

REPUBLIC OF KENYA

Wamalwa v Republic

High Court, at Nairobi August 30, 1985

Owuor J & Schofield J

Criminal Appeal No 1717 of 1984

(Appeal from the Resident Magistrate's Court at Nairobi, G Osango Esq)

Advocates

Miss LG Mbarire for Respondent

Appellant in person

August 30, 1985, Owuor J & Schofield J delivered the following Judgment.

The appellant was charged jointly with another but convicted alone for the offence of stealing by servant contrary to section 281 of the Penal Code. The particulars of the offence were:

“Tom Nyongesa Wamalwa (2) Johnson Kamau Nginyo on the November 27, 1983, at Jomo Kenyatta International Airport Maintenance Yard within the Nairobi Area, being persons employed in the Public Service as Mechanic Grade II and a driver respectively in the Aerodromes department jointly stole 200 litres of diesel light valued at Kshs. 1,046.00 the property of Kenya Government Aerodromes Department which came into their possession by virtue of their employment.”

The appellant was an employee of the Ministry of Transport and Communication stationed at Jomo Kenyatta Airport. According to the testimony of Samuel Ongaro PW 2, another employee of the same Ministry requisition order or voucher properly filled and signed by the appellant. The voucher was taken to him by a driver – co-accused of the appellant. Ongaro accordingly supplied 200 litres of fuel as indented for sub-station (7) or Generator 7. Ongaro wrote out a gate pass and also filled in the ledger indicating the amount of the supplied fuel, supplied to who and transported by who.

It was the evidence of Raymond Kefa PW 6 that he went on leave sometime late October, 1983 to late November, 1983. He had left the appellant doing his duties. When he came back, he requested the appellant to hand over the duties back to him. The appellant did not do so. After about three days he decided to check the books by himself. This is when he came across the requisition for the fuel in issue.

According to this voucher Exh (1) the appellant had ordered for this fuel for generator No (7) but there was no record of the fuel in the log book as was the practice. Immediately after this the appellant proceeded on leave. He then personally checked with the people who maintained the generator and was informed that there was no power failure on the November 27, 1983 to necessitate the requisition for fuel by the appellant. He therefore made a report to his superior and the investigation of this matter started.

Investigation was done by Peter Victor Wafula PW 7. Wafula testified that he was given the voucher ordering for the fuel. It indicated that the fuel had been ordered for by the appellant and accordingly recorded in fuel ledger folio No D/1/198. Upon checking the records for sub-station (7), there was no record of the receipt of the fuel. One Omeno who was on duty on that day also informed him that he had not received any fuel. It prosecution was never called to give this evidence to the court. In our view, it was therefore improper for the learned trial magistrate to refer to this information, leave alone basing his finding on it. It was after this that he handed over the matter to the police, the appellant arrested and

charged.

The appellant testified and admitted issuing the voucher in question. Fuel was obtained for generator No 7 whose maintenance was his responsibility. On the material day after the 2nd accused had brought the fuel to the airport, he took it and filled it in generator No 7 which has a capacity of six hundred litres. It was part of his duty to refuel the generator. We note and as indicated to us by the learned state counsel that this evidence from the appellant was not challenged by the prosecution at all.

We have carefully considered the appellant's six grounds of appeal. We also note that the learned state counsel did not support the conviction for reasons we fully agree with. We are unable to uphold the conviction. The charge against the appellant could not be deemed to have been proved beyond reasonable doubt without any evidence to disprove the appellant's allegation that he put the fuel in question in the tank for generator 7. It was the duty of the prosecution to adduce evidence of the amount of fuel in the tank before and after the requisition referred to. It was insufficient for them to produce a log book which did not contain the relevant entry.

We are of the view that no offence was proved against the appellant. The conviction was unsafe. We therefore allow the appeal, quash the conviction and set aside the sentence. We however, note that no further orders are necessary since the appellant has already served his imprisonment sentence.