

Wanyande v Republic

High Court, at Nairobi November 20, 1986

Bosire J

Criminal Appeal No 497 of 1986

November 20, 1986 Bosire J delivered the following Judgment.

On March 27, 1986 the appellant Stephen Omondi Wanyande, was convicted of stealing by a person employed in the public service, contrary to section 280 of the Penal Code after a full fledged trial, and was sentenced to 8 months imprisonment. He now appeals against the conviction. His grounds of appeal may be summarized as here under:

(1) That the learned trial magistrate erred by convicting him on circumstantial evidence only.

(2) The evidence adduced was not sufficient to sustain the conviction more particularly in absence of evidence as to the identity of the exhibited tap as being the property of the Kenya Railways Corporation.

(3) The trial magistrate erred by failing to consider the appellant's defence.

There was no appeal against sentence.

The facts alleged against the appellant are that on the morning of November 27, 1985 the appellant was seen by Alexander Mutua Maingi (Mutua) coming out of a common lavatory for the employees of the Sleepers Reconditioning Unit of the Kenya Railways Corporation. Both the appellant and Mutua were attached to that section. When Mutua entered the lavatory after the appellant had come out he found water flowing freely from an open pipe whose pipe had been removed. Mutua immediately went and informed Nelson Maina Njogu (Maina), the foreman in charge of the section. On learning that the appellant had been seen leaving the lavatory shortly before the water was found flowing, Maina suspected him. He called him and interrogated him about the condition of the lavatory at the time he had visited it earlier the same day, but the appellant denied he had noticed anything unusual. He then left the appellant being guarded by among other people, Timothy Nyamai Katira (Katira), and Cosmus Okoth Ogora (Okoth). Maina went to supervise the performance of work in the workshops. Meanwhile the appellant is alleged to have taken off and run across Enterprise Road, which was passing nearby, and went to a nearby kiosk. While outside the kiosk he put his hand into the near trouser pocket and removed something which he threw into a nearby "Nduma" garden. He then started walking back. Maina, Katira and Okoth, all said they saw the appellant throwing something into that garden. A search conducted in that garden shortly later led to the recovery of a water tap which on being tied on the open pipe from which water was found flowing, fitted very well. The appellant was arrested and charged.

The appellant while admitting that he had gone to the lavatory in question on the material date and time denied he had observed anything unusual in it. He admitted he crossed the Enterprise Road as alleged and went to a kiosk, but he denied he threw anything in the "Nduma" garden, or that he had gone towards that kiosk running or hurriedly. He implied that Okoth and the others had framed the case against him.

In convicting the appellant the trial magistrate found as fact that the appellant had been seen leaving the lavatory complained of; that the appellant escaped from the custody of Okoth, Katiran, among others, and was seen throwing away something into a Nduma" garden, and that he told a lie about not finding anything unusual in the lavatory when he visited it in the morning and before the water was found running. He was satisfied the prosecution had discharged the burden placed on them proving the charge

beyond any reasonable doubt.

Admittedly the appellant's conviction is based on circumstantial evidence only. However, circumstantial evidence has been oftentimes said to be the best evidence and that it is capable of proving a proposition with the accuracy of Mathematics (Republic v Taylor; Weaver and Donovan (1982) 21 Cr App P 20). It is evidence which must however, be narrowly examined to exclude every other hypothesis than that the accused committed the offence charged. (Simeon Musoke v Republic [1958] E A 716). The conduct of the appellant clearly show that only him stole the water tap. He was seen on the morning of the material date coming out of the lavatory in question. Soon thereafter water was found flowing and the tap which was supposed to control it missing. After his arrest on suspicion that he was a responsible for its disappearance, he took off. Eye witnesses testified having seen him run way. He was seen throwing away something which later turned out to be a water tap. The same fitted well where the missing one had been. I find no basis for the appellant's complaint that he had been framed up by his workmates. This is a case where the appellant's conduct tells clearly that he is the one and no one else who stole the matter tap. His conviction is safe.

The sentence of 8 months imprisonment is both legal and appropriate. I have no basis for interfering with it. The appellant's appeal fails and is dismissed in the entirety. Order accordingly.