



REPUBLIC OF KENYA

Gikumu v Republic

High Court, at Nairobi January 26, 1984

Brar J

Criminal Appeal no 401 of 1983

Criminal law - theft by servant - contrary to section 281 of the Penal Code cap 63 - evidence of accomplice who is not charged - whether magistrate was entitled to convict.

The appellant was a driver of a lorry owned by the complainant engaged in transportation. On the material day the driver was required to deliver some quarry stones to Eastleigh but instead delivered them to someone at Kariobangi. He received payment of which he gave the turnboy Kshs 5. Apparently peeved by the paltriness of the sum the turnboy reported the incident to his employer, the complainant. The appellant was arrested and charged with the offence of theft by servant contrary to section 281 of the Penal Code. The turnboy testified against the appellant as did another turnboy. From the evidence it was apparent they were accomplices. The appellant in his charge and caution statement admitted the offence and even led the police to the stolen stones where some were recovered. The appellant was convicted and sentenced to two years' imprisonment. He appealed against both conviction and sentence.

Held:

1. The learned magistrate was entitled to rely on the accomplice's evidence as the appellant corroborated it into extra judicial statements freely made to the police.
2. The appellant's story that he never stole the stones but merely offloaded them at a place other than the one to which he was instructed to take them, because of heavy rains which according to him made the road to the intended place impassable, was an afterthought.
3. The sentence though severe for a first offender was not manifestly excessive.

Appeal dismissed.

Cases

No cases referred to.

Statutes

Penal Code cap 63 section 281

Advocates

B Chunga for Respondent

January 26, 1984, **Brar J** delivered the following Judgment. The appellant was charged before resident magistrate at Kibera with the offence of theft by servant contrary to section 281 of the Penal Code (cap 63) and upon conviction was sentenced to 2 years' imprisonment. He is appealing against both the conviction and the sentence.

During the months of November and December 1982, he was employed by the complainant (PW 1) as a driver and he used to drive lorry registration number KTL 999. PW 2 was also employed on the same lorry as a turn boy. In the course of his employment, the appellant was instructed to transport the complainant's building stones measuring 1050 feet from Karen to a certain place in Eastleigh. Instead of taking the stones to that place, the appellant off-loaded them at Kariobangi where he sold the to someone. Thereafter he gave Kshs 5 to the turn boy (PW 2) who apparently was not satisfied with this amount and reported the matter to the complainant. Later it was discovered that a Jack, a chain and tow mirrors were also missing from the lorry. The matter was then reported to the police. When the appellant was questioned about the thefts, he admitted to PW 1 that he had sold the stones and that the missing mirrors and the Jack were in Machakos. He also showed the complainant and the police, the place where he had delivered the stones. A part of the stolen stones measuring 700 feet were recovered from that place.

On December 29, 1982, Inspector Henry Mulwa (PW 5) recorded an inquiry statement (Ex 2) after the usual caution and on December 31, 1982 he charged appellant with the offence of theft by a servant. In reply to the charge and the usual caution the appellant made a statement (Ex 3) voluntarily and without any threat, promise or inducement. Both Exhibits 2 and 3 were admitted in evidence without any objection from the appellant. In Ex 2 he admitted the theft of the stones but also implicated PW 2 and another turn boy named Wambua in the theft. In his cautionary statement (Ex 3) he again confessed to the theft of the stones and also stated where the missing jack, the mirrors and the chain were. He once again implicated PW 2 and Wambua in the theft of the stones.

The learned trial magistrate, in my view, quite rightly rejected the appellant's story that he had not stolen the stones but had offloaded them at a place other than the one to which according to him had made the road to the intended place impassable. This story was, I think, an afterthought on the part of the appellant. PW 2 was quite obviously an accomplice in the theft of the stones but I am satisfied that the learned magistrate was entitled to rely upon his evidence corroborated by the appellant in Exhibits 2 and 3, and also by his voluntarily showing to PW 1 and the police, the place where the stones were delivered.

Upon my own evaluation of the evidence before the lower court, I am satisfied that the appellant was properly convicted. The sentence, though severe for a first offender, is not manifestly excessive.

The appeal against both the conviction and the sentence is accordingly dismissed.