



REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA

AT NAIROBI

CRIMINAL APPEAL 65 OF 1986

STEPHEN KAVETA

JOSEPH GICHIRA

AMANI MWAMBURIAPPELLANT

V

REPUBLIC.....RESPONDENT

JUDGMENT

The appellants were all convicted of theft by persons employed in the public service contrary to section 280 of the Penal Code after a trial in the resident magistrate's court in Nairobi ending on December 6, 1985. They were each sentenced to twelve months imprisonment. The appellants appeared at the trial in this way, that 1st accused was Amani Mwamburi, the 2nd accused was Stephen Kaveta, and the 3rd accused was Joseph Gichira. Each of these persons appealed to the High Court, where their appeals were dismissed summarily. They then appealed to this court and it is sad to relate that they had each served the sentence imposed, by the time the appeals came on for hearing. Nevertheless they found it worth continuing with their appeals, probably to improve their future chances of employment. Because their appeals arrived here at different times Stephen Kaveta has been recorded first, Joseph Gichira second, and Amani Mwamburi third. But it would not assist in understanding their appeals by referring to them as they appeared in this appeal. Instead it will be easier to refer to them by name and as described in the trial.

The charge was that the appellant stole a brake drum and hub valued at Kshs 15,909/15 from the Railways Corporation. They were employed at the Mechanical Handling Dept; that is to say Amani Mwamburi and Joseph Gichira were employed as technicians and Stephen Kaveta worked there as a driver. The brake drum and hub belonged to a lorry, a BMC seven ton lorry. The brake drum and hub had been placed amongst scrap, but was still serviceable, and it was said that the drum had been called for at about 11.00 am on the day in question. By this time a report had come to the foreman that the brake-drum and hub was about to be stolen. This report led to an investigation. The basic facts which emerged were that Morgan Guda PW 4 had seen the appellant Amani Mwamburi rolling the drum. Morgan did not suspect theft, but alleged he told the foreman. It is not clear who the foreman was. Secondly, Police Constable Samuel Gathora PW 5, having charged Amani with theft, said that Amani directed the police to Kariokor where in a certain house the brake drum and hub were discovered. There was evidence that Stephen had driven his vehicle to Kariokor. Then Amani Mwamburi confessed to Inspector Geoffrey Gitau at 5.20 pm on the next day, June 28, 1985, according to the statement exhibited, that he stole the brake drum and hub. The trial court accepted the statement as voluntarily made. The court accepted this

evidence in preference to the denial of the appellant in his defence.

It appears that suspicion fell on Stephen Kaveta as the driver of a vehicle being used on that day. Stephen had washed the vehicle at 9.00 am on the day in question, he was with Amani Mwamburi according to Remisood Mwathi PW 2. Later on, according to Luis Abdi PW 3 Stephen had been helping with the exchange and repair of a radiator. But there was the report against him, a shadow without material substance in the evidence. It was his statements to the police which contained the main evidence.

As a result, it becomes clear that Stephen transported the brake drum and hub, but according to him he did not know that Amani Mwamburi and Joseph Gichira were stealing them. In his defence he denied theft. The trial court however thought that as Stephen admitted having transported the brake drum and hub to Kariokor where it was recovered by the police, that it was clear that all three accused persons participated in the theft.

As far as Joseph Gichira is concerned he was implicated in the suspicion. That became clearer only with the statements of Stephen Kaveta. In his own statement to Inspector Wambua PW 7 on June 28, 1985 he denied taking part in the theft. We said he had counselled Amani Mwamburi and Stephen Kaveta against stealing the drum. The learned Magistrate thought that Joseph Gichira had arranged for the taking of the drum. That is exactly what he said he had not done. There was no evidence against Joseph Gichira had arranged for the taking of the drum. That is exactly what he said he had not done. There was no evidence against Joseph Gichira at all, except for what Stephen Kaveta had said.

The accused appealed. In a most unimpressive manner the High Court disregarded section 35.2(2) of the Criminal Procedure Code and summarily dismissed all the appeals.

At the hearing of their second appeals, learned state counsel has conceded the appeals of Stephen Kaveta and Joseph Gichira out-right. They ought not to have had their appeals dismissed summarily for the reason that there was no evidence against them. We agree. From what we have observed above it will be seen that there was no evidence against either of the appellants except what each one said against himself and the other. Their statements were exculpatory. They were not confessions. As such they could not be taken as evidence against the other, even to the limited extent permitted by section 32 of the Evidence Act (cap 80). The learned trial magistrate drew unwarranted inferences from their statements against their makers. Stephen did transport the stolen property but he said he did not know that there had been a theft. Joseph did not at all make arrangements for the theft.

What was needed at the trial was a careful analysis of the evidence as it affected each accused person. The effect of the judgment is that regardless of what the accused said, they were all assumed to have acted in concert. That was the assumption which the High Court had to consider. Was it justified on the grounds put forward; was there identification of the stolen property; how could the drum and hub leave the yard undetected; were the extracted statements reliable without other supporting evidence; was the evidence as it stood acceptable in the face of discrepancies? Or, was it simply an assumption of guilt because of the rumours spoken of by the foreman and others in authority? The prosecution had no evidence that these accused stole the property in concert. There were only the rumours. Then the statements of the accused came in. In the end there was absolutely no evidence against Joseph Gichira, because Amani who confessed did not implicate him, and Stephen could not implicate him by an exculpatory statement. Stephen's statement as against himself needed careful analysis and probably rebutting evidence, which would show that he knew of the theft. Without that approach the statement remains unequivocal. State Counsel thought it unworthy of support. We agree.

All this has been explained time and time again, but perhaps an old case will suffice to explain the law once again. In *R v Willibad s/o Tibanyendela* (1948) 15 EACA 111 it was held that extra judicial statements by co-accused which exculpate themselves and implicate one or more of their co-accused are not admissible in evidence under section 30 of the Indian Evidence Act (now section 32 of cap 80). Such statements cannot be used as against any persons inculpated thereby but they should be admitted in evidence as statements exculpating the maker.

The assumption by the trial court that all three acted in concert stemmed from a fundamentally wrong approach in law. That was the concern of the High Court. But while the appeals should not have been dismissed summarily, we considered that the appeals to this court were sufficiently clear to conclude the matter. The appeals of Stephen and Joseph are allowed and their convictions are quashed and the sentences imposed set aside and cleared from the record.

The appeal of Amani Mwamburi is dismissed. He showed the police where the brake drum and hub were located. He confessed to theft. True he retracted his confession. We think that it was a true confession corroborated by the fact that he was seen rolling the brake drum and hub before it was found missing. He directed the police to the place where it was. His actions stand alone and prove his own guilt. The specific matters he has raised in his appeal do not assist him. The discrepancies in the evidence do not affect his own actions. The consequences of some of the evidence of identification did not affect the other evidence that the brake drum and hub were Railway Corporation property, even though taken from the scrap heap. The evidence in the case of Amani leads to no doubt, but that his conviction was sound.

Consequently in *Amani's* case the appeals against convictions and sentence are dismissed.

March 16, 1987

PLATT, GACHUHI & APALOO JJA