



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
CRIMINAL APPEAL NO 31 OF 2014

JOHN MAINA MATHAIYA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal against conviction/Judgement delivered on 28.4.2014 and sentence imposed on 13.5.2014 in Criminal case number 1205 of 2011, Nyeri, by W. A. Juma, C.M.).

JUDGEMENT

On 22.12.2011, **John Maina Mathaiya** (hereinafter referred to as the appellant) was arraigned before the Senior Resident Magistrates court at Nyeri charged with the offence of stealing by servant contrary to Section **281** of the Penal code.

It was alleged that on diverse dates between 17th November 2011 and 20th December 2011 at Telecom Kingongo yard in Nyeri District within Central Province, jointly with another not before court being a servant to Telecom Kenya Limited stole Telecom cables valued Ksh. 1,199,387.54 which came to his possession by virtue of his employment.

After evaluating the evidence and the law, the learned Magistrate found the appellant herein guilty and sentenced him to 2 years community service.

The principles to be kept in mind by a first appellate court while dealing with appeals are:-²

- a. There is no limitation on the part of the appellate court to review the evidence upon which the order appealed against is founded and to come to its own conclusion.
- b. The first appellate court can also review the trial court's conclusion with respect to both facts and law.
- c. It is the duty of a first appellate court to marshal the entire evidence on record and by giving cogent and adequate reasons may set aside the decision appealed against or the entire proceedings if they are flawed.
- d. When the trial court has breached provisions of the constitution or ignored statutory provisions, or misconstrued the law, or breached rules of procedure, or ignored crucial evidence or misread the material evidence or has ignored material documents, or in any manner compromised the accused rights to a fair trial or prejudiced the accused etc. the appellate court is competent to reverse the decision of the trial court depending on the materials in question.

In other words, the first appellate court must itself weigh conflicting evidence and draw its own conclusion and also scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses ⁴

PW1 Peter Omwando Mageto prior to proceeding on leave handed over a key to the store to the accused person who was his immediate assistant and that a theft occurred at the store between 16th and 20th December 2011. He had securely kept the extra keys at his office. An audit by **PW2 Yaya Abbas Mohamed** confirmed that the loss was worth Kshs. 1,199,387.54.

PW3 Elam Kagai Musasia a retired regional manager confirmed that the appellant reported to him that some cables had been stolen, that the appellant showed him a padlock which had scratches though it was functional. The police opted to charge the appellant since he was the one who had the keys at the material time. **PW4 & 5** were the day and night guards who testified that at the material time nothing was removed from the store.

PW6 No. 61849 Sgt M. Maro Gwiyo was the investigating officer. He concluded that there was no forceful entry since the padlock was intact. He arrested and charged the appellant.

At the close of the prosecution case the trial magistrate was satisfied that a *prima facie* case had been established and put the accused person on his defence. The provisions of section 211 of the Criminal Procedure Code were complied with and the appellant herein opted to give sworn evidence and called one witness.

In his defence, the appellant stated that upon discovering the missing items he reported to the regional manager. This evidence tallies with the evidence of PW2. He also went and reported to the police. He was later charged with the offence. He explained the procedure of moving goods out and into the store and was categorical that it was not possible for one person to move the cables from the store and even if it was to be cut into pieces, it would be cut into 200 pieces of 200kgs which would take a whole week every day to be moved out and that nobody would have left with such an item without being noticed by the guards and added that there were three guards with a dog handler. He also stated that PW1 was in October 2011 suspected of cable theft and that he resumed work in December 2011.

DW2 Elphas Kibia Muriithi confirmed that he went to the store at or about the material time and the cables were missing. He confirmed that the cables were bulky and could not be lifted. In total the stolen items were 5 to 7 tons and could not fit in small vehicle but in a lorry and that they would require 4 to 5 people to load them and even then it would take them 4 days. He also stated that the appellant was away on the material days and that he never worked during week-ends. He also explained the laid down procedure for removing goods from the store which included a formal request from the manager indicating the need, and the in charge would have to sign and insisted that it was not possible for someone to carry away such goods.

After evaluating the prosecution and the defence case, the trial magistrate found that there was enough circumstantial evidence against the appellant and found him guilty as charged and sentenced him to serve 2 years community service.

Aggrieved by the said finding, the appellant appealed to this court against the conviction and sentence imposed and raised seven grounds of appeal, which in my view can be reduced to one ground only namely; **(i)** that the learned magistrate erred in law in concluding that the prosecution had proved its case to the required standard.

To my mind the rule that the prosecution may obtain a criminal conviction only when the evidence proves the defendant's guilt beyond reasonable doubt is basic to our law. It is necessary that guilt should not only be rational inference but also it should be the only rational inference that could be drawn from the evidence offered taking into account the defence offered if any. If there is any reasonable possibility consistent with innocence, it is the duty of the court to find the defendant not guilty.

The key question that this court seeks to answer is whether or not the prosecution evidence established the offence to the required standard and also whether the appellant offered any other explanation that could exonerate him from the offence or whether there exists any other co-existing circumstances which could weaken or destroy the inference of guilt which is a necessary test before arriving at a conviction on the evidence tendered. The learned Magistrate based her conviction on what she described as circumstantial evidence.

The evidence used to prove guilt is classified as either direct or circumstantial. Direct evidence, testimony presented, is a statement about a fact constituting a disputed material proposition of a rule of law, while circumstantial evidence is testimony about a fact or facts from which the disputed material proposition may be inferred.

Thus, circumstantial evidence can be defined as relying on certain proved or provable circumstances from which a conclusion can be drawn that it was the accused person who committed the offence. It is evidence of circumstances which can be relied upon not as proving a fact directly but instead as pointing to its existence. It differs from direct evidence, which tends to prove a fact directly, typically when a witness testifies about something which that witness personally saw, or heard. Both direct and circumstantial evidence are to be considered, but to bring a verdict of guilty based entirely or substantially upon circumstantial evidence, it is necessary that guilt should not only be rational inference but also it should be the only rational inference that could be drawn from the circumstances. If there is any reasonable possibility consistent with innocence, it is the duty of the court to find the defendant not guilty. This follows from the requirement that guilt must be established.

Commonly, three special directions are given in substantially circumstantial cases:-

i. as to drawing inferences,

ii. that "guilt should not only be a rational inference but should be the only rational inference that could be drawn from the circumstances

iii. that if there is any reasonable hypothesis consistent with innocence, the court's duty is to acquit.

The second and third directions stated above are but different ways of conveying, or emphasising the meaning of "beyond reasonable doubt." Although a conviction will not be upset merely because the evidence is wholly circumstantial, a more rigorous test is generally used to determine whether such evidence is sufficient to convict.

In *Abanga alias Onyango vs. Republic*, the court of appeal stated the principles which should be applied in order to test circumstantial evidence. They set them out thus:-

"It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests (i) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established, (ii) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused; (iii) the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else"

A similar position was held *GMI v. Republic* These are:-

i. The circumstances from which an inference of guilt is sought to be drawn, must be

cogently and firmly established;

ii. Those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;

iii. *The circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.*

In order to ascertain whether or not the exculpatory facts put forward by the prosecution are incompatible with the innocence of the appellant and incapable of explanation upon any other reasonable hypothesis than that of guilt, we must also consider a further principle set out in the case of *Musoke v. R* citing with approval *Teper v R* thus:-

“It is also necessary before drawing the inference of accused’s guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference”

In *Sawe vs Republic* the court followed the above principles and added that *“suspicion however strong cannot provide the basis of inferring guilt which must be proved beyond reasonable doubt.”*

In the present case and after carefully considering the defence and prosecution evidence, I find that the circumstantial evidence relied upon by the magistrate did not meet the above threshold and that it did not irresistibly point towards the guilt of the appellant and that there was no reasonable basis for arriving at the conviction and that the evidence tendered against the appellant was manifestly weak and did not establish his guilt to the required standard. Such a conviction cannot be allowed to stand.

It is admitted that PW1 gave the store keys to the appellant. No inventory was taken as to show what was in the store at the material time nor is there evidence of whether or not there was any formal handing over. It is not clear why PW1 only handed keys and did not care to do a proper handing over and leave a clear inventory of what was in the store. It is ironical that the investigating officers overlooked this key issue yet the same person is said to have had a previous interdiction over lost items. There is evidence that it was not possible for such bulky items to leave the store without being noticed yet it is admitted that the premises was guarded day and night. It is also in evidence that it would require a lorry and 4-5 men and 5 days to load the items in a lorry. No evidence was tendered to show how the items left the premises and more important no evidence was tendered either direct or circumstantial irresistibly pointing to the guilty of the appellant. The procedure for moving items from the store was narrated by DW2 and the same was not contested and with such procedures in place, no evidence was tendered implicating the appellant or showing how he circumvented such procedures without being detected. It is on record that it was the appellant who noted the missing items and reported to his superiors and even to the police but he was suspected just because he had one key. The possibility of another person having access to the other keys could not be ruled out yet the police never cared to question PW1 where he kept the keys and whether any other person had access to them. On the whole, I find that the prosecution evidence was manifestly weak, unreliable and totally unsafe to form the basis of a conviction.

The defence offered by the appellant and his witness raises serious doubts as to his guilty? The defence is reasonable in the circumstances and credible. In my view, whatever is thought to be the purpose of criminal punishment, one fundamental principle seems to have evolved in the jurisprudence of the common law legal tradition; that, before an accused person can be convicted of a crime, his/her guilt must be proved beyond reasonable doubt. The existence of the principle of proof beyond reasonable doubt is unchallenged in the common law world. In the English common law, it was elegantly affirmed by the House of Lords in the celebrated judgement of **Viscount Sankay** in *D.P.P vs Woolmington*.

The explanation given by the appellant and his witness was reasonable. The Supreme Court of Nigeria in the case of *Ozaki and another vs The State* stated that for a defence to be rejected it must be incredible and that the defence must be weighed against the evidence offered by the prosecution.

In *Uganda vs. Sebyala & Others*, the learned Judge citing relevant precedents had this to say:-

“The accused does not have to establish that his alibi is reasonably true. All he has to do is to create doubt as to the strength of the case for the prosecution. When the prosecution case is thin

an alibi which is not particularly strong may very well raise doubts”

The accused has only what is referred to as the evidential burden which means the duty of adducing evidence or raising the defence of alibi. Once an accused person discharges the evidential burden of adducing evidence of alibi, it's the duty of the prosecution to disprove it. The duty of the court is to test the evidence of alibi against the issue adduced by the prosecution and if there is doubt in the mind of the court the same is resolved in favour of the accused.

The onus on the prosecution to prove the charge against the accused beyond reasonable doubt never shifts and there is no onus on the accused to prove the alibi beyond that of introducing the evidence of alibi.

To me the defence offered by the appellant raises doubts as to whether he committed the offence. A trial court has a duty to weigh the evidence adduced in court by all the parties in totality and make a finding on the culpability or otherwise of the accused. Choosing to analyse the prosecution evidence and leave out that of the accused is a fatal mistake. It's a duty bestowed in every court to weigh one set of evidence (prosecution) against another (defence) before arriving at a conclusion. This is the basic calling of every court without exception. In the present case it was improper for the magistrate to dismiss the defence offered by the appellant and basing the conviction on weak circumstantial evidence which did not irresistibly point to the guilty of the appellant. In fact there was no basis for so finding considering the totality of the evidence on record.

The South African case of *Ricky Gandavs The State* provides useful guidance. In the said case it was held:-

“The acceptance of the evidence on behalf of the state cannot by itself be sufficient basis for rejecting the alibi evidence. Something more is required. The evidence must be considered in its totality. In order to convict there must be no reasonable doubt that the evidence implicating him is true.....the correct approach is to consider the alibi in light of the totality of the evidence in the case and the courts impression of the witnesses....it is acceptable in totality in evaluating the evidence to consider the inherent probabilities....

The proper approach is to weigh up all the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and having done so, to decide whether the balance weigh so heavily in favour of the state as to exclude any reasonable doubt about the accused's guilt”

Having considered the circumstances of this case, the prosecution evidence and the defence offered by the appellant in lower court, submission by both counsels, I am not persuaded that the conviction was justifiable and that this is a case where the appellant ought to have been given the benefit of doubt. To give an accused person the benefit of doubt in a criminal case, it is not necessary that there should be many circumstances creating the doubt(s). A single circumstance creating reasonable doubt in a prudent mind about the guilt of an accused is sufficient. The accused is entitled to the benefit of doubt not a matter of grace and concession, but as a matter of right.

Reasonable doubt is not mere possible doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence leaves the mind of the court in that condition that it cannot say it feels an abiding conviction to a moral certainty of the truth of the charge.

In the present case and after carefully considering the defence and prosecution evidence, I find that there was reasonable basis for creating reasonable doubts as to the guilty of the appellant. The upshot is that this appeal succeeds. I hereby quash the conviction and set aside the said sentence imposed by the lower court against the appellant and substitute it with an order of acquittal.

Right of appeal 14 days

Signed Delivered and Dated at Nyeri this 15th day of September 2016

John M. Mativo

Judge
