



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
CRIMINAL APPEAL NO. 36 OF 2013

*(An Appeal From The Judgment Of The Chief Magistrate,
Embu In Cmc. Case No. 587 Of 2012 Dated 26/6/2013)*

EUDICAS KERING..... APPELLANT

VERSUS

PROSECUTION.....RESPONDENT

J U D G M E N T

The appellant and one Boniface Kimotho Chege were convicted by Embu Chief Magistrate of the offence of stealing by servant contrary to Section 281 of the Penal Code and sentenced to serve three (3) years imprisonment. He was dissatisfied with the judgment and lodged this appeal. That the grounds supporting this appeal may be briefly stated:-

- a. *That the magistrate erred in law and fact in failing to consider that the lorry and the items allegedly stolen were found in the custody of the watchman.*
- b. *That the appellant was convicted inconsistent and uncorroborated evidence.*
- c. *That some important witnesses were not called to testify.*
- d. *That the trial magistrate relied heavily on the evidence of the watchman to the effect that the lorry had been left in his custody.*
- e. *That no exhibit was produced by the police to connect the appellant with the offence.*
- f. *That his rights were violated in that he was kept in custody for more than 48 hours.*
- g. *That his defence was rejected by the trial magistrate without any good reason.*

This appeal was disposed of by way of written submissions. The counsel for the appellant Mr. Momanyi submitted that the prosecution did not prove the case beyond any reasonable doubt and that several gaps and doubts existed. He argued that the prosecution had applied to withdraw the case which was an indication that they did not have sufficient evidence against the appellant. The appellant had worked for the complainant for only six months which was a very short time for him to plan and execute the robbery. The 1st accused was the one in charge of the lorry and the goods and that the appellant did not know how to drive.

It was further argued that the 1st accused is the one who gave a lift to a certain lady and that he spent the material night with the said lady in a lodging. It is therefore possible that it is the 1st accused who planned and executed the robbery. The appellant was arrested at Embakasi where he had gone to report the robbery. The act of making the report to the police demonstrates his innocence.

The conduct of the 1st accused betrayed him and points guilt at no other person but him. The appellant

therefore is entitled to an acquittal in this appeal.

The charge sheet was defective in that it did not disclose an offence and neither does it state whether the offence was committed. The appellant was therefore convicted on a defective charge and ought to be acquitted.

The appellant was a first offender and the sentence of 3 years imprisonment meted out was harsh and excessive. He ought to have been given another option of punishment.

The respondent in their submissions filed by Ms. Brenda Nandwa argued that the prosecution proved the case against the appellant beyond any reasonable doubt. PW1 the transport manager of Kabansora Millers Limited testified that both the appellant and the 1st accused were employees of the company. The 1st accused was the driver of vehicle registration No. KAJ 100 H on the material day. The appellant was the conductor of the said motor vehicle. PW1 produced the log book of the motor vehicle which was in the name of the complainant company. He further testified that the appellant and the 1st accused had been authorized to transport 580 bales of wheat flour to the company's customer PW5 at Mitunguu. PW5 confirmed that she had placed an order with the company of the said goods and did not receive the said goods as promised.

The evidence of PW1 was corroborated by that of PW2 that the company's vehicle KAJ 100 H Mitsubishi lorry was the one used to transport the goods to Embu County and that the goods did not reach the customer. From the evidence of PW1, PW3, PW4 and PW6, the appellant and 1st accused travelled to Embu and parked the vehicle opposite Panesic Hotel at around 10.00 p.m. until the appellant accompanied by a lady was seen driving it away in the middle of the night.

The defence of the appellant that he did not have a driving licence did not save him from conviction. It is common practice in this country that conductors will learn how to drive in the course of the day to day work. It was indeed confirmed by PW3 that the appellant was seen driving away the lorry which carried the goods.

The appellant's defence that he was hijacked and kidnapped by unknown people who put him in a grey car who dumped him in Embakasi area of Nairobi was not credible. According to the respondent, the prosecution's evidence was consistent and well corroborated and the conviction was based on cogent evidence.

The duty of the 1st appellate court was explained by the Court of Appeal in the case of ***NJOROGE VS REPUBLIC [1987] KLR 19 at page 22:-***

“As this court has constantly explained, it is the duty of the first appellate court to remember that the parties to the court are entitled, as well as on the questions of facts as on questions of law, to demand a decision of the court of first appeal, and that court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions though it should always bear in mind that it has neither seen or heard the witnesses and to make due allowance in this respect (see Pandya Vs Republic [1957] EA 336, Ruwalla Vs Republic [1957] EA 570.”

PW1 and PW2 were employees of the complainant Kabansora Millers Limited whose head office was located in Nairobi. PW1 was the transport manager while PW2 was also a manager in a different capacity. It was their evidence that their customer PW5 carrying on business in Mitunguu area placed an order for 580 bales of wheat flour worth 751,000 Shs. on 9/4/2012. The goods were dispatched on 11/4/2012 at 11.30 a.m. aboard motor vehicle registration No. KAJ 100 H driven by the 1st accused. It was expected that the goods would be off-loaded at 4.00 p.m. at the business premises of PW5. the appellant was assigned duties as the conductor of the said vehicle.

The witnesses testified that they did not hear from the driver who was in charge of the vehicle until the following day when he reported that he could not trace the vehicle where he had parked it. PW1 reported the matter at Embu Police Station who commenced investigations. The vehicle was recovered parked by

the road side at Mwea. The ignition keys were found in the truck but the goods were missing. The tracking system had been removed but everything else was intact. The appellant was arrested at Embakasi where he had gone to report a case of hijacking and kidnapping. The 1st accused was also arrested at Embu police station.

PW3 an employee of Star Security company in Embu testified that on the 11/4/2012 at 10.00 p.m. he was on duty at Jatomy wholesalers opposite Panesic Hotel when a motor vehicle belonging to Kabansora was driven there. The driver and the conductor, whom he identified in court, requested that they be allowed to park the vehicle at the premises. The driver told him that the conductor would sleep inside the truck. They both walked away only for the conductor to return about half an hour later accompanied by a lady. He drove off the vehicle to unknown destination. The following morning the driver came to the premises and inquired as to where the vehicle was. PW3 informed him that the conductor had driven it away.

It was the testimony of PW4 that he was on duty as a watchman at Sally Printers in the night of 11/4/2012. From the shop he had a clear view of Kobil Petrol Station. Throughout the night he did not see any truck parked at the service station.

PW5 testified that she had made an order for 580 bales of wheat flour from the complainant company on the 9/4/2012. The goods were to be delivered to her business premises on the 11/4/2012 but were never delivered.

The testimony of PW6 an employee of Young Blue bar was to the effect that the 1st accused hired a room at the hotel. He was accompanied by a woman to the hotel room. Around 2.00 a.m. PW6 heard a knock at the window. She proceeded to the room where the 1st accused informed her that he had been locked from outside by the lady who was with him and that she had left with his keys and identity card. She opened the room for him and he left.

PW8 an officer attached to Embu CID office received the report of the theft of goods from the complainant. The lorry was recovered at Mwea along Nairobi- Embu highway. The consignment was missing and the vehicle tracking system had been removed. He obtained an invoice and vehicle movement register from PW1. Thereafter he arrested the driver and the conductor of the vehicle at different places. He interrogated the suspects and found their versions of the incidents conflicting. After recording statements of several witnesses, he charged them with the offence.

The appellant in his unsworn statement of defence said that he and the driver of vehicle registration No. KAJ 100 H left Nairobi for Meru on 11/4/2012 at 2.00 p.m. At Juja the driver picked a lady leaving the appellant behind. Later on the appellant and the driver proceeded to Embu and parked the vehicle at Panesic Hotel. The driver was left with the lady while the appellant went to eat and returned at 10.00 p.m. He slept in the vehicle and later heard a commotion at the back of the lorry. The vehicle was opened by the lady who had been in the company of the driver. The driver pointed a pistol at the appellant. The lady also entered the lorry and it was driven at Kobil petrol station within Embu town. The appellant was later bundled into a small car and locked in the boot. He was driven to Nairobi where he was dumped. He reported the matter to the police. The appellant told the court that he did not have a driving licence.

In this case, the appellant was charged with stealing by servant contrary to Section 281 of the Penal Code which provides:-

“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.”

It is not in dispute that the appellant was an employee of Kabansora Millers Limited and that he and the 1st accused had been entrusted by the employer to deliver an order to Mitunguu area in Meru County. The appellant was a servant of the complainant who came into possession of the stolen property on account of the complainant who gave him the goods to deliver to a customer. He argued that the lorry

and the goods were in custody of the watchman and that his duty was only to offload the lorry on arrival at the destination.

It was the evidence of PW3 that the lorry was parked at Jatomy Wholesalers by the appellant and the 1st accused. The 1st accused left while the appellant drove away the vehicle away from the parking. The vehicle was later to be recovered at Mwea without the goods. The conduct of the 1st accused at the hotel and the failure to report to his employers that the lorry and the material went missing in the material night confirms that the appellant and 1st accused had common intention and were working together in execution of a common plan.

PW1 testified that the vehicle left Nairobi at 11.30 a.m. and it was expected that the goods would be offloaded at Mitunguu at 4.00 p.m. The 1st accused and the appellant did not explain why they decided to disobey the instructions of their employer to deliver the goods on time and instead spent the night in Embu. There is evidence that the 1st accused left the hotel at 2.00 a.m. He did not explain his whereabouts from the time he left the hotel to the time he called PW1 to inform him that the lorry and the goods were missing.

The appellant also failed to explain where he was between the time that he was allegedly hijacked and the time he was arrested in Nairobi in the evening of the following day. PW3 confirmed that the vehicle and the goods had been left in his custody by the driver.

The appellant told PW8 that the motor vehicle was driven by another man and the woman who was with the 1st accused to Kobil petrol station where some gang member guarded him as others removed the tracking system. It is important to note that the appellant omitted this information from his defence. The evidence of PW3 that it is the appellant who drove away the vehicle was found to be consistent and credible. The appellant's argument that the lorry and the stolen goods were in the custody of the watchman has no basis. PW3 confirmed that the 1st accused had left the lorry and the goods in the custody of the appellant.

The appellant alleged that the prosecution's evidence was inconsistent and uncorroborated. However, in his submissions there was no indication of what evidence he claimed was inconsistent. The allegation that the evidence was uncorroborated is not supported by the record. The evidence of PW1 was corroborated by that of PW2 and PW5. The evidence of PW3 was confirmed by that of PW4 to the effect that the appellant is the one who drove the lorry to an unknown destination. Further corroboration on the conduct of the 1st accused came from PW6. In criminal law there is no requirement of corroboration and the court may convict on the evidence of a single witness provided it warns itself of the danger involved before convicting.

The appellant alleged that the magistrate erred in convicting him on evidence of members of public who were not called as witnesses. The prosecution is not bound to call a certain number of witnesses in order to procure a conviction. Section 143 of the Evidence Act provides:-

“No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for prove of any fact.”

In the case of **DAVID MUTUNE NZONGO VS REPUBLIC [2014] eKLR** the court held that under Section 143 of the Evidence Act there was no minimum number of witnesses required to prove a case.

I find no merit in this ground.

The appellant argued that the evidence of the watchman PW4 was not supported by any documents. There is no requirement in law that evidence be supported by document provided that the evidence is clear, consistent and credible.

In the appellant's submission he raised the issue that no exhibit was recovered to connect him with the offence. The evidence of the police was that they recovered the truck without the goods. Evidence from

other witnesses on the part played by the appellant in the theft of the goods was overwhelming. Therefore it was not necessary that an exhibit recovered from the appellant had to be produced in order to sustain a conviction.

The appellant complained that his defence was rejected by the magistrate without any basis. The court was very candid in its judgment that the appellant failed to disclose for how long he remained in the boot of the small car. Neither did he give the exact time and place where he was released.

It is important to note that the appellant did not raise any alarm at the time of the alleged attack. His defence that he did not know how to drive was dislodged by the evidence of PW3 who saw him drive away the vehicle. PW4 testified that he did not see the lorry or the small car at Kobil petrol station that night. In view of the evidence on record, the defence of the appellant could not pass the test of innocence. The magistrate gave her reason for rejecting the defence.

The evidence against the appellant in this case was circumstantial. However, it was so overwhelming that it pointed to the appellant and the 1st accused as the persons who planned and executed the theft of the complainant's goods. It is my finding that the conviction was based on cogent evidence.

Section 281 of the Penal Code provide for the sentence of imprisonment for a period of seven years. The sentence of three years imprisonment was therefore within the law.

I find no merit in this appeal and it is accordingly dismissed. The conviction and sentence are hereby upheld.

DELIVERED, DATED AND SIGNED AT EMBU THIS 9TH DAY OF JUNE, 2015.

F. MUCHEMI

JUDGE

In the presence of:-

The appellant

Mr. Momanyi for the appellant

Mr. Onjoro for the respondent