



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CRIMINAL APPEAL NOS. 546, 547 & 548 OF 1982**

**JOSEPH MUNYAO MALEBE .....1ST APPELLANT**

**JOSEPH MULANDI.....2ND APPELLANT**

**JOSEPH KINYILI MWANIA.....3RD APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

The three appellants, Joseph Munyao Malebe (first appellant), Joseph Mulandi (second appellant) and Joseph Kinyili Mwanja were charged separately on separate counts in one charge sheet with the offence of stealing by servant contrary to Section 281 of the Penal Code (Cap 63) and were each sentenced to eight months' imprisonment. They appealed to this court against their convictions and sentences. The appellants' appeals were consolidated.

The offences were alleged in the particulars of the joint charge sheet to have been committed on separate dates but not jointly on one day. Looking at the charge sheet, it is defective for joinder of several accused persons who are alleged to have committed separate offences on different dates. The items alleged to have been stolen are also different although they are stated to be bed-sheets belonging to Kilimanjaro Buffalo Lodge. The alleged stolen sheets were alleged to have been stolen by the appellants on unknown dates between different months. On the face of it, the charge sheet was defective for misjoinder of the appellants as well as misjoinder of offences committed during different dates and months. The appellants were not charged jointly as having had common intention and to that extent, the misjoinder of appellants and separate alleged offences occasioned prejudice to the appellants because they did not know what charges they were supposed to meet whether jointly or separately with common intention to commit the offences. This misjoinder occasioned a failure of justice. Being an incurable defect, the trial was a nullity.

I do not think that it would meet ends of justice to send the case for fresh charges and retrials. The learned state counsel conceded the appeals and rightly so. I agree with him. Even if I send an order of fresh charges and retrials of the appellants separately, the result will be the same. That is to say according to available evidence, motion of the bed-sheets was from the store to the rooms and then to the washing base. Anything might have happened in one of these areas. There was evidence of previous loss from the store and the appellants were not suspected or connected with the loss or theft.

There was also evidence that there were approximately eight attendants attached to the Lodge and that any one of them had access to the store, washing-base and the rooms. There was no evidence that the appellants or any one of them had exclusive access or control of the bed-sheets at the store or at the washing base in the rooms where even guests were permitted to lodge at various times. There was no record kept of the number of bed-sheets kept in the store and taken out for use in the rooms.

There was no evidence either that the appellants or any one of them was found in unlawful possession of any number of bed-sheets. Where then was the evidence to connect the appellants with the alleged offences? Any attendants or members of the public could have stolen the alleged bed-sheets. The evidence did not point out irresistibly to the appellants or any of them to the exclusion of any other. The appellants were arrested on pure suspicion and this was confirmed by PW 1 in his evidence when he testified that:

“This time I was suspecting other employees and they are the accused before the court (identified). They were arrested by the police and then charged. That is all.”

With the greatest respect, the trial magistrate failed to consider from the available evidence that other employees might have been involved with the loss of the bed-sheets. This was a misdirection which occasioned further failure of justice. For these reasons, I allow the appeals, quash the convictions and set aside the sentences. I order that the appellants be set at liberty forthwith unless otherwise held on other warrants.

**Dated and delivered at Nairobi this 11th day of November, 1982.**

**M.G MULI**

**JUDGE**