REPUBLIC OF KENYA

High Court at Machakos

Criminal Appeal 127 of 2009

JOSEPH MUHIA NJENGA ……………….……….APPELLANT

VERSUS

REPUBLIC ……………………………………...RESPONDENT

(Being an appeal from the original conviction and sentence in Machakos Chief Magistrates Court Criminal Case No. 3051/2008 by Hon.M.O. Okutche,R.M. on 16/6/2009)

JUDGMENT

Joseph Muhia Njenga, herein after "*the Appellant*" was jointly charged with another with two (2) counts.

1. Stealing motor vehicle contrary to section 278(A) of the Penal Code.

Particulars thereof being that, between the night of 28th and 29th day of November, 2008 at East Africa Portland Cement Company Athi River, in Machakos District within Eastern Province jointly with others not before court stole motor vehicle registration number KAU 129A make Mitsubishi Fighter valued at Kshs. 1.7million the property of **Patrick Maitha Kagenya.**

2. Stealing contrary to section 275 of the Penal Code. Particulars thereof being that between the night of 28th and 29th November, 2008, at East African Portland Cement jointly with others not before court stole 220x 50kgs bags of cement valued at Kshs. 165,000/= the property of **Patrick Maina Kagenya.**

The appellant having pleaded not guilty to the charge was tried, found guilty, convicted and sentenced to

two (2) years imprisonment on the 1st count and one year imprisonment on the 2nd count.

The applicant being aggrieved, now appeals against the conviction and sentence on the ground that;-

§ the plea was unequivocal;

§ the provisions of section 200 of the Criminal Procedure Code was not complied with by the court;

§ the trial magistrate erred by shifting the burden of proof,

§ he erred infact and law by making a finding based on inadequate evidence and failure to make a finding that rights of the appellant were violated.

This being the first appeal it is my duty to reconsider the evidence adduced in the lower court, evaluate it and draw my own conclusion as to whether the judgment of the trial court should be upheld. (See **Okeno vs Republic Criminal Appeal No. 75 of 1971).**

The appellant appeared before the court whereby charges were read to him and he pleaded not guilty. His case was heard. The prosecution in an endeavour to prove the case to the required standard called four (4) witnesses.

PW1, **Patrick Maina Kagenya** sent his driver, the applicant and turn boy to collect cement from Athi River Portland Cement Ltd using his motor-vehicle registration Number KAU 129A. He got information from his driver that the motor-vehicle was missing. He reported the matter to the police.

Thereafter he got an anonymous telephone call. The information received led him to Dandora Caltex Petrol Station where he found the motor vehicle parked. Investigations carried out revealed that indeed cement had been collected from Athi River Portland Company. The police charged the appellant and the turn-boy.

PW2, **Simon Kipchirchir Rono,** a Security Clerk E.A. at Portland cement was on duty on 29th November, 2008. At 2.10 a.m per their records, delivery Note No. 567346 and L.P.O No. 2306, motor vehicle registration No. KAU 129A left the depot at 4.50am carrying eleven (11) tonnes of cement. The motor vehicle was being driven by one **Richard.**

PW3, **No. 34663 Cpl Daniel Chepkwony** on receipt of the report from PW1 investigated the case and

charged the appellant.

PW5, No. 65718, CPL Gerald Wasike of Scenes of Crime took photographs of the motor vehicle.

In his defence the appellant explained that on arrival at the depot on the 28th November, 2008 they were not able to load the motor vehicle with cement because there were celebrations going on. They left the motor vehicle at the premises. They returned to the depot on the 29th November, 2008 only to find the motor vehicle missing.

A watchman at the premises told him and the turn boy that the motor vehicle left the premises at 4.30am. He also told them that they were not the ones who left the motor vehicle there. They were later arrested.

In his written submissions counsel for the appellant reiterated the allegation that the plea was unequivocal as the appellants preferred language was not shown; section 200 of the Criminal Procedure Code was not complied with by the magistrate who took over the case; there was no evidence to link the appellant with the commission of the offence and the trial magistrate shifted the burden of proof which was a violation of the appellants rights.

In a reply thereto, **Mr. Mukofu** for the State opposed the appeal. He submitted that the motor vehicle in issue was in custody and control of the appellant on the 27th November, 2008. How it had been stolen/left his custody he could have reported to the complainant/police.

With regard to the issue of the language used the appellant having conducted cross-examination of the prosecution witness and mounted his defence was a demonstration that he understood the language of the court. He urged the court to uphold the conviction.

Issues to be determined are as follows;-

i) whether the plea was equivocal

ii) whether the provisions of section 200 of the Criminal Procedure Code were adhered to

iii) whether the burden of proof was shifted to the appellant

iv) whether the appellant’s rights were violated under section 71 of the Constitution

v) whether the prosecution proved its case beyond reasonable doubt

I have perused the record of the lower court. The appellant appeared before **Hon. F.N. Muchemi,** Chief Magistrate *(as she then was*) the name of the prosecution is indicated as **C.I. Kosgei.** Similarly, the name of the interpreter is indicated as Collins.

The language the accused was conversant with was not recorded by the court. However, the interpreter was present and the charge was read to the accused and he pleaded not guilty. The issue to be addressed is whether the appellant was prejudiced in the circumstance. In the cited case of **Robert Njoroge & Others vs Republic- Appeal Case No. 232 of 2008-** where the Judge stated that the preferred language of the appellant was unclear, the appellant had pleaded guilty to the charge. An order for a retrial was made by the court.

The manner of recording a plea was set out in the case of **Kariuki vs Republic [1984] KLR 809.** It was an adoption of the decision of the celebrated case of **Adan vs Republic [1973] E.A. 445**. It is the duty of the court to read and explain the charge and all ingredients in the language that the accused understands. The accused would be prejudiced if he pleads guilty to a charge he does not understand. But in a case like the instant one where there was an interpreter, the accused having pleaded not guilty; the case having been set down for hearing; witnesses having testified in Kiswahili language; the appellant having cross-examined witnesses and even having tendered evidence in Kiswahili; definitely the interpreter communicated appropriately in Kiswahili language that the accused understood. In the circumstances the appellant was not prejudiced. Consequently the plea was unequivocal.

Section 200 Criminal Procedure Code stipulates as follows:-

“(1) ***Subject to subsection (3), where a magistrate, after having heard and recorded the whole or part of the evidence in a trial, ceases to exercise jurisdiction therein and is succeeded by another magistrate who has and exercises that jurisdiction, the succeeding magistrate may -***

a. Deliver a judgment that has been written and signed but not delivered by his predecessor; or

b. Where judgment has not been written and signed by his predecessor, act on the evidence recorded by that predecessor, or re-summon the witnesses and recommence the trial.

The appellant faults the process of writing and delivery of judgment in the lower court. It is argued that the magistrate who heard the case and later ceased to exercise jurisdiction within Machakos, wrote the judgment and signed it on the 3/6/2009. His colleague who succeeded him delivered the judgment on the 29th June, 2009. He however indicated that it was read and signed in open court. This according to the appellant was prejudicial to him as it could not be said who in actual sense signed the judgment.

I have perused both the handwritten draft (*Judgment)* and the typed copy. It is clear, the magistrate who was transferred **Mr. Okutche** wrote the judgment and signed it (*he appended his signature thereon*) on the 3rd June 2009. Thereafter **Hon Gacheru** delivered the judgment on the 29th June, 2009 and signed his part.

Section 200(1) (a) provides as the follows:-

"…***The succeeding magistrate may -deliver a judgment that has been written and signed but not delivered by his predecessor".***

It is a requirement that the author of the judgment signs it. This was complied with by **Hon. Okutche.** Further, it is a requirement that the succeeding magistrate delivers the judgment. How can a succeeding magistrate establish the fact of delivery of the judgment? He can only do so by appending his signature after discharging his duty. **Hon Gacheru** did state that he had complied with section 200(1) (a) of the Criminal Procedure Code and duly signed the order.

Section 200(1) (a) of the Criminal Procedure Code was duly complied with hence the appellant could not have been prejudiced in the circumstances.

The trial magistrate having considered both the prosecution and the defence's case remarked as follows.

"***Their defence is an afterthought. It does not rebut the prosecution's case. They were made to save their situation and dismiss them."***

` The magistrate made the remark after analysing evidence adduced by the prosecution in comparison to what the accused's had to state. There is however, nothing in the judgment showing that he expected the appellant to disapprove the evidence adduced by the prosecution witnesses. This therefore does not mean that he shifted the burden of proof which always lies with the prosecution.

It is stated that the appellant's rights were violated under section 71 of the Constitution.

Section 71 of the Constitution provides;-

(1) ***"No person shall be deprived of his life***

intentionally save in execution of the sentence of a court in respect of a criminal offence under the law of Kenya of which he has been convicted.

(2) Without prejudice to any liability for a contravention of any other law with respect to the use of force in those cases hereinafter mentioned, a person shall not be regarded as having been deprived of his life in contravention of this section if he dies as the result of the use of force to such an extent as is reasonably justifiable in the circumstances of the case-

a) For the defence of any person from violence or for the defence of property;

b) In order to effect a lawful arrest or to prevent the escape or a person lawfully detained;

c) For the purpose of suppressing a riot, insurrection or mutiny; or

d) In order to prevent the commission by the person of a criminal offence,

or if he dies as the result of a lawful act of war. `

It is in regard to protection of the right of life. There is absolutely nothing on the record of the lower court to even suggest that the appellant was denied the right to life. This was a misconception.

Finally, I have to determine whether the prosecution proved the case against the appellant beyond reasonable doubt.

Charges herein are of stealing a motor vehicle and general stealing. Stealing is defined in section 268 (1) of the Penal Code which provides as follows:-

"a person who fraudulently and without claim of right takes anything capable of being stolen, or fraudulently converts to the use of any person, other than the general or special owner thereof, any property, is said to steal that thing or property"

The appellant herein as a driver of the subject motor vehicle was in possession of the same having been authorised by the complainant (PW1). He was supposed to carry cement from the depot.

Evidence adduced proves the fact that indeed the motor vehicle was loaded with cement, some 11 tonnes (*220x50kg bags).* The delivery note No. 567346 and local purchase order No. 2306 according to PW2 indicated the motor vehicle left the premises at 2.20am being driven by **Mr. Richard.** The explanation given by the appellant in his defence is that he was not at the depot. He had gone home. Initially he was not able to load cement on the motor vehicle as expected because there were festivities at the premises. An issue that came up at the point of defending himself.

In his testimony PW1 said after learning that the motor-vehicle was missing he asked the appellant (driver) for the keys to the motor vehicle but did not have them. At that point they /driver and turn-boy started blaming each other.

The motor vehicle was found at Kayole after the complainant received an anonymous call. The delivery note and ignition key were therein. From evidence adduced, it is evident that the person who took away the Motor vehicle was enabled by the person who was in possession of the keys to the said motor vehicle. This person per evidence that is not disputed was the appellant. Without evidence to the contrary the explanation given by the appellant was not satisfactory. The person who took away the motor vehicle did so without the consent of the owner. The owner had authorised the appellant to use the vehicle to deliver cement to some destination. When the motor vehicle went missing for two (2) days the owner was denied of its title. It does not matter that they intended to abandon it where it was recovered. They dealt with it in a manner that resulted into it being returned in after it had been used differently from the way the owner intended. This conversion in the circumstances was fraudulent. With regard to the second count of stealing, to-date the cement has not been recovered. It was taken with intent to deprive the owner (PW1) of it permanently.

Having re-evaluated the evidence adduced and considered submissions made. I find the trial magistrate having reached a decision based on evidence adduced. The conviction on both counts was safe against the appellant. I uphold the conviction and sentence.

In the result the appeal is dismissed. The bail given to the appellant is hereby cancelled. He shall serve the remaining part of the sentence imposed by the court. It is so ordered.

DATED, SIGNED and **DELIVERED** at **MACHAKOS** this **9TH** day of **MAY, 2013.**

L.N. MUTENDE

JUDGE