IN THE COURT OF APPEAL

AT NAIROBI
(CORAM: AKIWUMI, TUNOI & SHAH, JJ.A.)
CRIMINAL APPEAL NO. 92 OF 1995

BETWEEN

LUCAS OCHIENG WARINDA .....APPELLANT

AND

REPUBLIC .....RESPONDENT

(Appeal from a Conviction and Sentence of the High Court

of Kenya at Nairobi (Justice E. M. Githinji) dated

10th May, 1994

in

CRIMINAL APPEAL NO. 33 OF 1994)

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JUDGMENT OF THE COURT

The appellant was charged with two counts that between May, 1993, and 10th August, 1993, being a servant of the Kenya Medical Training College, stole four curtains belonging to that institution and that on 10th August, 1993, was found in possession of a cooking pan belonging to the Kenya Medical Department.

The evidence led in support of the first count was that on 10th August, 1993, he was found walking within the Kenyatta National Hospital by the Chief Security Officer attached to that hospital, in possession of one of the four curtains marked with the initials of the Medical Training College which was wrapped in paper, and which the appellant had pretended were clothes which he was taking to the laundry. Upon his quarters being searched that same day, three curtains marked with the initials of the Occupational Therapy department were found which according to the Supplies Officer of the Medical Training College, had gone missing since May, 1993. Also found in the house of the appellant was a frying pan marked KMD to denote that it was the property of the Kenya Government Medical Department. This frying pan was the subject matter of the second count. The defence of the appellant was, without stating how he had acquired it, that the curtain that he had been found with by the Chief Security Officer belonged to him, that he had purchased the three curtains found in his quarters at Gikomba the well known open air market in Nairobi, and that he bought the frying pan at a place in Nairobi called Mali kwa Mali. The learned magistrate who heard the case found the appellant's defence to be "unreliable and cannot stand" and that the prosecution had proved its case beyond all reasonable doubt.

He convicted the appellant on both counts.

On appeal to the High Court, the conviction on the first count was affirmed and that on the second count set aside. In affirming the conviction of the appellant on the first count, the learned judge held that there was strong circumstantial evidence which could only lead to the conclusion that the appellant had stolen the curtains, namely, that the appellant worked in the hospital from where all the four curtains which were clearly and appropriately marked had been stolen and that they had all being found in his possession, one within the precinct of the hospital and three in his quarters. It was against this decision of the learned judge that the appeal before us has now been brought.

The grounds of appeal argued by counsel for the appellant were that there was no evidence to show that the curtains had been stolen after May, 1993, that the circumstantial evidence relied upon by the learned judge to affirm the conviction of the appellant also showed that the appellant could have been the innocent possessor of curtains that could not in the first place, be said to have been stolen, and that the learned judge did not give adequate consideration to the defence of the appellant that he had come into possession of the curtains innocently.

We think that we can say right away that these criticisms have some validity with respect to the three curtains found in the quarters of the appellant, in that even if the appellant had been charged with receiving stolen curtains, his explanation if not believed, might possibly be true. (See Peter Mwangi Kinyanjui & John Mwangi Ngenyaria v. Republic Criminal Appeal No. 128 of 1989 (unreported), Wabiro alias Musa v. Republic (1960) E.A. 184 and Kipsaina v. Republic (1975) E.A. 253). On the other hand, however, the same cannot be said with respect to the one curtain marked with the initials of the appellant's employer and wrapped in paper and which the appellant was caught red handed with after he had failed to bluff his way through with the ridiculous story that what was wrapped in the paper were his clothes which he was taking to the laundry. But how does this affect the first count itself? We think that because it cannot be said that the theft of all the curtains can be founded on the same facts, there had been a misjoinder in that count and that there should have been two separate counts one charging the appellant with the theft of the curtain he was caught red handed with by the Chief Security Officer, and a separate one charging the appellant with the theft of or receiving the alleged stolen curtains found in his quarters. However, the facts in respect of the theft of the one curtain which the learned judge in our view, quite properly accepted, are very clear. Moreover, it is manifest from the proceedings that the appellant suffered no prejudice by the misjoinder. In these circumstances, we will invoke the provisions of section 361(5) of the Criminal Procedure Code which is in the following terms, in dismissing the appeal before us:

> "On any appeal under this section, the Court of Appeal may, notwithstanding that it may be of the opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has in fact occurred.".

In the result, the appeal is dismissed.

Dated and delivered at Nairobi this 9th day of May, 1996.

A. M. AKIWUMI

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JUDGE OF APPEAL

P. K. TUNOI

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JUDGE OF APPEAL

A. B. SHAH

.....

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR.