REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIVASHA

CRIMINAL APPEAL NO. 26 OF 2015

(Formerly Nakuru HC.CR.A. No. 278 of 2013)

(Being an Appeal from Original Conviction and Sentence in

Criminal Case No. 648 of 2013 of the Chief Magistrate's

Court at Naivasha before E. Riany - RM)

MARY WANJIRU GEORGE.....APPELLANT

- VERSUS -

REPUBLIC.....RESPONDENT

J U D G M E N T

1. The Appellant **Mary Wanjiru George** was charged with the offence of Stealing contrary to Section 275 of the Penal Code. In that on diverse dates between 1/11/2012 and 28/2/2013 at Mutonyora Village, Magumu Location within Nyandarua County she stole building materials, namely stones, ballast and sand all valued at Kshs 105, 300/= the property of **Nancy Wamaitha Mbogo**. She was convicted and sentenced to 1 ½ years imprisonment.

2. Her petition of appeal filed through P. K. Njuguna Advocate challenged both the conviction and sentence. Ground 2 to 5 state:-

> **"2. THAT the Honourable Resident Magistrate erred in law and in fact in making finding based on incredible and patently false evidence of the Complainant, PW1.**
>
> **3. THAT the evidence adduced in support of the charges was incredible and tainted with extraneous and malicious factors.**
>
> **4. THAT the evidence presented was contradictory and unbelievable.**
>
> **5. THAT the Court record was not accurate or comprehensive as some evidence offered by the defence and some of the cross examination was not captured, including the production of defence exhibits."(sic)**

3. Ground 6 and 7 challenged the sentence as being harsh and excessive. The Appellant was represented at the hearing of the appeal by Mr. Mugambi. The appeal was opposed by the Director of Public

Prosecutions. Parties disposed of the appeal by way of written submissions. Grounds 1 – 6 were merged for purposes of the Appellant's submissions.

4. The Appellant submitted that the prosecution failed to prove the charge for reasons that:-

a. only oral contradictory evidence was rendered in respect of the value of the stolen goods.

b. that nobody witnessed the theft of goods by the Appellant or her agent, contrary to the trial court's finding.

5. Other matters raised in respect of fair trial related to speedy hearing were not contained in the Petition of appeal. On ground 6 and 7 it was submitted that the court did not consider the Appellant's mitigation.

6. The Director of Public Prosecutions asserted that through **PW1, PW2** and **PW3** the prosecution proved theft by the Appellant. The DPP also supported the sentence meted out, terming it lenient.

7. The duty of the first appellate court since the decision in **Pandya -Vs- Republic [1957] EA 336** is as follows:-

> **"On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court's own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court differing from the Judge or magistrate even on a question of fact turning on the credibility of witnesses whom the appellate court has not seen."**

8. The prosecution's case was that the complainant **Nancy Wamaitha Mbogo (PW1)** had purchased building materials and stored them on her plot at Magumu, Mutonyora. Subsequently she moved to Busia. A neighbour, **Joseph Mburu Kimani (PW2)** noticed in January 2012, that **John Mburugu Waweru** (**PW3**) hired to construct a house for the Appellant in an adjacent plot, was using the said material. He notified **PW1**. When questioned, **PW3** said that the Appellant had instructed him to use the material of **PW1** claiming to have bought the same from her. **PW1** disputed this and reported to police. The Appellant was arrested and charged.

9. In an unsworn defence statement the Appellant denied stealing the materials and stated that materials removed from **PW1's** plot were not used in her project. She said she used her own materials for her construction.

10. Stealing is defined in Section 268 of the Penal Code which states:

> **"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."**

Three elements constitute the offence of theft namely, the taking or conversion of something capable of being stolen with the intention to permanently deprive the owner of the thing, or any of the other intents stated in Section 268 (2) of the Penal Code.

11. The trial magistrate correctly found that the complainant had stored some building materials including sand, ballast and stones on her plot before travelling to Busia. It is true, as submitted by the Appellant's

counsel that the Appellant did not personally ferry any goods from the said complainant's plot.

12. The trial magistrate in her judgment observed in that regard that the mason, **PW3** was a truthful witness who, based on previous cordial relationship with the Appellant had no reason to swear false testimony against her. Believing this evidence she stated:

> **"From the adduced evidence, it has been confirmed that the accused person instructed her employee to go to complainant's plot of land to get building materials on the pretext that they had agreed with the complainant which turned out to be a lie. The said materials were then used to construct her house. The same amounted to stealing."**

13. I can find no reason to fault this finding upon reviewing the evidence by **PW2** and **PW3**. This is what **PW3** stated in his evidence:-

> **"In her (Appellant's) compound was one lorry of sand and one lorry of stones and she told me she had talked with her neighbour (PW1) when her stones ended and next plot there were many stones and she said she had bought we use and we used the same together with ballast. It is about 3 lorries. She transported 9 x 9 elsewhere. Ballast we used two lorries. She then told me cash was over and job stalled." (sic).**

14. During his cross-examination **PW3** reiterated this evidence. In her defence the Appellant appeared to suggest that the materials were removed after her construction stalled. Despite **PW3's** assertions to the contrary in his evidence-in-chief, the Appellant did not make the suggestion to him in cross-examination that materials were not removed to her construction site at the time construction was ongoing.

15. **PW3's** evidence was fully corroborated by **PW2** who witnessed the removal and use of **PW1's** material in the Appellant's project. **PW2** is the one who alerted **PW1** concerning the matter. The fact that the Appellant did not physically remove the stones and other stated material does not detract from the evidence by **PW2** and **PW3**. After all the removed material was used on the Appellant's construction.

16. The Appellant induced **PW3** to remove the materials from **PW1's** yard by claiming to have an agreement with the owner, **PW1.** Constructively, therefore the Appellant was the one who stole the building materials and benefited from their use in her construction.

17. Section 20 of the Penal Code defines principal offenders in the following terms

> **"1. When an offence is committed, each of the following persons is deemed to have taken part in committing the offence and to be guilty of the offence, and may be charged with actually committing it, that is to say:-**
>
> > **(a) every person who actually does the act or makes the omission which constitutes the offence;**
> >
> > **(b) every person who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence;**
> >
> > **(c) every person who aids or abets another person in committing the offence;**
> >
> > **(d) any person who counsels or procures any other person to commit the offence;**
> >
> > **and in the last-mentioned case he may be charged either with committing the offence or with counselling or procuring its commission."**

18. In this case **PW3** did not know that the Appellant had no right to the materials. He was procured or used by the Appellant, the ultimate beneficiary of the offence. Similarly, there can be no dispute that the materials stolen were items capable of being stolen and were converted thereby depriving the **PW1** of

them permanently, because they were used in the Appellant's construction.

19. It is true that there were no receipts tendered to prove the value of goods stated in the charge sheet. However under Section 137 (c) (i) of the Criminal Procedure Code, all that is required in framing a charge is to:

> **"Indicate with reasonable clearness the property referred to, and, if the property is so described, it shall not be necessary ……. to name the person to whom the property belongs or the value of the property."**

The charge particulars described the property as "building materials, namely stones, ballasts and sand all valued at Kshs 105,300/= the property of **Nancy Wamaitha Mbogo**."

20. There is no complaint regarding the description of the property in the charge. The complaint that the value of the property was not proved has no basis, because **PW1** described the amount of building materials taken from **PW1's** yard to the Appellant's construction; namely 3 lorries of stone, two lorries of ballast and 18 wheel barrows of sand. There being no dispute that these items existed on **PW1's** yard, the failure to prove the exact value thereof is inconsequential in my view. Ditto the alleged contradiction regarding its value between the oral evidence of **PW1** and **PW4.**

21. The trial magistrate correctly observed that the Appellant in cross-examination of **PW1** had appeared to canvass the defence that she had purchased the materials from **PW1,** but later retreated and relied on a complete denial. The court was entitled to make the impugned observation in considering the defence. A defence canvassed in cross-examination by an accused person may be contrasted with the final defence made in deciding on the credibility of the defence. The defence herein was correctly rejected.

22. It is therefore my considered view that there was solid evidence supporting the charge laid against the Appellant. As stated in **Francis Otieno Oyier -Vs- Republic Criminal Appeal No. 158 of 1984 2 (UR)** the Appellate court will not interfere with findings of the lower court that are based on the credibility of witnesses unless the findings were plainly wrong or that no tribunal could have made them. The appeal against conviction has no merit and is dismissed.

23. Regarding the sentence imposed, the Appellant complains that it was harsh and excessive. There are settled principles on the circumstances in which the appellate court will interfere with a sentence. In the case of **Ogalo s/o Owuora –Vs- Republic [1954] 19 EACA 270**, it was stated:-

> **"(1). The Court does not alter a sentence on the mere ground that if the member of the Court had been trying the Appellant, he might have passed a somewhat different sentence, and it would not ordinarily interfere with the discretion exercised by the trial Magistrate unless it is evident that the Magistrate acted upon some wrong principles or overlooked some material factors. (See also JAMES VS REPUBLIC (1950) 10 EACA 147)**
>
> **(2). The test criterion is that if the sentence is manifestly excessive in view of the circumstances of the case, the sentence will be disturbed. The Appellate Court should not interfere with the sentence of a lower Court unless it is satisfied that the same was so severe as to amount to a miscarriage of justice. (SEE NILSON VS REPUBLIC (1970) EA 599)."**

24. Further in **Wanjema -Vs- Republic (1971) EA 493**, the court went ahead to state:-

> **"[The] Appellate court should not interfere with the discretion which a trial court extended as to sentence unless it is evident that it overlooked some material factors, took into account some immaterial factors, acted on wrong principle or the sentence is manifestly excessive in the circumstances of the case."**

25. The Appellant's mitigation at the trial consisted of a one-liner, to the effect that she had children who were dependent on her. The trial magistrate cannot be faulted for not considering the age of the offender:

the record does not indicate that it was stated to her. The sentence awarded was lawful. However in light of her antecedents as a first offender, the Appellant should have been considered for a less severe sentence.

26. In consideration of the foregoing, I would interfere with the sentence by setting aside the sentence of 1 ½ years imprisonment and substituting therefor a fine of Shs 20,000/= and in default the Appellant will serve 6 months imprisonment. The appeal against sentence has therefore succeeded to that extent.

Delivered and signed at Naivasha, this **15th** day of **June, 2017.**

In the presence of:-

Mr. Mutinda for the DPP

Mr. Mugambi for the Appellant

Appellant – present

C/C – Barasa

C. MEOLI

JUDGE