



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT GARISSA**

**CRIMINAL APPEAL NO. 7 OF 2015 AND 8 OF 2015 (CONSOLIDATED)**

**1. ABEL MULI MBILA**

**2. GEDION MUTUNGA MANDI.....APPELLANTS**

**VERSUS**

**REPUBLIC..... RESPONDENT**

***(From the conviction and sentence in Mwingi SRM Criminal Case No. 211 of 2013 – H. M. Nyaberi Ag. SPM)***

**JUDGEMENT**

The two appeals No. 7 of 2015 by Abel Muli Mbila and Appeal No. 8 of 2015 by Gideon Mutunga were consolidated and heard together as they arose from the same trial in the subordinate court.

The two appellants were charged in the subordinate court jointly with two others with breaking into a building and committing a felony contrary to section 306 (a) of the Penal Code. The particulars of the offence were that on 27th April 2013 at National Cereals and Produce Board Mwingi of Kitui county while being employees of Kali security guards, a lorry driver and a guard of Eversafe Security Guards respectively jointly broke and entered into a building namely warehouse of national cereals and produce board and committed a felony namely theft of 47 bags of green grams of total value of Kshs. 385,400/= the property of National Cereals and Produce Board. A 5th accused at the trial Josphat Okuku Maloba was charged alone with stealing by clerk and servant contrary to section 281 of the Penal Code. The particulars of the offence were that on 27th April 2013 at the National Cereals and Produce Board Mwingi in Kitui County being a store clerk at National Cereals and Produce Board Mwingi jointly with others stole 47 bags of green grams of total value of Kshs.385,400/= the property of National Cereals and Produce Board.

Two of the accused in the first charge John Muthui Kyaikyo and Joseph Nzoka Muthui (not the appellants) were charged with failing to prevent a felony contrary to section 392 of the Penal Code. The particulars of the offence were that on the same day and place being employees of Kali and Eversafe Security Guards detailed to guard National Cereals and Produce Board Mwingi silos depot failed to use reasonable cause to prevent theft at the depot whereby 47 bags of green grams were stolen.

After a full trial, all the accused before the subordinate court except the 5th accused Josphat Okuku Maloba were convicted of the offences charged. The appellant in appeal No. 7 of 2015 Abel Muli Mbila who was the third accused in court 1 and the appellant in Criminal Appeal No. 8 of 2015 who was the 2nd accused, were each sentenced to serve 3 years imprisonment.

Dissatisfied with the decision of the trial court, the two appellants have come to this court on appeal

through their respective advocates. The appeal of Abel Muli Mbila was filed by C.K. Nzili and Co. Advocates on the following grounds:-

1. That the learned trial magistrate erred in law and in fact in convicting the appellant on charges which were contradictory, illegal and not supported by sufficient evidence.
2. That the learned trial magistrate erred in law and in fact by failing to consider the appellants defence of alibi.
3. The learned trial magistrate erred in law and in fact in relying on the evidence of a co accused to convict the appellant without sufficiently warning himself as per the law of the dangers of such testimony.
4. The learned trial magistrate erred in law by taking into account irrelevant considerations that had no factual basis therefore arriving at wrong conclusion in law making the entire decision amount to a miscarriage of justice.
5. The learned trial magistrate erred in law and in fact in wrongly applying section 157 of the Criminal Procedure Code that there was a conspiracy and or collusion between the appellant and co-accused.
6. The learned trial magistrate erred in law and in fact in shifting the burden of proving alibi to the appellant.
7. The learned trial magistrate erred in law and in fact by giving an excessive sentence without considering the appellants mitigation and the circumstances of the case.

The grounds of appeal in appeal No. 8 of 2015 filed by Mulinga Mbaluka and Co. Advocates on behalf of Gideon Mutunga Mandi are as follows:-

1. The learned trial magistrate erred in fact and law by failing to acknowledge that the appellant did not commit the offence of breaking into a building and committing a felony contrary to section 306 (a) of the Penal Code.
2. The learned trial magistrate erred in fact and law by failing to appreciate the appellants defence.
3. The sentence meted on the appellant is harsh and excessive.
4. The learned trial magistrate erred in fact and law when he failed to appreciate that the prosecution did not prove the charges as framed.
5. The learned trial magistrate misdirected himself in both fact and law when he failed to make a finding that the prosecution evidence was contradictory and could not have sustained the charge against the appellant.
6. The decision of the learned trial magistrate was against the weight of the evidence.
7. Learned trial magistrate erred in law and fact when he considered extraneous matters of evidence to sentence the appellant.

The counsel for the appellants C. K. Nzili and Co. for Abel Muli Mbila and M/s. Mulinga Mbaluka and Co. for Gideon Mutunga filed written submissions. Mr. Nzili who appeared for his client Abel on the hearing date also made oral submissions. Mr. Ngala who appeared for the 2nd appellant Gideon associated himself with submissions of Mr. Nzili and emphasized the points raised in the written submissions of Mr. Mulinga Mbaluka advocate.

Learned Prosecuting Counsel Mr. Orwa responded to the written as well as the oral submissions made on behalf of the two appellants. Counsel emphasized that the trial court could not be faulted in the decision it came to in both conviction and sentence. Counsel asked that both appeals be dismissed.

During the trial the prosecution called 5 witnesses. PW1 was William Andrew Kilimatinde a Depot Manager of the National Cereals and Produce Board at Mwingi. It was his testimony that they had three stores for maize, green grams and cooking oil. That they took stock weekly and hired private security guards to provide services on 24 hour basis. He and the stores clerk were the custodian of the keys. He stated that on 27th April 2013 the keys were in possession of Josephat Okuku Maloba the 5th accused at the trial. He came to the office on 3rd May 2013 at 8a.m and worked but at noon the said Maloba reported to him that 47 bags of green grams were missing from store No. 3. He immediately reported the incident to the Regional Manager at Embu and commenced investigations and found that a number of bags valued

at Kshs. 8,200/= each were missing. He then compiled a report and sent it to the Regional Manager.

According to him, the security guards on duty were the 2nd accused Gideon Mutunga one of the appellants, and the 4th accused who was called Joseph Nzoka Mathui. He stated that the 5th accused Joseph Okuku and a cashier William had reported the matter at Mwingi Police Station. It was his evidence that the guards who were on duty during the time were arrested. The police later gave information about where the green grams were sold. He made a formal report and the auditor's from the Regional Office at Embu carried an audit and report on 8th May 2013. The report gave the breakdown of stock as at 26th April 2013. It was his evidence that the 3rd accused Abel Muli Mbila an appellant herein, was a driver to a person by the name Kinoti who resided within the Cereal Board quarters. He was later informed that 17 bags of green grams had been sold within Mwingi Town by the 1st, 2nd Gideon (an appellant) and 4th accused persons.

In cross examination, he stated that there was no physical break in and that he did not make a report to the police. He stated that it was the first time a theft had occurred. He also stated that he had been a Manager for two years. He maintained that there was evidence that 47 bags of green grams were missing. He stated also that the locks were both from inside and also from outside. He could not confirm if the padlocks were tampered with. He stated that on Monday morning, the guards did not make any adverse reports.

PW2 was Michael Wambua Mbuvi a Supervisor with Kali Security Services Machakos Town. He stated that they were the employers of John Muthui as well as Gideon Mutunga one of the appellants herein. He stated that the security guards work on shifts. That on 27th April 2013 John Muthui handed over duties to Gideon Mutunga. On 28th April 2013 he received a phone call from Wambua Mutungi a Security Guard at Auction Aid that John Muthui and Gideon Mutunga had been arrested on theft which had occurred at the Cereals Board to depot. He travelled at Mwingi and was summoned to CID office. He stated that he never knew the 3<sup>rd</sup>, 4<sup>th</sup> or 5<sup>th</sup> accused. In cross examination, he stated that he did not confirm that theft had occurred. He denied writing letter complaining why the employees of Kali Security had been arrested.

PW3 was Hellen Kawele Wambua a business lady dealing with cereals. It was her evidence that on 28th April 2013 at 10.30am while at her shop, Muli Mbila one of the appellants enquired whether she was interested in buying green grams. When she confirmed, he told her that he had 17 bags which he would sell at Kshs. 55/= per kilogram. The 16 bags weighed 90kgs each, while one bag weighed 81Kgs. She paid him Kshs. 83,655/=. She stated that the green grams were brought in a vehicle named "Almighty" registration KAY. She could however not remember the other registration numbers of the vehicle.

She stated that on 5th of May 2013 two police officers from Mwingi and an officer from Cereals Board went to her, and she told them that she had bought the green grams but sold them. It was her evidence that the 3rd accused Gideon one of the appellants herein, usually brought her cereals to buy. She stated that no green grams were found in her store. In cross examination she stated that it was the 3rd accused one of the appellants herein, who sold her green grams. She stated that the green grams were in green bags while Cereals Board packed their cereals in sisal bags.

PW4 was David Mwaniki Mukithi of Kimangao Kyuso District. He stated that he was a loader and that on 28th April 2013 at about 9am, while at the store of Hellen Kawele a lorry arrived driven by the 3rd accused whom he knew as Muli. Hellen called him to offload the sacks. He offloaded the 17 sacks. He stated that the driver paid him and Jack and Kiomboyo Kshs. 340/= for the job. She stated that Hellen was not present at the offloading point. Three weeks afterwards however, Hellen told him that the bags had been stolen from the Cereals Board. According to him, the registration No. of the lorry was KAY 884L. He did not know the owner of the vehicle. He did not know the 1st, 2nd and 5th accused.

In cross examination, he stated that the 3rd accused Muli gave the green light to offload the bags. He stated that the green grams were in nylon bags. He learnt three and half weeks afterwards that the bags had been stolen.

PW5 was PC. John Njuguna from Mwingi Police Station. He was the investigating officer and stated that

on 4th May 2013 at 6pm he was instructed by the DCIO to investigate the matter. That on the 5th of May 2013, the 5th accused came with one Kathurima and informed him that he had some information about where the green grams had been sold. He summoned PC Muteshi and 5th accused took him into a shop in Mwingi owned by Hellen Kawele.

Hellen acknowledged having bought 16 ½ sacks of green grams on 28th April 2013 from Abel Muli Mbila each weighing 90kgs and the last one 81 Kgs. Hellen was arrested and taken to Mwingi Police Station. They found Muli Mbila at Mwingi Cereals Board and arrested him.

On interrogation Muli Mbila stated that on the morning of 28th April 2013 he was instructed by John Muthui Kyaikyo (1<sup>st</sup> accused) to proceed to Mwingi Cereals Board to pick a lorry already loaded with cereals to look for a market. He drove the vehicle to a shop of Helen Kawele and was paid Kshs. 83,000/= and paid Muthui Kshs. 63,000/= and retained Kshs. 20,000/= for transport. According to this witness, Muthui Kyaikyo was arrested on the same day at the Cereals Board gate. He stated that the said Muthui admitted that he had stolen the green grams in the company of Gideon Mutunga and Joseph Nzoka Muthui all of them watchmen at the gate. They police thus arrested all of them.

On the next day the police went back to the Cereals Board depot and found Joseph Nzoka who stated that he had made arrangements with 1st accused John Muthui to leave the store door open on the night of 27th to 28th April 2013 and they removed the green grams. The witness then asked Chief Inspector Wafula Mwingi Police Station to record statement under enquiry. He prepared the charges and arraigned the suspects in court the following day. He stated that he obtained the weekly report on the stock from the Cereals Board offices. He stated further that the stock showed a deficit of 47 bags of green grams. He also obtained the gate register from the guards. He noted that motor vehicle registration KAY 884L had not been recorded in the register except on 4th April 2004.

According to him he visited the Depot Store and found that the 47 sacks of green grams were keenly removed from the top without disturbing the other stocks. He noted that the door was not broken. The store man informed him that he had securely closed all the doors and that on 28th April 2013 there were no transactions because it was on a weekend. He stated further that when the 5th accused discovered about the theft he kept report and instead commenced his own investigations. He stated that he urged the 1<sup>st</sup> to 4<sup>th</sup> accused, then later charged the 5th accused after consulting his seniors who felt that he was involved in the theft. He was Cross examined at length. He was also re-examined.

PW6 was Chief Inspector Jonathan Wafula the then OCS Mwingi police station. He stated that he was requested by the investigating officer PC Njuguna to record a statement under inquiry from Joseph Nzoka Muthui. He explained the procedures he followed in recording the statement. The 1st to 3rd accused did not object to production of the statement. However the 4th accused Joseph Nzoka Muthui the maker of the statement, objected to his production. The court ordered that a trial within a trial to be conducted which was done. A ruling was thereafter delivered by the court in which decided that the statement was not admissible.

When put on their, defences both appellants chose to give sworn statements. Gideon Mutunga stated that he was initially working for Kali Security. They guarded Action Aid go downs at Mwingi Cereals Boards as well as two motor vehicles. He stated on the night of 27th April 2013 he was not on duty and reported on the morning of 28th April. He denied involvement in commission of the offence. He stated that he was arrested on 5<sup>th</sup> May 2013, interrogated, and found with Kshs. 2,000/= in his bank account. He complained that the book maintained by Eversafe Security Guards at the gate was not produced in evidence as an exhibit. He denied receiving money from Muthui. He was cross examined at length.

Abel Muli Mbila testified as DW3. He testified that he was driver. That on 26th April 2013 he left Mwingi for Nairobi carrying charcoal in motor vehicle Reg. No. KAY 884L a lorry. He slept in Nairobi, and on the 28th April 2013, he loaded timber and drove back to Mwingi and offloaded the timber at 5.00pm. Thereafter, he took the vehicle to Mwingi Cereals Board staff quarters. On the 5th May 2013 his employer called him to his house at the Cereals Board quarters. On arrival he found him with four people, one of whom was Kathurima and one was Okuku. He was ordered to drive to the police station where he

was arrested and put in the cells. He denied being paid for 47 sacks of green grams. He was cross examined at length.

The other accused at the trial, also gave their own statements in defence. Based on the evidence on record, the trial court found the two appellants guilty of count 1 together with the 1st and 4th accused at the trial. The trial court convicted and sentenced them to serve 3 years imprisonment. They have now come to this court on appeal.

This being a first appeal, I am duty bound to re-evaluate all the evidence on record and come to my own conclusions and inferences. See the case of *Okeno Vs. Republic [1972] EA 32*.

I have re-evaluated the evidence on record. The evidence which connects the appellants to the offence is that of Hellen Kawele who stated that she was sold bags of green grams through a lorry driven by Abel Muli. It is instructive to note that of the 47 or so bags that were said to have been sold to her shortly before the report reached the National Cereals Board and the police, not even half a bag was found in her shop. She did not say whether she sold those bags through retail or wholesale business. In my view it would not be possible for 47 bags or even 17 bags of green grams, to be sold in retail in a record 2 or 3 days. If they were sold in bulk or wholesale it would be expected that there would be a record and that she would have known the description of the person or institution that she sold the bags to. As it is her word against that of the appellants. Even if there was a so called eye witness to the transaction of sale, it would still be baffling in my view, to imagine such a large quantity of green grams leaving her shop in such a short while.

Both appellants were convicted of jointly breaking into a building and committing a felony of theft. The National Cereals and Produce Board might have lost some bags of green grams. However the question is were the appellants the culprits? That is did the appellants break or were they accomplices?

The prosecution was duty bound to establish a connection between the breaking or opening of the National Cereals and Board and loss of the bags of green grams and the appellants.

The learned magistrate went to great length in defining the ingredients of the offence. He was in my view right in doing so. However the question still remains, did the appellants participate in the incident? In my view the prosecution did not establish a believable connection between the two appellants and the alleged break in and theft. The statement under inquiry which would have implicated them was ruled by the trial court to be inadmissible. The other evidence on record does not state what specifically each of the appellants did that connected him to the offence. Merely being a watchman on the day in question or being handed over that duty the next day does not make one liable to such a criminal offence. It appears that nobody discovered the break in for a few days which was in my view a lapse of supervision. But it also weakened the prosecution case as to when the incident occurred.

The fact of being a watchman also does not make one a criminal when an irregularity occurs. It certainly makes one a prime suspect when the crime occurs while the watchman is on duty. However it is the duty of the prosecution to demonstrate the circumstances that lead irresistibly to the conclusion that that watchman was part of the scheme to commit that offence. This is the requirement when circumstantial evidence is to be used to found a conviction. Unfortunately, in the present case, the prosecution has failed to tender evidence that would lead irresistibly to the conclusion that the 2<sup>nd</sup> appellant herein Gideon Mutunga as a watchman must have been involved in the loss of the green grams from the National cereals and produce board.

As for selling or delivering bags of green grams by Abel to Hellen, even if it was true, which the appellant denied, it would not establish the offence of breaking and theft. Maybe it was conveying stolen property, which he was not charged with.

From the foregoing I find that the convictions herein are not sustainable. The prosecution evidence did not prove beyond reasonable doubt that the appellants were involved in the theft or loss of the bags of the green grams from the National Cereals and Produce Board at Mwingi.

Consequently I find merits in the two appeals. I allow the appeals, quash the convictions and set aside the sentences imposed. I order that each of the appellants be set at liberty forthwith unless otherwise lawfully held.

**Dated and delivered at Garissa this 7th day of October, 2015**

**GEORGE DULU**

**JUDGE**