REPUBLIC OF KENYA

IN THE HICH COURT AT ELDORET

CRIMINAL APPEAL NO. 104B OF 2016

AGGREY NGURET…….. APPELLANT

VERSUS

REPUBLIC…….....RESPONDENT

(Being an Appeal from the original conviction and sentence by Honourable KESSE M. CHERONOH Senior Resident Magistrate, dated 6th September, 2016, in Kapsabet Principal Magistrate's Court Criminal Case No. 3127 of 2013)

JUDGEMENT

1. The appellant was tried and convicted in two counts. In the first count, he was convicted of the offence of stealing contrary to *Section 268(1)* as read with *Section 275* of the *Penal Code.* He was sentenced to two years imprisonment.

2. In count two, he was convicted of the offence of conspiracy to effect an unlawful purpose contrary to *Section 395 (f)* of the *Penal Code*. He was sentenced to 6 months imprisonment. Both sentences were ordered to run concurrently.

3. The particulars supporting the first count were that on 25th October, 2013 at Kamasai trading centre in Nandi County, jointly with others not before the court, the appellant stole 86 iron sheets valued at Ksh. 97,470.50, the property of *Butali Sugar Mills Ltd.*

4. In the second count, it was alleged that on diverse dates between 1st August, 2013 and 25th October, 2013 at Kamasai trading centre in Nandi County, the appellant jointly with others not before the court conspired to steal.

5. The appellant was aggrieved by his conviction and sentence hence this appeal. His petition of appeal dated 15th September, 2016 encompassed eleven grounds of appeal which can be condensed into three main grounds as follows;

> (i) That the learned trial magistrate erred in law in convicting the appellant on evidence which did not prove the charges preferred against him beyond any reasonable doubt.
>
> (ii) That the trial magistrate erred in failing to give due consideration to the appellant's defence.
>
> (iii) That the trial magistrate erred in imposing a custodial sentence on the appellant.

6. At the hearing, the appellant was represented by learned counsel *Mr. Sagasi* while learned prosecuting

counsel *Ms. Kigegi* appeared for the state.

In his submissions, *Mr. Sagasi* introduced a new complaint which was not included in the petition of appeal. He submitted that the trial court failed to inform the appellant about his right to recall witnesses who had testified before the charge sheet was substituted. I must state at the outset that under the provisions of *Section 350 (2)* of the *Criminal Procedure Code*, an appellant is not permitted at the hearing of an appeal to rely on grounds other than those included in the petition of appeal.

7. That said, *Mr. Sagasi* further submitted that the appellant was not positively identified as being one of the persons who were involved in the theft of the iron sheets as PW2 was the only witness who claimed to have identified him in circumstances that were not conducive to a reliable and positive identification of the suspects. In support of this proposition, he relied on the authorities of ***Lesarau V Republic 1988 KLR 783*** and ***Mwangi & another V Republic 188 KLR 803.*** Counsel urged me to find that the evidence adduced by the prosecution did not support the offences charged in the two counts and allow the appeal.

8. The appeal is contested by the state. *Ms. Kigegi* submitted that the prosecution adduced sufficient and credible evidence which proved all elements of the two offences beyond any reasonable doubt. She further submitted that the sentences imposed on the appellant were lawful and urged the court to dismiss the appeal for lack of merit.

9. This is a first appeal to the High Court. I am aware of my duty as the first appellate court to revisit and re-evaluate all the evidence presented before the trial court to arrive at my own independent conclusions. In doing so, I should be careful to remember that unlike the trial court, I did not have the benefit of seeing or hearing the witnesses.

See: ***Okeno V Republic 1972 EA 32; Kinyanjui V Republic (2004) 2 KLR 364.***

10. I have carefully re-examined and considered the evidence on record, the grounds of appeal; the submissions made on behalf of the appellant and the state as well as the authorities cited.

11. I wish to start by addressing the appellant's concern that his defence was not considered by the trial court. A perusal of the learned trial magistrate's judgement shows clearly that the appellant's defence was analysed and considered by the trial court but was dismissed as untrue. Nothing therefore turns on that ground of appeal.

12. Turning to the other grounds of appeal, the record of the lower court shows that the prosecution case was supported by a total of seven witnesses. On my own re-appraisal of the evidence on record, I find that PW1, PW2, PW6 and PW7 gave material evidence which proved that the appellant was employed by the complainant as a storekeeper and that on 23rd October, 2013, several construction materials including 185 iron sheets were delivered and received by the appellant at the construction site. Besides proof of these facts by documentary evidence, they were also admitted by the appellant in his defence.

13. PW2 who was the appellant's workmate recalled that at the material time, he was awakened by the noise of a moving vehicle and iron sheets being moved. On going to check what was happening, he found five people but he only identified the appellant as he was the only person he knew before. He was standing at the door of the store. He was able to see and recognize him through torchlight. They exchanged greetings after which he went to look for the watchman. The vehicle then left.

14. Later the same day, PW6 who was the contractor in charge of the construction site took stock of the iron sheets that had been delivered at the site and discovered that 86 of them were missing. The appellant admitted in his defence having witnessed the said stock taking. I agree with *Mr. Sagasi* that the evidence of PW2 amounted to the evidence of identification by a single witness at night which needed to be treated with utmost caution before being made the basis of a conviction.

15. On my appraisal of the evidence in this case, I am satisfied that the appellant was positively identified as being among the people who were seen hovering around the complainant's store with a waiting motor

vehicle in the wee hours of the morning after which 86 Iron sheets were found missing. He was PW2's workmate and this was clearly a case of recognition which is always more reliable than the case of identification of a mere stranger. The fact that the two of them exchanged greetings means that they saw each other at a close distance and there was no possibility of mistaken identity. The learned trial magistrate believed the evidence of PW2 and I find no reason to doubt his credibility.

16. I am satisfied that the learned trial magistrate properly interrogated the evidence of all the prosecution witnesses including that of PW2 and arrived at the correct conclusion that the charge in count 1 had been proved against the appellant beyond any reasonable doubt. The circumstantial evidence adduced against the appellant was watertight. It pointed directly to the guilt of the appellant as charged. I therefore find that the appellant was properly convicted in Count 1. The conviction is accordingly upheld.

17. On sentence, the sentence of two years' imprisonment imposed on the appellant in count 1 is lawful as the maximum sentence prescribed by *Section 275* of the *Penal Code* is three years' imprisonment. There is therefore no basis for me to interfere with the sentence imposed by the trial court and it is thus affirmed.

18. Regarding count 2, my analysis of the evidence on record reveals that the prosecution did not adduce any evidence to prove how or with who the appellant allegedly conspired to effect un unlawful purpose. The said unlawful purpose was not disclosed. In fact, no evidence was adduced to support the charge in count 2. The evidence tendered in support of count one was the same evidence the prosecution relied on in support count 2. In my view, count 2 ought to have been charged as an alternative charge to count 1 but not as a separate count. I have no doubt in my mind that the appellant was wrongly convicted in count 2.

I therefore quash the conviction in count 2 and set aside the sentence of 6 months imprisonment.

19. In the end, the appeal succeeds with respect to the conviction and sentence in count 2. The appeal against the conviction and sentence in count 1 fails and it is accordingly dismissed.

It is so ordered.

C. W. GITHUA

JUDGE

DATED, SIGNED and DELIVERED at ELDORET this 6th day of April, 2017.

In the presence of:-

Appellant

Ms Oduor for the state

Ms. Sagasi for the appellant absent

Mr. Lobolia court clerk