REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NO. 120 OF 2010

CHARLES GITAHI WANGARI……APPELLANT

VERSUS

REPUBLIC……...……..RESPONDENT

(Being an appeal against conviction and sentence in a judgment delivered in Nyeri Chief Magistrates Court Criminal Case No. 1106 of 2008 (Hon. J. Kiarie) on 17the May, 2010)

JUDGMENT

The appellant was charged with the offence of stealing by servant contrary to **section 281** of the **Penal Code (Cap. 63)**. According to the particulars of the offence, it is alleged that on diverse dates between 16th September, 2008 and 8th October, 2008 at Quality café in Nyeri District within central province, being a servant of Cyrus Wanjohi Kamunya stole from the said Cyrus Wanjohi Kamunya one freezer, one tea urn, a metal stool, a dozen of arcol ceramic plates all valued Kshs 55, 100/= the property of the said Cyrus Wanjohi Kamunya which came into his position by virtue of employment.

In the alternative, the appellant was charged with the offence of handling stolen property contrary to **section 322(3)** of the **Penal Code;** in this alternative count, it was alleged that on the 8th day of October, 2008 at Whispers café in Nyeri South district within central province, otherwise than in the course of stealing the appellant retained one freezer, one tea urn and one metal stool knowingly or having reasons to believe the same to be stolen or unlawfully acquired property.

At the conclusion of the trial, the appellant was convicted of the principal count of theft by servant and fined Kshs. 50,000/= or one year imprisonment in default of fine. It is this conviction and sentence that the appellant has appealed against; in his grounds of appeal, the appellant raised the following grounds:-

1. The learned magistrate erred in law and fact in convicting the appellant based on a defective charge sheet;

2. The learned magistrate erred in law and in fact in convicting the appellant when there was no evidence that the complainant owned the tea urn which the appellant is alleged to have stolen;

3. The learned magistrate erred in law and in fact when he disregarded the appellant's evidence of being the owner of the tea urn;

4. The learned magistrate erred in law and in fact in convicting the appellant based on inconsistent and contradictory prosecution evidence;

5. The learned magistrate erred in law and in fact in convicting the appellant yet there was evidence that the complainant held a grudge against the appellant arising from business rivalry;

6. The learned magistrate erred in law and in fact in convicting the appellant yet the prosecution had not proved its case beyond reasonable doubt; and,

7. The sentence against the appellant was manifestly harsh and excessive.

The appellant asked the court to allow the appeal, quash the conviction and set aside the sentence.

At the hearing of the appeal, Mr Muthui Kimani for the appellant reiterated the grounds of appeal and urged the court to find that the prosecution evidence was inconsistent with particulars of the offence as stated in the charge sheet. For instance, contrary to what is stated in the particulars of the offence, the appellant was not the complainant's employee when the alleged stolen items were stolen and therefore the charge of stealing by servant could not possibly be sustained.

Counsel also referred to the evidence of the complainant himself to refute the allegation that the tea urn alleged to have been stolen by the appellant was the complainant's; he said that this particular item was not proved to be amongst the items that the complainant is alleged to have purchased and more importantly, there was no proof of ownership.

On contradictions and inconsistencies in the prosecution evidence, the learned counsel for the appellant submitted that the evidence of the complainant contradicted that of the investigating officer on when the items are alleged to have been stolen.

The appellant asked the court to find that the trial court failed to take into account the evidence that there was business rivalry between the complainant and the appellant and therefore the criminal charges against the appellant were instituted for ulterior motives and out of bad faith. Because of this omission the trial court reached an erroneous decision.

Ms Maundu for the state conceded the appeal and agreed with the appellant's counsel that the appellant could not possibly have been charged with the offence of stealing by servant when he was neither the complaint's employee, agent nor servant. The learned counsel for the state also submitted that indeed there were fundamental contradictions in the prosecution evidence which could not sustain a conviction.

On the ownership of the urn, counsel submitted that it was not established that it belonged to the complainant; the sale agreement the complainant produced purporting to show that the items he purchased for his hotel did not include the tea urn which is the particular item that the appellant was convicted of having stolen. According to counsel, the appellant's defence raised reasonable doubt as to whether the offence with which he had been charged and convicted was proved to the required standard.

I have considered the submissions by the learned counsel for the appellant and for the state; as usual this being the first appellate court I have to interrogate the evidence and analyse afresh and come to my own conclusions. It is only after such fresh analysis that I will be able to tell whether the learned magistrate's decision can be upheld. I must, however, bear in mind that the learned magistrate had the advantage, which I do not have, of seeing and hearing the witnesses. I am guided in this regard by the case of **Okeno versus Republic (1972) EA 32** where the Court of Appeal was of the view that:-

> ***"An appellant is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrates' findings can be supported. In doing so it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses."(See page 36 of the decision thereof).***

It is noted from the learned magistrates judgement that of all the items that the appellant is alleged to have stolen in his capacity as the complaint's employee it is only the tea urn that was proved to have been stolen as alleged; it is for this reason that the appellant was convicted of stealing the complainant's urn while still in his employment. It follows therefore that in analysing the evidence proffered at the trial, it would be appropriate to focus on the evidence pertaining to this particular item, of course without disregarding the rest of the evidence.

The complainant, **Cyrus Wanjohi Kamunya (PW1)** testified that he owned a hotel called 'Quality Café' in Nyeri town in which he had employed the appellant as its manager; the appellant was employed in 2001, initially as a waiter but he rose through the ranks to become the hotel's manager as at September, 2008 when he left employment.

On 14th September, 2008, the appellant told the complainant he intended to leave employment on 15th September, 2008, since his relatives had started a similar catering establishment, apparently, in Nyeri town. With this information, the complainant had to look for his replacement and on 16th September, 2008 he replaced him with one Peter Juma.

Not being satisfied with the reason given for the appellant's departure, the complainant launched his own investigations on why his employee whom he testified that he had related well with could have left. He discovered that indeed the appellant had started a hotel business close to where the complainant's hotel was; in his own words, the appellant's hotel "was a competing business".

The complainant testified that when he checked the inventory of his items in the hotel, he established that cutlery such as plates, a tea urn, spoons, cups, a freezer and furniture comprising five stools were missing. He also checked his records with the auditor and discovered that Kshs. 1.5 Million was also missing. With these discoveries, he reported the apparent theft to the police on 8th October, 2008.

On the night of 8th October, 2008, he was accompanied with two police officers and two of his workers to the appellant's hotel where he found the appellant's employee, one John Chomba. According to the complainant, his workers were able to identify his lost items including the tea urn in issue which he said had been inscribed with initials Q.F. that signified his business name. The rest of the items are said to have been inscribed with the initials Q.C.

On cross-examination, the complainant testified that he discovered the missing items between 17th September, 2008 and 8th October, 2008; he said he made the discoveries when he was investigating why the appellant could have possibly left. On 16th September, 2008, he asked Peter Juma, the new manager, to check whether all his items were intact; he reported back on a date that the complainant could not remember that after the stock-taking, some items, including the tea urn, were found to be missing.

To prove that the complainant had purchased the items that are alleged to have been lost, the witness produced a sale agreement in which these items are supposed to have been included; however, he conceded that the tea urn was not included in that agreement and that he had no receipt for its purchase. In fact he said that the tea urn was identified by his workers.

Altough the complainant testified that the first time he went to the appellant's café was when he was accompanied with the police, **Onesmus Njogu Mativo (PW2)** testified that indeed the complainant had been to that café earlier and that he told them that he had seen what appeared like his freezer in the café; incidentally he had been there to check a microwave that the appellant's wife had collected from the complainant's hotel the previous day. This witness, who was one of the two workers that accompanied the complainant to the appellant's café with the police on the night of 8th October, 2008 said that all they identified as belonging to the complainant was a freezer which the police took away.

This witness testified that it was on the evening of 8th October, 2008 that they discovered that the fridge together with other items were missing; amongst these items were a radio speaker and a tea urn which as at the date he was testifying had not been traced.

The investigating officer police constable **David Ali (PW4)** testified that when the complainant reported the case at Nyeri police station, he told him that it is on 8th October, 2008 that he discovered the lost items were missing from his store. He suspected that the appellant could have stolen these items and therefore he accompanied him to the appellant's hotel where they found, amongst other items, a tea urn with the initials QC NYI written on it. According to this witness these initials signified 'Quality Café, Nyeri'. The officer testified that he took an inventory of the items they recovered from the appellant's hotel.

The appellant gave a sworn statement in his defence and said that the tea urn he was accused of having stolen was actually his and that he bought it on 29th September, 2008 at Kshs. 7,000/=. He produced a receipt for its purchase to prove ownership. He testified that he left the complainant's employment on 16th September, 2008; on that day he handed over to the complainant all his property including the money he had been collecting. The appellant testified that on 8th October, 2008, the complainant went to his café and threatened him with dire consequences simply because the appellant had opened a café next to his.

At some point in time, the complainant sent him an emissary asking him whether he could sell him his business at Kshs. 200,000/=. It was the appellant's case that the charges against him were motivated by reasons other than upholding criminal law; they were trumped because of the business rivalry between him and the complainant and therefore were intended for ulterior motives.

Section 281 of the **Penal Code** under which the appellant was charged and convicted states as follows:-

> ***281. Stealing by clerks and servants***
>
> ***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.***

From this section at least three crucial elements have to be proved before one can be convicted of the offence of stealing by servant; the first of these elements is that theft must be proved, secondly, the employer must be proved to be the owner of the stolen item or the thing capable of being stolen and lastly it must be proved that the alleged offender is an employee of another person, whether natural or juristic person.

It follows that the pertinent questions in these appeal are whether there was theft of the tea urn and tied to this question is the question whether the complainant was the owner of the tea urn. If the first two questions are answered in the affirmative, the question that would follow is whether the appellant was the complainant's employee at the material time.

Since the first two questions are tied together, it would be ideal to deal with them simultaneously. In a bid to prove that he was the owner of the recovered items, the complainant referred to a sale agreement in which those items were listed; however, the tea urn was not among them. The complainant testified that he also did not have any receipt for its purchase.

In his evidence in chief, he testified that it was his workers who identified the tea urn amongst the other items that were allegedly recovered from the appellant's hotel and that he could also recognise it either because it had been marked with the initials Q.F or Q.C. One of these workers, **Onesmus Njogu Mativo (PW2),** testified, however, that all he could identify was the freezer and not the tea urn. In fact he added that the missing radio speaker and the tea urn had never been recovered.

The evidence that the tea urn could have been identified by the initials Q.F or Q.R inscribed was also in doubt because the investigations officer said that in fact the urn was marked with initials 'Q.C N.Y.I' which he testified signified 'Quality café Nyeri'. It is not clear from the record where the investigations officer could have obtained this information from because even the complainant or his worker never made any reference to such an identification mark.

The appellant on the other hand produced a receipt showing that he purchased the tea urn on 27th September, 2008 and therefore the tea urn was his.

My conclusion from the evidence presented before the trial court is that it was not proved beyond reasonable doubt that that the complainant was the owner of the tea urn; although, the learned magistrate rejected the appellant's evidence of ownership of the urn, the right question before the court should have been whether the prosecution had proved to the required standard that the complainant was the owner of this item. In my view, the complainant's ownership of the tea urn was cast in doubt, at the very least.

As to the third question, there is clear evidence that the appellant left the complainant's employment on 16th September, 2009; the complainant testified that he replaced him with Peter Juma on this particular date and the appellant himself said that this is the date he left. Since the aspect of the appellant's employment was vital to this offence, it was incumbent upon the prosecution to prove that the tea urn, assuming it was proved to belong to the complainant, was stolen on or before the 16th September, 2008.

From the record the date on which the tea urn is alleged to have been stolen is not clear. The complainant testified that it could have been stolen between 16th September 2008 and 10th October, 2008. His own worker testified that it is only on 10th October, 2008 when they checked the items in the store that they discovered that the tea urn was missing. The investigations officer also testified that when the complainant made his report, he said that he discovered that his items were missing on 8th October, 2008.

If there was a possibility, as the prosecution evidence showed, that the urn was stolen after 16th September, 2008, then the charge of stealing by servant against the appellant could not be sustained for the appellant was no longer the complainant's employee. There was also a possibility that if any item stolen from the complainant's café after 16th September, 2008, it could have been stolen by anybody else and not necessarily the appellant. All these possibilities create a reasonable doubt as to when the alleged items and in particular the tea urn was stolen and whether it is in fact the appellant who stole it.

It is clear from the analysis of the evidence in its entirety that the prosecution evidence was mired in doubt; it cannot be said with conviction that the offence of stealing by servant contrary to **section 281** of the **Penal Code** was proved as against the appellant beyond all reasonable doubt. I am inclined to conclude the appellant's conviction was not safe. For these reasons I agree with both the learned counsel for the appellant and the state that the appellant's appeal is meritorious and is hereby allowed; the conviction is quashed and the sentence set aside. The appellant is set free unless he is lawfully held.

Signed, dated and delivered in open court this 6th February, 2015

Ngaah Jairus

JUDGE