrived at by the Learned Trial Magistrate. The case of **Chemagong vs Republic**(Supra) that the Appellant had relied upon in support of his case was not of assistance to him.

DISPOSITION

64. Accordingly, the upshot of this court's judgment, therefore, is that the Appellant's Petition of Appeal filed on 26th January 2015 but erroneously stamped as 26th January 2014was not merited and the same is hereby dismissed. The sentence that was meted upon the Appellant by the Learned Trial Magistrate is hereby affirmed.

65. However, for the avoidance of doubt, the two (2) sentences are to run consecutively as the two (2) offences occurred on diverse dates between June 2013 and 5th June 2014.

66. It is so ordered.

DATED and **DELIVERED** at **VOI** this **23RD**day of**FEBRUARY**2017

J. KAMAU

JUDGE

In the presence of:-

Peter Mwoki……Appellant

Miss Anyumbafor State

Josephat Mavu– Court Clerk