REPUBLIC OF KENYA

IN THE HIGH COURT AT KISII

CRIMINAL APPEAL NO 57 OF 1993

FRANCUS ATEBE MOGERE……......... APPELLANT

VERSUS

REPUBLIC…………….………..… RESPONDENT

(From Original Convictions and Sentences of the Senior Principal

Magistrate's Court at Kisii in Criminal Case No 4956 of 1990 -

Injene Indeche Esq SRM)

JUDGMENT

The appellant and his co-accused (who has not appealed) were convicted of theft, contrary to section 275 of the Penal Code. It was alleged that they jointly stole 116 trees belonging to the complainant.

This appeal must be allowed. The evidence of Nyaecha (PW3), an employee of the complainant was that on the morning of 10th November, 1990, when he went to the complainant's *shamba* he found the appellant and the co-accused cutting down the trees using an axe and the *panga*. His evidence does not show as to whether or not he questioned them. This would surprise one since PW3 knew or must have known that the trees belonged to his employer and he saw them actually cutting them down as he maintained. His evidence is that he simply went away and reported the matter to the complainant's wife as he did not find the complainant. According to the complainant's wife the report was made to her on the 11th that is a day after, by PW3. Surprisingly she neither visited the scene nor went to make a report either to the Assistant Chief or to the police, which in my view would be a normal thing. She added that when her husband returned on the 15th November, she informed him about what had happened. The evidence of her husband (complainant PW2) is that upon receiving the report he went and made a report to the Assistant Chief. However, the Assistant Chief was not willing to assist. I note that in the judgment, the learned Senior Resident Magistrate said that the complainant found that the Assistant Chief was not in and he went and made a report at Kisii Police Station. PW3 continued to say that he went with the police officer to the scene and the police took the photographs (exhibit 1 & 2).

The defence of the appellant and the co-accused was that they bought some trees from another person whom they named as Mackenzie. They also said that one Washington Obiri negotiated the transaction. DW1 (Onserio) said that on the material date he met the appellant and his co-accused in the company of Washington Obiri at a *Kiosk*. Mackenzie and one elder were present. The co-accused said at the time that he wanted to construct a house and buy some trees for it. Mackenzie said that he had some trees to sell and they went to the site and co-accused marked the trees he wanted and paid Shs 50/- as part payment towards the agreed price. Oteyo DW2 recalled having met the co-accused negotiating the price of the trees with Mackenzie. He saw them marking some trees.

In dealing with the defence, the magistrate said in his judgment that if the appellant and the co-accused had bought the trees from another person they would have had an agreement drawn and signed by both parties present. This view taken by him influenced him to some extent to record the convictions. There is gross misdicretion in concluding that a written agreement was a must. There are many transactions of this nature between the people in the local society which are never turned up into writing and many times no problem arises as a result of lack of a written agreement.

Turning to the evidence of Jane (PW5) I note that in her evidence she said that some relatives of the accused persons agreed to compensate her husband but later they changed their minds. She went on to say that the second accused actually agreed to deposit the money at Onyancha advocate’s office and the 1st accused (appellant) promised to withdraw money from the bank. She added that the agreement was reduced into writing in the presence of two of the clan elders she knew.

The learned magistrate failed to direct his mind to this aspect of the evidence. If there was a written agreement on admission of liability as Jane claimed, why did not the prosecution take any step to produce it? Had Jane spoken the truth in the absence of the said agreement before the Court it is not possible to say exactly what its contents were. The learned magistrate gave no place in his judgment to this part of Jane’s evidence but the possibility that it influenced his mind cannot be ruled out.

In rejecting the defences the magistrate said that the failure on the part of the accused persons to call Mackenzie and Washington had to be construed that their evidence would have gone against them. This was a fatal misdirection as it shows that the learned magistrate placed the burden of proof on the accused persons. The prosecution could have called them as witnesses in rebuttal. Except in certain cases an accused has to prove or disapprove nothing. The magistrate totally ignored the evidence of two witnesses called to support the defence.

For the above reasons, the conviction against the appellant is quashed. Exercising my power in revision, I also quash the conviction against the co-accused (Joseph Kembero Nyagwaga) who has not appealed.

I set aside the sentences against the appellant and the co-accused and order that both be set to liberty forthwith.

Dated and Delivered at Kisii this 18th day of March, 1993

V.V. PATEL

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JUDGE