



No. 432/2014

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO.153 OF 2011

JOSEPHAT NAANYU KIDIRI.....APPELLANT

VERSUS

REPUBLICRESPONDENT

(Being an appeal from the original conviction and sentence in Machakos Chief Magistrates Court Criminal Case No. 2069 of 2010 by Hon. S.M. Mungai on 5/8/2011)

JUDGMENT

1. **Josephat Naanyu Kidiri** , the appellant was jointly charged with another with the offence of stealing by servant contrary to **Section 281** of the **Penal Code** . Particulars of the offence being that on the **1st day of October, 2010** at East African Portland Cement Factory Athi River District within the Eastern Province, Being servants to East African Portland Cement Factory Limited stole from the said East Africa Portland Cement Factory 6000 litres of diesel valued at **Kshs. 465,300/=** which came into their possessing by virtue of their employment.
2. Having denied the charge he was tried, convicted and sentenced to serve **three (3)** years imprisonment.
3. Being aggrieved by the conviction and sentence thereof he appealed on grounds that ;-
 - i. The trial magistrate convicted on a defective charge that was full of inconsistencies and circumstances that resulted into the conviction were not proved beyond any reasonable doubt.
 - ii. The sentence imposed was manifestly harsh as the appellant was a first offender.
4. According to the prosecution's case, on the **1st October, 2010**, PW2, **Kioko Mutuku** a driver of a tanker registration number KAG 026G owned by Golf Energy Transporters was assigned duties of delivering fuel from their depot at industrial Portland Company Blue Triangle Limited. He was supposed to deliver 10,000/= litres of fuel.
5. In company of his conductor PW3, **John Irungu** they delivered the fuel at the East Africa Portland Cement Company premises. The appellant's co-accused was assigned duties of escorting the motor-vehicle. They went to clinker area where fuel was inspected by the appellant who instructed them to deliver only 4000 litres. They were then directed to some place, approximately four (4) kilometres away towards the Nairobi direction. The fuel was drained into drums. Delivery notes were signed. The lorry went back to the depot. In the meantime PW1, **Timothy Charo Chimbejah** the Security Officer of the complainant got information regarding what transpired. He reported the matter to the police. They effected arrest.
6. When put on his defence the appellant denied having stolen the fuel. It was his testimony that he

- was based at Kunga quarry and the fuel would be taken to the factory under the escort of G4S security. The person who supervised the offloading of the fuel into the pumps was **Benson**. He argued that the turn-boy and the driver mentioned his name because they needed to blame him in order to save their jobs.
7. The appeal was disposed off by way of written submissions.
 8. This being the first appellate court my duty is to reconsider and re-evaluate evidence adduced at trial in order to come up with my own independent conclusions bearing in mind the fact that I neither saw nor heard witnesses testify. (*See Okeno versus Republic [1972] E.A. 32*).
 9. Issues to be determined are:-
 - i. Whether the appellant was an employee of East African Portland Cement Factory(Complainant)
 - ii. Whether he stole some 6000 litres = of fuel valued at Kshs. 465,300/= the property of the complainant
 - iii. Whether the sentence imposed was harsh and excessive
 10. It was incumbent upon the prosecution to adduce evidence of the appellant's employment. Ordinarily any employee would have a letter of employment giving his/her job description. In this case PW1, the Security Officer of the complainant said the appellant was an employee of the company. This was not sufficient proof of employment. However, the issue of employment was not challenged. The issue of not being a servant did not arise. Infact in his defence the appellant alluded to being an employee of the company. The court having found that he was indeed an employee cannot be faulted (*see State versus Samuel Maotshe 1968-70 B.L.R 400*).
 11. It was the prosecution's case that fuel was stolen. A re-evaluation of evidence adduced shows that PW4, **Boniface Ndiga**, a supervisor at Kanga Quarry got information from G4S guards that some fuel had been stolen per their suspicion. He had worked until 1/10/2010 and left Tom Olang incharge. He resumed duty on 4th per his testimony only to be told by an unnamed clerk that the fuel pump was dysfunctional, the V-belt had got cut. He therefore instructed the appellant to provide 4000 litres of fuel and the belt. PW1 was notified. He caused the pump to be inspected. It had no fuel. He (PW4) was told some 10,000 litres of fuel had been delivered but was missing. He alluded to records that he checks. These records were not availed in court. It was important for the court to see the records to establish whether or not there was fuel in the storage pump/tank. I say so because according to exhibit No. 4 a fuel receiving data form, on the **1st October, 2010**- Gulf Energy Limited by Supplier Note No. 2155 delivered diesel to East African Portland Cement Co. Limited – some 10,000 litres of diesel. Prior to the said quantity being delivered the balance of fuel stood at 3950 litres.
 12. Those who witnessed and acknowledged delivery of the 10,000 litres of diesel were;-
 - Fuel clerk – Joseph Kidiri (appellant)
 - receiving clerk –Henry Meshack
 - Security guard – Richard Mugoi
 - Driver – Kioko Mutuku (PW1)

Signatures were appended on the document.

13. PW4 was the one who reported to PW1 about the alleged missing fuel. He perused the weighbridge ticket (exhibit No.1) which indicated that when Gulf Energy Limited supplied diesel on 1/10/2010 motor-vehicle registration number KAG 026G was weighed at the entrance. The weight was found to be 15,220kg. On exit the weight was 7,280kg. The net weight was 7,940kg. PW1 interpreted the document to indicate that the offloaded fuel was 4000 litres. On cross-examination he stated that the weighbridge personnel are the one who could convert the Kgs to litres.
14. Having lacked the expertise in that area, it was imperative for an officer with such knowledge to be called as a witness. In the circumstances the court would have been informed as to what quantity of fuel was indeed delivered. PW1 believing that the appellant had indeed stolen the fuel had this to state.

“Accused 1 is fuel attendant (sic). He told me the pump rubber had been damaged. He handles fuel at the quarry as receiving and issuing clerk. He did not receive 10,000 litres. He only received 4000 litres instead. He stole the balance of 6000 litres as he emptied it to the storage tank. He signed a document indicating that he received 10,000 litres. He did not account sufficiently for the fuel.”

15. Exhibit No. 4 which was produced by the prosecution though not submitted to the document examiner to prove beyond doubt the signatories to the same having been relied upon showed that it was not only the appellant who acknowledged receipt of 10,000 litres. There were other signatures. What did they have to say about the fuel? Their evidence would have been imperative.
16. PW2 one of the signatories of the document stated in his evidence that 10000 litres of fuel was delivered but only 4000 was emptied at the destined place. He is the same person who delivered the fuel when it was weighed at the outset at the weighbridge. It was his evidence that it was not the first time they were delivering fuel. His evidence is corroborated by that of his turnboy, PW3. This would suggest that they were accomplices to whoever was denying the complainant fuel if at all there was such a scheme. Their evidence called for corroboration.
17. PW5, No. **44952 Corporal Henry Bitok** who investigated the case stated that he was led by PW2, PW3 and the suspects to where the fuel was deposited. At the premises they found a man who told them what happened. To quote him he stated.

“We were led to the place. We were unable to recover it. A man at the place told us what happened. After investigations we charged the two accused”

18. This mysterious man who gave them vital information was not called as a witness. What exactly did he tell them?
19. The investigator in this case chose to leave out vital witnesses, the G4S security guards, **Tom Olang** the incharge store, the officer who was in custody of important records that would prove whether or not the fuel was received and the quantity, the weighbridge personnel who could convert what was actually delivered from Kgs to litres and finally the mysterious person who would have corroborated the allegation by PW2 and PW3 as to where exactly the fuel was delivered. These were material witnesses.
20. This court is alive to the fact that a case is never decided by counting of head. A court can even convict on the evidence of a single untainted witness. If it is satisfied beyond reasonable doubt that such evidence is true (*see Kenosi versus the State 1993 BLR 329 HC*). However, in instances where the evidence adduced has many loopholes requiring filling up by some other evidence, such material witnesses must be called. In such an instance the learned magistrate would be enjoined to weigh the evidence adduced, consider its merits and demerits and reach a decision.
21. In the instant case gaps not filled by the prosecution created a huge doubt as to whether some 6000 litres of fuel were diverted. In the premises it cannot be said with certainty that the appellant stole fuel that came into his possession by virtue of his employment. In the circumstances the conviction was not safe. The same is therefore quashed; the sentence meted out is set aside. The appellant shall be at liberty unless otherwise lawfully held.

It is so ordered.

DATED, SIGNED and DELIVERED at MACHAKOS this 6TH day of NOVEMBER, 2014.

L.N. MUTENDE

JUDGE