



REPUBLIC OF KENYA

Okuoga v Republic

Court of Appeal, at Kisumu June 25, 1985

Hancox, & Nyarangi JJA & Platt JA

Criminal Appeal No 65 of 1985

(Appeal from the High Court at Kakamega, Aganyanya J)

June 25, 1985, Hancox, & Nyarangi JJA & Platt JA delivered the following

Judgment.

This is a second appeal from the appellants conviction on three counts of theft by a person employed in the public service contrary to section 280 of the Penal Code.

On count 1 the appellant was charged with stealing two tents and poles on or about August 2, 1980 at Wesu Hospital while the appellant served there as the doctor and Medical Officer of Health. The trial court found that the actual theft took place on August 10, 1982 and the change of date was accepted apparently by the first appellate court, because it was at this latter date that the fraudulent conversation was held to have taken place.

On count 17, the appellant was charged with stealing 40 soft boards between August 4, 1982 and December 24, 1982 contrary to section 280 of the Penal Code at Bungoma District Hospital.

On count 19, the appellant was charged with the same type of theft, between September 15, and December 24, 1982 of 15 drums at Bungoma Hospital. He was sentenced to 9 consecutive months' imprisonment on each count. But this was reduced on first appeal to a total of 18 months' imprisonment by causing the sentence of 9 months' on count 19 to run concurrently with the imprisonment on each of counts 1 and 17.

The appeal of the appellant lies on matters of law in accordance with the provisions of section 361 of the Criminal Procedure Code. It is as well to place this provision in the forefront of this judgment, because the memorandum of appeal and the explanations of the appellant in court, range over many areas of the fact in this case. It may be convenient here to note that we shall, be unable to deal with the appellant's appeal against sentence to grounds 49 and 50, as this matter has been declared by section 361 to be one of fact. The sentence is otherwise permitted by law if the convictions are sound. Again, we shall be unable to take into account the tribal and political background referred to by the appellant, as that alleged antipathy against the appellant is not a matter directly concerned with these quite specific instances of theft, concerning the activities of the appellant himself. Either the appellant took possession of these articles and converted them to his use fraudulently, or he did not. The courts below found that he did fraudulently convert them. Thus the question for this court, in general, is whether the lower courts were entitled in law on the evidence before them, to find that these thefts had been proved beyond reasonable doubt.

On count 1, the facts proved beyond doubt or admitted by the appellant in his defence were as follows: The appellant at all material times in these three charges was a medical officer in Government service, and apart from his professional work as a doctor, carried out administrative duties as a Medical Officer of Health in charge of the hospital at which he was stationed. The appellant served in these capacities at Wesu Hospital in Taita-Taveta District. On August 2, 1980, Mr Ocham, a supplies assistant dealing with stores, issued to the appellant two junior tents for use in the mobile cholera campaign. The appellant was to use them for as long as they were needed and then return them, although the exact time for their return is disputed by the appellant. At any rate, the appellant admitted in evidence, that by the time he was transferred from Wesu Hospital to Bungoma Hospital, the cholera campaign was already over, and he did not need to sue the tents in Bungoma for any purpose. The appellant was transferred in January 1982. It was accepted by the lower courts that he had been in the operating theatre on the day that his luggage had been sent by the coast government agent from Wesu to Bungoma. The trial court made a special finding that the appellant did not know that the tents had been thus transported. It is not denied that the tents had been handed back to store. With some kindness, perhaps, to the appellant, he was not asked why it was that when his luggage had gone, the tents were not found to be left behind, so that he could hand them back having no further use for them. Perhaps he forgot. At any rate, nobody else at Wesu remembered them. It was accepted that by mistake the tents were sent to Bungoma. According to the appellant, when he reached Bungoma, after his luggage had arrived, he found it stored in a small house. Later it was moved to a large house, and kept in the servants' quarters for a driver. So he decided to send home unwanted articles. He would then ask the drivers when they were going to Kisumu to collect drugs so that they could take his property for him. He says that the drivers used to load the properties in his absence and take them to (his) home. "That is how the tents came to be at my home." On the other hand according to driver Anyonyo it was on August 0, 1982, that the appellant called him, and told the driver to pack the things in his vehicle, and between 4.00 am and 5.00 am the driver should drive them to the appellant's home. The vehicle was then packed with two tents, mattresses and beds and at 4.00 am or thereabouts, the appellant, his workman Otengo and driver Anyonyo drove to the house of the appellant's father near Miwani. They arrived at 6.00 am and met the mother of the appellant. They unloaded all the goods from the vehicle including the tents and left them in a house. At 8.00 am they started back, reaching Bungoma at 9.00 am.

It seems from the nature of the defence as evidenced by the appellant, that the story of Anyonyo is not true. The inference from the defence is that, the appellant knew nothing of all this. But later on, on December 24, 1982 driver Anyonyo led the police officer (investigating certain complaints concerning a saw-mill) to the house where the tents and other things were stored. The appellant admitted in his defence that the tents found in his father's house were the tents issued to him at Wesu Hospital. It appears that the government's marks were partly obliterated on one, and rubbed off on the other. However, as the appellant acknowledges that they were the tents issued to him at Wesu, no issue of identification arose.

On the December 26, 1982, it is alleged that the appellant approached Mr Maunda, a relative through marriage of the appellant, and asked Mr Maunda to introduce the appellant to the District Water Officer, Mr Odidi. Mr Maunda is a mechanical engineer in the Ministry of Transport and Communication, and in the course of maintaining vehicles and pumps, at times carries tents for junior staff. He relies for supply for these tents on the water officer. On November 3, 1982 he had requested three or four tents, but he was issued with two tents according to the voucher of that date exhibited in court. One story is that Mr Maunda did not take delivery of the tents on that date, because he had no petrol for his safari, and he was told that the tents would be available when wanted. Thus when the appellant approached Mr Maunda, it was with a view to surrendering the tents to the Ministry of Water so that they could be issued to Mr Maunda. The appellant said that he would surrender them on December 28, 1982 Mr Maunda contacted Mr Odidi on December 27, and December 28 1982 and it was arranged that the tents to be surrendered would be taken on charge and issued to Mr Maunda. Mr Maunda signed a voucher and the register to that effect. An hour later Mr Maunda found that voucher on his table. The appellant explained that the tents he was supposed to surrender had been taken by the Police. The appellant wanted the voucher to claim them back from the police. The same evening, the December 28, 1982, the appellant persuaded Mr Maunda to travel with him to Bungoma as the appellant was to claim the tents, and needed Mr Maunda's help. They appeared before the police on December 29, in Bungoma, and Mr Maunda explained his position, at first in a favourable manner to the appellant, and then he made a second statement which he said he made after

realizing the danger he was in. The danger was this. Mr Maunda had kept two tents at his Aringo House awaiting his safari. His aunt, Mrs Helda Awiti took them to her house at Miwani for a private function. She is the wife of the appellant's brother. From the defence the two tents found in the appellant's house were apparently to be equated with the two tents Mr Maunda had stored pending his safari. The appellant's re-examination revealed that he had told 'C I D Malala " that Maunda should be asked about the tents because he understood that Mr Maunda used to keep tents at the house of the appellant's father. But the lower courts held that the investigation had penetrated this obscurity, and in the end the appellant admitted in terms – "the tents issued to me at Wesu Hospital are the same tents which were recovered in my father's house." But it is understood that Mr Maunda suddenly realized that he was in danger, and abandoned the appellant.

On this evidence the lower courts concluded that the appellant had fraudulently converted the tents at least from August 10, 1982 when he stored them at his father's house. No doubt they would be useful just as Mr Maunda explained in the activities of his aunt Mrs Helda Awiti.

Against this conclusion, the appellant has raised several grounds of appeal, in which disagreement emerges with the main witnesses, driver Anyonyo and Mr Maunda. As we have said, a generous attitude was adopted by the trial court, and ground 3 may be conceded, that the tents arrived at Bungoma without the knowledge of the appellant. It may also be conceded in ground 6 that the tents stayed in Bungoma for some time, until they must have been sent to his father's house. Although it might appear from his own evidence, that the appellant had had an opportunity of knowing what had arrived in Bungoma when his goods were taken from the small house to a large house, nothing was made of this and we leave the matter aside, despite the time which elapsed from January to August 1982. The great dispute is whether the appellant knew of the tents when the vehicle was packed up on August 9, 1982. In ground 5, the appellant claimed "that on (his) permission but without (his) supervision, (he) allowed the driver and (his) workers to remove and pack those unnecessary requirements and to send them to (his) father's home at Miwani." He did not know that the tents were included. He had no idea that the tents had been found by the Police at his father's house, (ground 11 and 13). In fact, the search had been occasioned by a vendetta against him. But it is in grounds 28 and 29 that the greatest dissention arises. He alleges that Driver Wanyonyi (Anyonyo) lied to court when he testified that the appellant's father, because if Mr Cosmas Awiti, whose name had frequently, featured during the hearing, had not been deliberately left out as a witness, he, Awiti would have confirmed to the court that on the material day the appellant had never left Bungoma. Moreover, the driver had lied because the vehicle that he had used could not possibly have ferried old car tyres, beds tents and other household goods on one trip. The appellant contends that this evidence is so far fetched that it should be rejected with contempt. The appellant attacks Mr Maunda in ground 35. There is ground 42 that inadmissible evidence crept in; admissible evidence was left out (ground 45); the prosecution failed to prove the case against him beyond all reasonable doubt (ground 44); indeed it is an abuse of his intelligence for anybody to think that he should steal tents, soft boards and old empty drums.

In the case of driver Anyonyo the argument falls under the following headings:

- (a) who was present when the vehicle was loaded ready for the journey to Miwani on August 10, 1982.
- (b) who was present when it was unloaded;
- (c) how many journeys did he complete?

On all three points the driver's evidence was:

"the accused (ie the appellant) told me that he wanted me to transport his properties to his home. He told me that to pack the things in the vehicle and at about 4.00 am. I should start on the journey. We packed two tents, about 8 mattresses, over four beds in the vehicle. After packing, I left the vehicle at his house. I went to the hospital as I was on night duty. At about 4.00 am I went to house of 1st accused. The first accused wrote the work-ticket and he and his workman called Otenaga boarded the vehicle. I then drove the vehicle to Kisumu then

Miwani and to a market called Masoko. Before we reached Masoko market we branched to a house which 1st accused told me belonged to his father. We arrived at home at about 6.00 am..... The first accused told me that was his mother. We started unloading things from the vehicle and put them inside the house. We unloaded all goods from the vehicle including tents and left them in the house.....”

The trial court held that the appellant had asked the driver to load the properties in the vehicle and had accompanied the tents to Miwani which had been of-loaded in his presence. The tents were in an open pick up, the conclusion was that he had transported the tents to his father’s house, and that marked the date of the fraudulent conversion, as emphasized by later events.

The first appellate court asked ‘and what had the appellant to say about the evidence of P W 19 (driver) that it was the appellant and this witness who packed the vehicle which transported appellant’s personal effects to his home including the tents dispute?’ The evidence is there to support those findings. “We packed” the vehicle could only refer to the appellant and driver in that particular context. “We unloaded:” that was with the appellant present. Now the appellant calls all this evidence lies. There was evidence to show that it was with the appellant’s supervision that the vehicle was unloaded. In his defence the appellant gave the impression that this goods were sent when the drivers went to Kisumu to collect drugs. There is no supporting evidence-in-chief or cross examination on this point from other witnesses. The appellant complained that the driver could not have carried all the articles in this case on one trip. The driver did not claim to have done so. On the August 10, 1982 he only carried two tents mattresses and beds. The appellant also complained that Cosmas Awiti would have said that he, the appellant, had not been present at his father’s house on August 10, 1982. This was some sort of scheme to keep back a prominent witness. All we can say is, that the appellant did not explain this in his defence, and from the rest of the evidence we cannot guess why or how Cosmos Awiti would have know of the appellant’s where about on August 10, 1982. He was not mentioned as being present at the house at the time, nor that he had been met during the journey. The court cannot be expected to speculate on matters not in the evidence, and while it is not for the appellant to prove his defence, an appellant cannot raise matters in a memorandum with any effect, unless there is evidence which makes the complaint intelligible. Whether Awiti was mentioned in other contexts, he was certainly not mentioned in this context by anyone, and therefore the prosecution cannot be faulted for not calling him.

In conclusion therefore, the appellant’s grounds of appeal up to this stage, do not show that any issue of law arises for this court to deal with. There was evidence correctly assessed to support the findings and the factual inferences drawn were inevitable. The appellant had taken part in transporting the tents and he knew that they were lodged in his father’s house. There was no inadmissible evidence that we can detect. If that be so, the episode concerning Mr Maunda was discreditable in the extreme. Not only did the appellant try to pass off the tents as having been lawfully issued by the Water Officer, Kisumu, to whom he falsely alleged that they belonged; but nearly jeopardized Mr Maunda’s career into the bargain. The trial court saw Mr Maunda’s evidence clearly. It was that of a man who had made some false moves to help the appellant, but had explained what had really happened later. That would appear to us to be incorrect inference to draw, despite the appellant’s argument to the contrary. That is so, because in the end, the appellant’s admission that the tents that had been issued to him at Wesu, entirely exonerated Mr Maunda, and proved that his second explanation was true. Was this episode indicative of panic or fraudulent intent? The appellant argued that he could keep tents for as long as he was in government service. He could hand them back at any time. It seems to follow that as the appellant was trying to hand them back at any time. It seems to follow that as the appellant was trying to hand the tents back his defence is that he was simply trying to put right a situation which arose from forgetfulness and neglect. That cannot be the position in reality. The understanding was that the tents had been issue to the appellant for the cholera campaign; not for a life time in the medical service. Naturally no date was stated for handing them back, because no one knew when th campaign would close. However, when it was clearly over, the tents had obviously to be handed back; and that was certainly the position when the appellant was posted away from Wesu hospital. The tents belonged to that hospital and had to be accounted for there.

There was no need of them in Bungoma. The appellant’s duty therefore was to hand them back at Wesu

Hospital before he left. It appears that it was accepted that this was not done, by the oversight of everyone at Wesu. But when the appellant did find them in Bungoma he had a simple task. It was to return them to the medical authorities. As the appellant stresses that his department had been made no complaint against him he would face no difficulties. But he kept them at his father's house. That was not honest. After the police found them, he then tried an ingenious plan to prove they had been returned to government on November 3, 1982. It is clear that this was covering up a dishonest situation. Why did not the appellant say that by mistake the tents had gone to his home without his knowledge? The way the appellant operated, he could only be considered to have converted the tents to his own use, as the lower courts found. He had abandoned the defence for mistake, for the false defence of having returned them to Government, for the reason that he had made no mistake.

We are therefore obliged to uphold the appellant's conviction, and no doubt to incur the anathema upon those abusing the appellant's intelligence, which in fact we do no underrate at all. The appeal against conviction on count 1 is dismissed and the sentence imposed on this count therefore stands.

We pass on then to ground 17. On a first reading of the judgments of the lower courts, one is impressed by lack of time scale, although the issue was whether there had been one or two purchases of soft-boards. On examining the matter further the reason becomes clear. It was because evidence was entirely contradictory from beginning to end. It was said that Mr Marcus Onyango (PW 13) arranged the sale of 40 soft –boards on July 30, 1982. The appellant arranged the payment –voucher, Local Purchase Order and receipt, and having short circuited the procedure as described by Mr Oboko, the store-keeper, facilitated payment to Mr Marcus Onyango on August 4, 1982. Delivery of the soft –boards was to be made at anytime the appellant chose. Mr Marcus Onyango left the deliver to his brother and foreman Bernard Onyango, (called “Ben” in the evidence) (P W 12). Apparently there were two deliveries, the first of 30 soft boards on or about August 11, 1982, as far as Barnard Onyango could recall. A few days later he says that the remaining ten, and a further 12 soft boards were delivered. No record of these deliveries was kept. No further payment was made.

In the hospital, the appellant found that the store men, Mr Oboko and Mr Muli refused to sign the indent, until they had seen the 40 soft boards or somebody who had seen them. Carpenter Cosmos Lusweti had been called by the appellant at lunch time on August 10, 1982 and he had seen a hospital pick-up loaded with 40 soft –board. At the staff meeting that same afternoon, Mr Oboko accepted Mr Lusweti's word, but Mr Lusweti was caused to sign the indent and for the receipt of the 40 soft –boards. It is unlikely that he could have seen 40 boards, because by the date he signed the indent, the August 10, 1982, Mr Onyango has said that 40 soft –boards had not yet been delivered. But if Mr Lusweti is right, and the lower courts accepted his evidence, then Mr Onyango is wrong. Moreover Mr Anyonyo the driver, testified that it was not until September 15, that he and he appellant collected the 30 boards. Mr Bernard Onyango accepted that Mr Wanyonyi had driven the vehicle (ie Anyonyo to collect the 30 boards. Something went wring with the date of the collection of soft-boards; or there were separate transactions 40 boards bought by the hospital, and 52 bought by the appellant as he says. Mr Lusweti disappeared and joined another department on August 23, 1982. Could Mr Lusweti really be relied on ?

On the other hand Mr Bernard Onyango entered into giving entirely fictitious receipt for Kshs 5,200 as far as he was concerned, if what he says is true. Under the guidance of Mr Moroni, who gave evidence, in a private house he made out a receipt for cash paymeant by the appellant of Kshs 5,200 on June 23rd 1982, when Mr Onyango knew that he was selling a further 12 soft-boards and that 40 had been paid for. Why did he do that? There is no logical explanation. Unlike Mr Maunda's case on the first count, the obscurity remains. For who was Mr Bernard working if he was not an accomplice as the High Court thought? Was he falsifying his evidence as the appellant says, because there had been a genuine sale and delivery in September to the appellant or was he falsifying a transaction because the appellant did not buy the boards, and he was covering the appellant? He never explained his strange actions. Is he really reliable?

These discrepancies did not trouble the lower courts because they were not recorded as existing. The appellant unnaturally attacked the evidence of Mr Lusweti, and accused Mr Bernard Onyango of perjury. Unfortunately as the lower courts did not analyse the evidence fully, it can not know be said what they

would have found if they had. Consequently despite the suspicion arising from the evidence and the receipt dated the December 24, 1982 the date of the police finding the boards, it cannot be said with certainty that the lower courts would have found that the prosecution had proved its case beyond reasonable doubt. We allow the appeal on this court, quash the conviction and set aside the sentence imposed.

We pass on how to the 19th count. In this transaction a number of concrete facts be set out. The store man at the Nzoia Sugar Co, Mr Kanyi testified that appellant had arranged to buy 15 drums for Bungoma District Hospital on the basis of a local purchase order. This was on September 14, 1982. The next day September 15, 1982 two drivers came – one in an ambulance to hand over the L P O and take delivery of the drums. Mr Kanji received the L P O and gave delivery of 15 drums. Of these, 4 were taken by Mr Juma in the ambulance and were taken by driver Anyonyo (Wanyonyi). Both these drivers took their cargo to the Bungoma District Hospital. Mr Juma Idi drove his four away to Bumula health center, as he had come to collect drums. Mr Anyonyo reported to the appellant at the hospital. The appellant instructed Mr Anyonyo to take the 11 drums to the appellant's father's house with some soft-boards. On December 24, the police discovered drums. The appellant said that he had purchased the drum for Ksh 350 in November 1982, but that the receipt had been delayed until December 24, 1982 the day the police seized the drums. The receipt itself came from a strange source. There is no record of payment of this sum to Mr James Oloo Ololo (the accounts assistant who gave evidence. But the appellant did not put it to Mr Ololo that the appellant had paid Mr Ololo. The appellant admitted in his defence that the drums in his father's house were 7 drums he had purchased from the hospital. But then where are the remaining 4 drums?

The lower courts drew the inference that as the appellant knew full well that the drums had come from Nzoia Sugar Company which he denied for some reason; that he had not accounted for all 11 drums which were delivered to him; that as the receipt for payment was not a receipt given in the normal course of business, and the case had not been taken into account in the usual way, it was not the truth that the appellant had explained.

The appellant has not raised many grounds of appeal specifically on this charge. He seems to attack James Oloo Ololo in ground 17 and then says that he was not called on ground 31. There was not a great deal of explanation in court. Having reviewed the evidence it seems to us that the lower courts correctly addressed themselves to the evidence, and that they were entitled to conclude that the appellant had converted eleven drums to his own use, rather than fifteen. But that lesser amount does not affect the resultant conviction under the charge as framed. Having reviewed all the evidence, it may perhaps be useful for us to add that apart from the specific complaints on each charge and the relevant witnesses, the appellant raised a number of grounds of a very general nature. We have considered the alleged background antagonism towards the appellant of the hospital staff; the allegation that the record is not as full as it could be; that the prosecution did not call the witnesses it should have called. But let us say this again, these general allegations did not interfere with the specific circumstances of each theft. The basis of each case was the possession of the stolen goods in the appellant's father's house, and that was arranged and admitted by him. In so far as there was real controversy, for example on ground 2, the appellant has been given the benefit of the doubt, as indeed the lower courts had also given the appellant in other counts. It seems to us that the appellant was given a fair trial and that he was properly convicted on counts 1 and 19.

The appeal against conviction on ground 19 is dismissed. As far as sentence is concerned the terms of imprisonment were ordered to run concurrently by the High Court, and that order must stand. In the result the appellant's total sentence of imprisonment is nine months.