



IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: CHESONI, C.J. TUNOI & SHAH, JJ.A)

CRIMINAL APPEAL NO 85 OF 1997

BETWEEN

NGULI MANGELI KATHUKU.....APPELLANT

AND

REPUBLICRESPONDENT

**(Appeal from a Judgment of the High Court of Kenya at Mombasa (Mr. Justice M.A. Ang'awa)
dated 4th July, 1997 in**

H.C.C.R.A. NO 275 of 1997)

JUDGMENT OF THE COURT

This is an appeal from a judgment of the superior court in its appellate jurisdiction dismissing an appeal from a judgment of the Chief Magistrate's court whereby the appellant was convicted of an offence contrary to section 279 (c) of the Penal Code, namely, that he stole one bag of sugar valued at Kshs.1,300/= the property of Kenya Airfreight Handling Limited (KAHL) whilst the sugar was in transit from Italy to Somalia.

Before we go into the grounds of appeal argued before us we would set out the facts pertinent to this appeal.

The appellant was employed as a cleaner in a warehouse belonging to KAHL. On the 31st day of March, 1993 he was seen by Joseph Kaduru Wanjohi (PW3) coming out of a warehouse pushing a trolley with a dustbin on it. The trolley, whilst in the process of being pushed by the appellant, got stuck and the dustbin on it fell down revealing a 50kg bag of a sugar which was in the dustbin.

Prior to this incident the appellant was told by Philip Muli Muthike (PW4) to go upstairs (to the warehouse) to clean the window and the appellant proceeded there with the dustbin. Mr. Muthike told the Chief Magistrate that the dustbin in question was the one which the appellant used to go and clean the window in the warehouse.

The appellant, on being asked by PW3, the reason for the bag of Sugar being in the dustbin replied that it was simply 'waste'. PW3 whose evidence is vital was not challenged at all on the important aspect of the dustbin containing a 50kg sugar bag. The counsel for the appellant confirmed to us that there was no

dispute as to the dustbin containing the said bag of sugar and that the same fell out of the dustbin which was on the trolley which was, at the material time, being pushed by the appellant.

Upon being convicted of stealing contra section 279 (c) of the Penal Code the appellant appealed to the superior court against both conviction and sentence. The superior court (Ang'awa J,) after hearing the appeal reduced the charge to that of conveying suspected stolen property contrary to section 323 of the Penal Code. The superior court did so, we presume, on the supposition that, there was not sufficient evidence of theft. The learned judge has not said so but the only inference we can draw is that she had in mind the issue of theft itself not having been proved.

We come, now to the grounds of appeal. The first ground is:

“Having found that the complainant did not testify in the subordinate court, the Honourable Judge erred in law in not acquitting the appellant”.

Mr. Kateteh based his argument as regards the first ground of appeal on section 202 of the Criminal Procedure Code. This section, as per its marginal note, deals with non-appearance of the complainant at the hearing. This section simply points out that if at the time appointed for the hearing of the case, the accused person appears and the complainant does not appear (if he had knowledge of the time and place appointed for hearing) the court shall thereupon acquit the accused. This section is clearly meant to cater for the eventuality when no witnesses including the complainant appear. Then the court may either acquit the accused person or adjourn the hearing. But this section does not cater for dismissal of a charge when the complainant appears through his/her/its witnesses.

In this case the complainant, KAHL, appeared through witnesses in the employment of Kenya Airways and Freight Forwarders who had first hand knowledge of the facts relating to the charge before the court. The presence of a complainant may well be necessary if he or she is a witness of substance. But when the complainant himself or herself cannot assist the court by giving any evidence his or her presence would be superfluous. There are instances where a complainant may have to identify his/her goods etc. but his or her absence when he or she cannot usefully give any evidence does not and cannot mandate a court to acquit the accused person. In any event we do not see how a limited liability company (which KAHL is) cannot appear through its agents, servants or employees. The first ground of appeal has no merit.

The second ground of appeal reads:-

“The Honourable Judge erred in convicting the appellant of the offence of conveying suspected stolen property contrary to section 323 of the Penal Code”

We have already pointed out what the learned judge could have had in mind when she reduced the charge from a felony to that of a misdemeanour. The question that is posed to us is: Did the learned judge have power to do so? On a first appeal to the High Court that court does exercise the powers of the subordinate court. Section 179 of the Criminal Procedure Code clearly provides:

“179(1) When a person is charged with an offence consisting of several particulars a combination of some only of which constitutes a complete minor offence, and the combination is proved but the remaining particulars are not proved, he may be convicted of the minor offence although he was not charged with it.

(2) When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it.

The learned judge had, as we have said, the power to reduce the offence of theft (felony) to that of conveying suspected stolen property (a misdemeanor). We see no misdirection on the part of the learned judge in so reducing the offence. She could well have come to the conclusion that there was an irresistible inference of theft. But she decided to not so infer. She cannot be faulted or that. The appellant ought to consider himself fortunate that he stands convicted of a minor offence when he could have been convicted

of the offence as originally charged.

We find no merit in this appeal which is dismissed.

Dated and delivered at Mombasa this 23rd day of January, 1998.

Z.R. CHESONI

CHIEF JUSTICE

P.K. TUNOI

JUDGE OF APEPAL

A.B. SHAH

JUDGE OF APEPAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR