



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION
CRIMINAL APPEAL NO. 352 OF 2010

GIDEON MBUTHIA MWANGI.....APPELLANT

VERSUS

REPUBLICRESPONDENT

(From original conviction and sentence in criminal case Number 1714 of 2005 in the Chief Magistrate's Court at Nairobi – Mrs. C. Githua (CM) on 14/05/2010)

JUDGMENT

1. **Gideon Mbuthia Mwangi** was charged with four counts of stealing contrary to **Section 281** of the **Penal Code**. He was convicted in count no. **IV**, and acquitted in count Nos. **I, II** and **III**, respectively. Upon conviction the appellant was sentenced to eight (8) months imprisonment.
2. The brief facts in **Count VI** were that on 16th day of November 2001 at the Pelican Engineering and Construction Yard at Embakasi in Nairobi, jointly with another, being servants of Pelican Engineering and Construction Company as site manager and store keeper respectively, they stole from the said company 45 pieces of steel scaffolds valued at 230,000/= which came into their possession by virtue of their employment.

Grounds of Appeal

3. The appellant subsequently filed an appeal, advancing 11 grounds as follows:
 - i. ***That the case was not proved beyond reasonable doubt.***
 - ii. ***The court relied on contradictory, insufficient and inadmissible evidence.***
 - iii. ***The essential ingredients of the offence were not considered.***
 - iv. ***That some vital documents were not considered by the court.***
 - v. ***The evidence of vital witnesses was withheld.***
 - vi. ***The court applied inappropriate principles to convict and sentence the appellant concluding that the case was proved beyond reasonable doubt.***

Learned counsel Mr. Mwaniki compressed and argued the grounds together on behalf of the appellant.

Respondent's Reply

4. The learned state counsel Mr. Kabaka, conceded the appeal in its entirety on behalf of the respondent for reasons that the prosecution did not prove its case beyond reasonable doubt as by law required. Mr. Kabaka submitted that there was no direct evidence tendered by the prosecution and that the only evidence relied upon by the court to convict the appellant was circumstantial.
5. Mr. Kabaka further submitted that the fact that there was no evidence that the stolen items were returned alone was not conclusive, since the witnesses testified that some items were returned to the company premises without being recorded.
6. The Appellant raised an alibi defence in a sworn statement and called no witnesses. He stated that the company owed him salary arrears amounting to Kshs. 1 million, and had fabricated this case to frame him. Mr. Kabaka urged that the court did not consider this defence and instead shifted the burden of proof onto the appellant.
7. I have analysed and re-assessed this evidence afresh as the court of first appeal to make my own findings and draw my own conclusions. In line with **Odhiambo vs Republic Cr. App No. 280 of 2004 [2005] 1 KLR.** In so doing I bear in mind that I did not have the advantage of seeing or hearing the witnesses as they testified.
8. The back drop to this case is that Pelican Engineering and Construction Company the complainant herein was involved in the business of construction of buildings and roads and it stored all its construction equipment at a site in Embakasi known as site B. **PW1** was the Project Manager, while the appellant was the site Manager responsible for safe custody of equipment, issuance thereof and the keeping of records at the site.
9. The trial court acquitted his co-accused on all four counts but found the appellant guilty on one count in which he was jointly charged with the said co-accused. From the judgment the court acted on circumstantial evidence to convict the appellant.
10. I have re-evaluated the said evidence and find that the appellant was convicted on circumstantial evidence which does not point irresistibly to his guilt and which is explainable on other hypotheses. An example is the fact that the second accused person who was the storekeeper and who faced similar evidence was acquitted of all charges. The court considered that the stolen items were removed from the premises and that there was no evidence that they were returned. This alone was not conclusive evidence since witnesses testified that some items were returned to the company premises without being recorded.
11. The record shows that the court relied almost entirely on the evidence of **PW2**, who said he was introduced to the appellant by a certain Mr. Njagi Muturi. The said Mr. Njagi Muturi did not testify to confirm that there were such meetings between him, the appellant and **PW2**. I humbly agree with Mr. Kabaka that the court requiring the appellant to show that the evidence against him was false amounted to shifting the burden of proof onto him.
12. Being of this view I entertain no doubt that the learned trial magistrate's decision to convict the appellant was arrived at in error both in fact and in law and that Mr. Kabaka was prudent to concede the appeal. I accordingly allow the appeal, quash the conviction and set aside the sentence. The appellant is set at liberty forthwith unless otherwise lawfully held.

SIGNED DATED and DELIVERED in open court this **12th day of March 2014.**

L. A. ACHODE

JUDGE