REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NANYUKI

HCCRA. NO. 6 OF 2015

JAMES MURIITHI NJOROGE…….APPELLANT

-VERSUS—

REPUBLIC……RESPONDENT

(Being an appeal from the original conviction and sentence by **Hon. B M KIMTAI SENIOR RESIDENT MAGISTRATE** dated 2nd MAY 2013 in Nanyuki Chief Magistrate's **Court Criminal Case No. 1078 OF 2012)**

JUDGMENT

1. **JAMES MURIITHI NJOROGE** was charged before the Nanyuki Chief Magistrate's court with the **Offence of Stealing by Servant contrary to Section 281 of the penal code.** He was also charge with an **alternative offence of handling stolen goods Contrary to Section 322 of the Penal Code.**

2. The particulars of the offence of stealing were:

> ***"JAMES MURIITHI NJOROGE:*** *Between the nights of 12th and 13th October, 2013 at Lusoi Everest Farm Naromoru in Nyeri County being a SERVANT OF Everest Farms Ltd. Stole five Sodium Flood lights value at Kshs 81,000 the property of the said Everest Farms Ltd which came into his possession by virtue of his employment."*

3. JAMES Muriithi Njoroge was convicted by the trial Magistrate, to use the words of the trial Magistrate in his judgment he stated:

> *"I find accused guilty as charged and I will convict him as per the law."*

4. On conviction the court sentenced him to pay a fine of Kshs. 40, 0000/= and in default to serve nine months in prison. This appeal is against both conviction and sentence but going by appellant's grounds of appeal the Learned Counsel by oral submission before court contradicted those written submission by stating that the appeal was only against conviction.

5. The ground of appeal presented by the appellant are as follows:

a. ***THAT*** *the Learned Magistrate Erred in law and in fact by convicting the appellant when the prosecution did not prove their case to the required standard thereby occasioning the appellant a miscarriage of justice.*

b. ***THAT*** *the Learned Magistrate trial Magistrate erred in law and in fact in convicting the appellant where the essential ingredients of the charge of stealing by servant had not been proved by the prosecution.*

c. ***THAT*** *the Learned Magistrate erred in law and in fact by drawing adverse inference against the appellant thus shifting the burden of proof contrary to the law o evidence.*

d. ***THAT*** *the learned trial Magistrate erred in law and in fact by failing to consider defence and submissions by the defence.*

e. ***THAT*** *the judgment is not well reasonable and is based on guess work and speculation.*

f. ***THAT*** *the Learned trial Magistrate erred in law and in fact by basing his judgment on inconsistent, incredible and contradictory evidence of the prosecution witnesses.*

g. *T**HAT** the learned trial magistrate erred in law and in fact by convicting the appellant on both principal and alternative charge without prove (**sic)** of alternative charge by the prosecution.,*

h. ***THAT*** *the case was not properly investigated and there was no complainant.*

i. ***THAT*** *the learned magistrate erred in law and in fact by basing his judgment on assumption and suspicion thus arriving at a finding which was contrary to evidence on record.*

j. ***THAT*** *the evidence on record was not sufficient to sustain a conviction.*

6. This is the first appellant court and as such I am guided by the principles set out in the case **DAVID NJUGUNA WAIRIMU V – REPUBLIC [2010] e KLR** where the court of appeal stated:

> "*The duty of the first appellate court is to analyse the re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellant court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions."*

7. The appeal was opposed by Mr. Tanui the Principal Prosecution Counsel. Learned Counsel Mr. Tanui submitted that appellant stole his employer's flood lights valued at Kshs. 81,000/= and after his trial the Court Magistrate found the prosecution had proved its case and convicted him accordingly. He emphasized that the trial court convicted appellant on the main charge and not the alternative charge. In the end Learned Counsel submitted that the appeal has no merit and sought that it be disallowed.

8. The issues that arise from the petition filed herein are as follows:

a. ***Did the prosecution prove its case on required standard and in particular did prosecution prove the essential ingredients of the charge of stealing by servant.***

b. ***Did the trial court fail to consider the appellant's defence and did the said court shift the burden of proof***

c. ***Was there an error in convicting appellant "as charged."***

d. ***Was there a complainant.***

e. ***Did the trial court make a finding that was contrary to the evidence.***

ISSUE (a)

9. As Submitted by the Learned Counsel Mr. Chweya, for the appellant, the prosecution did not present direct evidence connecting the appellant and the theft of flood lights. What the prosecution relied upon was circumstantial evidence. There are very clear parameters that a prosecution should meet when relying on circumstantial evidence. Those parameters were the subject of discussion in the case,

> ***BENSON LIMANTEES LESIMIR & ANO. VS. REPUBLIC CRIMINAL APPEAL NO. 102 &103 OF 2002 WHERE THE COURT OF APPEAL STATED:-***
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> *"In the circumstances, then the evidence tendered by the prosecution does not irresistibly point to the appellants to the exclusion of all others within the meaning of* ***R. vs Kipkering Arap Koske & Another 16 EACA 135*** *where it was inter alia held that:"*
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> *"In order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt."*

It is important to state that suspicion cannot suffice to infer guilt. The court for appeal in the case **JOAN CHEBICHII SAWE – V- REPUBLIC CRIM. APP. NO. 2 OF 2002** had this say about suspicion in a criminal case:

> "*The suspicion may be strong but this is a game with clear and settled rules of engagement. The prosecution must prove the case against the accused beyond any reasonable doubt. As this court made clear in the case of* ***Mary Wanjiku Gichira vs Republic(Criminal Appeal No. 17 of 1998****(unreported), suspicion however strong cannot provide a basis for inferring guilty which must be proved by evidence."*

10. With above in mind I will consider the prosecution's evidence. In a nutshell the prosecution's case is that appellant on 13th October, 2012 at 12.20a.m. approached the gate of his employer's farm and met security guards, that is **P W 1 Moses Gitau and P W 2 Charles Outa**. Appellant requested for a torch from the guards which he was given. He used it to go towards the toilet and then returned it. On returning it appellant went towards the farm. Because P W 1 and P W 2 were suspicious they followed him. By then the guards were four. The guards hid at a certain spot and waited for appellant. After half an hour appellant came to where the guards were waiting, with pliers in his hand. The guards also noted that the appellant's clothes were muddy. The guards on question the appellant he told them that he had removed five flood lights which he intended to sell because he had debts. Appellant was arrested and locked up in a room by the guards. The following morning in the presence of security supervisor guards appellant showed them where he had hidden the five flood lights. P W 1 to P W 4 confirmed that the farm's five flood light were missing. The prosecution produced the five flood light as exhibits before court and a broken ladder which prosecution witness said appellant used to remove the flood lights. The fact the ladder was broken, according to the prosecution witnesses, explained why appellant's clothes were muddy. The farms fence is electrified by solar power but the prosecution's witnesses could not explain how appellant managed to pass the lights through that fence.

11. All the prosecution's witnesses confirmed that appellant was an employee with Everest Farm. Even the appellant in his defence confirmed that same when he stated:

> *"… I was working in this farm under contract of 3 month."*

12. There is therefore no doubt whether appellant was an employee of the farm even though Learned Counsel for the appellant submitted that that fact had not been proved.

13. Appellant in his defence denied the offence. His explanation of why he was at the farm on the material date was that he was standing in for his co-worker Samuel Nderitu. To the contrary of what prosecutions witnesses stated he said that he was at the farm and was arrested by the guards at 10.30p.m.,

when he went to switch off the lights as per company procedure. The following day he was led to the place the light were hidden but denied having stolen those lights. He ended his defence by alleging that he had been framed so that he could lose his job.

14. In this issue (a) the court is considering whether the prosecution discharged its burden of proof and whether the ingredients of stealing by servant have been proved.

15. The prosecution has to prove its case beyond reasonable doubt. What is reasonable doubt? ***Denning J in the case of MILLIER – V- MINISTER OF PENSIONS [1947]*** Explained what reasonable doubt is. He stated:

> "*It need not reach certainty, but it must carry a high degree of probability, proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence "of course it is possible, but not in the lease probable." the case is proved beyond reasonable doubt, but nothing short of that will suffice."*

16. Lord Diplock in the case**WALTER– V- REPUBLIC [1969]**explained reasonable doubt as that quality and kind of doubt which when you are dealing with matters of importance in your own affair, you may allow to influence you one way or the other. It also can be said that it is a doubt that can be given or assign reason as opposed to speculation. (see Principles of Evidence by Alan Taylor)

17. Bearing the above in mind I do find that the prosecution proved its case beyond reasonable doubt. It presented convincing and credible evidence of theft perpetrated by appellant an employee of the Everest Farm.

18. Stealing is defined in the Black's Law dictionary 8th Edition as:

> *"To take (personal property) illegally with the intent to keep it unlawfully".*

19. The definition of stealing as found in Section 268 of the Penal Code CAP 63 is:

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

20. Section 281 of Cap 63, under which appellant was charged qualifies the definition reproduced above found in Section 268 of Cap 63 by stating:

> *"…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 imprisonment of seven years."*

21. The lights which appellant stole from Everest Farm came to him by virtue of his employment the Farm where he was employed as an electrician.

ISSUE (b)

22. By this issue the court will consider whether appellant's defence was considered and whether the trial court shifted the burden of proof.

23. The trial court did consider the defence offered by appellant, and the the ground of appeal which disputes this is rejected. The appellant offered a simple short defence that he had gone to the farm to switch off the lights when he was arrested. He blamed his arrest to a plot to frame him which would lead to the loss of his job.

24. The Learned trial Magistrate did not as submitted by appellant shift the burden of proof. What the Learned Magistrate did, and it perfectly permissible, was to assess the evidence. For example the Learned Magistrate noted that the appellant was employed at the farm to switch on and off the lights. In considering the evidence e of the security guards who said that they waited for appellant, when he had into the farm for half an hour the learned magistrate his judgment stated in reference to that period of time, thus:

> "*This draws a clear conclusion that that accused (the appellant was doing something not right simply because switching off the lights as he alleges does not take that long."*

25. Also in reference to the electric fence the Learned Magistrate stated:

> "*The court would also wish to pinpoint that since accused was tasked with switching off and on the flood lights and that he had knowledge of electricity. Its only him also who can explain how the said flood lights were able to be passed through an electric solar powered fence without being electrocuted. This makes the court to draw the inevitable conclusion that accused must have also switched of the fence line so that he would execute his mission."*

26. In respect of issue (b) therefore I find in the negative.

ISSUE (c)

27. The Learned trial court failed to state whether appellant was convicted on the main count, stealing by servant, or on alternative count of handling stolen goods. The Learned Magistrate convicted appellant as charge. It is important to note that the trial magistrate in the opening paragraph of his judgment only set out the main charge as the charge appellant faced. I therefore follows that when convicting, the Learned Magistrate convicted on that charge and not on both the main charge and the alternative charge. In my view appellant was neither embarrassed or prejudiced nor was he occasioned injustice by the holding of the trial Magistrate that he was convicted as charted.

28. Much more this court as the first appellant has the power to re-evaluate the evidence and to reach its own independent conclusion. Having found that the prosecutions proved their case against appellant in respect of the main count this court shall therefore substitute the lower court's conviction.

ISSUE (d)

29. Appellant argued that there was no complainant because the lights that were the subject of the theft had a mark "*E.E.L"* which P W 5 sergeant Boniface Kiswili stated stood for Everest Enterprises Limited. Appellant has argued that no witness attend court on behalf of Everest Enterprises Limited but that rather the witness who testified on behalf of Everest Farm.

30. It is worth noting that the fact an item is marked EEL it does not necessarily mean it belongs to Everest Enterprises Limited. The prosecution's witnesses who gave evidence on behalf of Everest farm confirmed that the flood lights belonged to Everest Farm and that evidence was not contradicted. The submissions on this issue by appellant, therefore, are rejected. The court finds there was a complainant Everest Farm Limited and flood lights belonged to that complainant.

ISSUE (e)

31. This issue poses the question whether the trial court made a finding which was contrary to the evidence. Having considered the evidence adduced and the judgment of the Learned trial Magistrate I determine issue (e) in the negative. The Learned trial Magistrate as stated before in starting his judgment made it clear that he was considering the main count against appellant. The conclusion of the trial court reached in that judgment in my view was in conformity of the evidence which evidence proved the guilt of appellant on the main count.

COURT'S DETERMINATION

In the end the judgment of this court is as follows:

a. The conviction of the lower court is hereby quashed and is hereby substituted with a conviction on the main count of stealing by servant Contrary to Section 281 of the Penal Code.

b. The appeal against sentence is dismissed.

Dated and Delivered at Nanyuki this 4th February, 2016

MARY KASANGO

JUDGE

Coram

Before Justice Mary Kasango

Court Assistant – Kiruja

For state ……

For Appellant …….

COURT

Judgment delivered in open court

MARY KASANGO

JUDGE