REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NYARANGI, PLATT & APALOO JJA)

CRIMINAL APPEAL 76 OF 1985

MOSES NJUE KAMANA……. APPELLANTS

VERSUS

REPUBLIC…….....…… RESPONDENT

JUDGMENT

August 4, 1987, **Nyarangi, Platt & Apaloo JJA** delivered the following Judgment.

The appellant Moses Njue Kamanja was on July 26, 1984 convicted by the resident magistrate Makadara, of the offence of stealing by a servant employed in the public service and was sentenced to 1 ½ years imprisonment. He appealed against the conviction and sentence to the High Court on a number of grounds. On December 7, 1984, the High Court (Mrs Aluoch, J) after an independent evaluation of the facts affirmed the said conviction and dismissed the appeal.

The appellant has brought a further appeal to this court against the appellate decision of the High Court apparently under section 361(1) of the Criminal Procedure Code. Before considering the grounds of appeal to this court, it is necessary to relate the facts briefly.

The appellant was, at the time material to this case, employed by the Ministry of Environment and Natural Resources as a Forest Ranger. One of his duties was to guard the central stores of the Ministry. Between the night of May 18 and early morning of May 19, 1984, 15 tyres were stolen from the stores. The appellant was on duty during this period and was duly armed. It appeared that the padlocks to the stores were tampered with.

The evidence that connected the appellant to the theft, was given by one Wilson Oketch, who was on guard duties close to the Karura forest that night. He testified in sum, that between 12 midnight and 1 am, he was attracted by the barking of dogs. He went near an electric post to investigate. He then saw the appellant who stood by an electric post to investigate. He then saw the appellant who stood by an electric post fully armed. Near him, was a man who was engaged in removing certain heavy items. That person made about 15 trips. As the appellant stood by and did nothing about the removal, he thought it was a friend moving house. So he did not raise alarm. When he learnt two days later that tyres were stolen from the stores that night, he apparently related this incident to his employers or police.

When the police were invited to the scene, constable Mugo entered the store where the tyres were kept and noticed that there were a number of polythene bags which were blood stained. He cut the stained portions and sent them to the police station. Meantime, blood samples were taken from ten employees of the Ministry. The bags as well as the blood samples were sent to the Government Chemist. This includes a samples of the appellant's blood. The Government Chemist found that the blood stain found on the bags matched the blood group of only the appellant. It was a rare blood group because the chemist said only 7% people have that blood group. The appellant denied that he knew of or in any way participated in the theft.

The learned Magistrate after recapitulating and evaluating the evidence, felt satisfied that the charge

against the appellant was proved. He appealed against this conclusion to the High Court. After an independent evaluation of the evidence, that court reached the same result. So there are two concurrent holdings against the appellant on the facts.

As we said, the appellant brought a second appeal to this court and prayed that his conviction be set aside. Under section 361(1) of the Criminal Procedure Code, his right of appeal to this court is limited to questions of law only. Although some of his six grounds of appeal were dressed as issues of law, they are in truth factual questions. However, in the ground 4 the appellant complained that when he was arrested and searched no scar or bleeding was found on him. And as the Government Chemist explained there are other people with the same blood group as that of the appellant. So the blood from the polythene bag was not necessarily that of the appellant. That view is fortified by the fact that the Police Surgeon was not called to give evidence whether the appellant could have been the source of the blood. It was therefore a misdirection for the trial court to hold that it was "most probable" that the appellant left blood stains on the polythene. There was no evidence to establish that it was the appellant's blood which the Government Chemist examined. The Police Surgeon should have been called to prove the chain of evidence and thus ensure that the blood stains on the polythene bags were of the same blood group as that of the appellant. On the remaining evidence as a whole there was, as already indicated, ample visual evidence identification to sustain the conviction.

That this is so, is shown by the fact that the only oral argument he addressed to the court as supplement to this grounds of appeal, complained that the learned magistrate should have believed the evidence of Wilson Oketch.

There is nothing incredible about the witness's evidence. He knew the appellant before. Both worked at the same place. And he worked at the same place. And he swore that the saw him clearly by electric light. The appellant did not deny that he was on duty that night. The part he played in the theft of the tyres, justified the inference that he acted in concert with the person who physically removed the goods.

There is no showing that in arriving at this conclusion, the learned magistrate committed any error of law, nor did the High Court which affirmed his decision, violate any law. We think therefore that this appeal has no merit and ought to be dismissed.

We do so order.

August 4, 1987

NYARANGI, PLATT & APALOO JJA