



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**( Coram:Kneller JA, Chesoni & Nyarangi Ag JJA )**

**CRIMINAL APPEAL 19 OF 1984**

**BETWEEN**

**WARINGA.....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

**(Appeal from the High Court at Nakuru, Mead J)**

**JUDGMENT**

The appellant, who was employed by the Kenya Railways as a Permanent Way Inspector, was convicted of stealing by servant contrary to section 281 of the Penal Code (cap 63) and was placed on probation for one year. His first appeal was dismissed by the High Court (Mead J) and he has now appealed to this court.

The theft the appellant was charged with related to thirty-eight secondhand wooden sleepers worth Kshs 1,863.90, which he was alleged to have sold to a Gilgil farmer, Anthony Islam Barlow (PW 1) for Kshs 380. The sleepers were the property of the Kenya Railways. The appellant's contention in this appeal is on the grounds that the two courts below erred in law in not treating Mr Barlow's evidence as that of an accomplice; the evidence of Samson Onyango (PW 2) was not impartial as his relationship with the appellant was strained; not enough consideration was given to the defence case and the decision was against the weight of evidence. That is a summary of the eight grounds of appeal put forward by the appellant, but which are not all points of law as required by section 361(1) of the Criminal Procedure Code (cap 75).

As to Mr Barlow's complicity, it is true he said that he knew the sleepers were government property and above that he never asked for an official receipt for the alleged payment of Kshs 400, thus giving the appellant the opportunity not to account to his employer for that sum of money. His conduct and that of the appellant was all along suspicious especially the manner in which the discussions were held to the exclusion of all others except the two themselves, Barlow's words that he was dealing with the appellant as a representative of Kenya Railway, and that he believed the appellant had the necessary authority to sell the sleepers could not completely exonerate him. The trial magistrate considered all this, for in his well-considered judgement he wrote:

“...even though PW 1 can be regarded as an accomplice as he bought the sleepers knowing that they belonged to Kenya Railways the evidence of PW 1 has been strongly corroborated by the evidence of PW 3, PW 5 and PW 7”.

PW 3 was Mr Chami, the district civil engineer stationed at Nakuru, to whom the theft was reported. His evidence was not quite corroborative but that of Wycliff Juma Soita (PW 5), Francis Mbugua (PW 4) and Absolom Amtangi (PW 7) was. Soita and Mbugua were present during the discussions between the appellant and Barlow although they may not have participated or heard what was discussed. Barlow sent Soita and Mbugua, after the negotiations were completed, at 2 pm on March 24, 1981 to collect the sleepers and store them in his workshop. Amtangi worked for the Kenya Railways and he said that the appellant instructed him to be on duty on the March 23 and he travelled with the appellant in the trolley to the site where the sleepers were and there was a discussion between Barlow and the appellant. Amtangi, Mbugua and Soita had nothing against the appellant as to make up a tale against him. They told the court what they saw – and were asked to do – by Barlow and the appellant. When considering evidence of an accomplice, the first duty of the court is to decide whether the accomplice is a credible witness. See *R v Ndara s/o Kuruki & Seven others* (1945) 12 EACA 84. The trial magistrate considered this for he said in his judgement:

“.....the court does not see any reason why PW 1(Barlow)... should lie against the accused”.

As stated in *R v Manilal Ishwerlal Purohit* (1942) 9 EACA 58, the corroboration which should be looked for is some additional evidence rendering it probable that the story of the accomplice is true and that it is reasonably safe to act upon it. It must be independent evidence which affects the accused by connecting him or tending to connect him with the crime, confirming in some material particular not only the evidence that the crime has been committed but also that the accused committed it. It is of course not necessary to have confirmation of all the circumstances of the crime. In *R v Taibali Mohamedbhai* (1943) 10 EACA 60 the predecessor of this court correctly said:

“What is required is that there should be independent testimony corroborative of the evidence of the accomplice in some material particular implicating the accused or tending to connect him with the crime with which he is charged. The principle is that if an accomplice is so corroborated not only may that part of his evidence which is corroborated be relied on but also that part which is not corroborated”.

The evidence of Mbugua, Soita and Amtangi was independent testimony corroborative of the testimony of Mr Barlow in some material particular implicating the appellant with the crime with which he was charged. The evidence of Barlow was in the circumstances reliable. In fact although the appellant sought to discredit the evidence of Mr Onyango (PW 2), the Assistant Permanent Way Inspector, on the ground that the relationship between the two was not cordial, Onyango’s evidence also corroborated Barlow’s testimony.

Whatever might have been the cause for strained relationship between the appellant and Onyango there was no ground for the latter implicating the appellant with the theft of the sleepers. In any event, it was the appellant who told Onyango that Barlow had collected the sleepers.

The two lower courts’ judgements which speak for themselves show that the defence case was given due consideration and also that the decision was not against the weight of evidence.

There is no merit in this appeal and so we dismiss it.

**Dated and Delivered at Nairobi this 14th day of March 1984.**

**A.A.KNELLER**

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**JUDGE OF APPEAL**

**Z.R.CHESONI**

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**AG. JUDGE OF APPEAL**

**J.O.NYARANGI**

.....

**AG. JUDGE OF APPEAL**

I certify that this is a true copy  
of the original.

**DEPUTY REGISTRAR**