



IN THE COURT OF APPEAL

AT KISUMU

(Coram: Kneller, Hancox JJA & Chesoni Ag JA)

CRIMINAL APPEAL NO. 52 OF 1983

BETWEEN

SHEM OPIYO WAGUDE.....APPELLANT

AND

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant, Shem Opiyo, was convicted of stealing by a person employed in the public service contrary to section 280 of the Penal Code and was sentenced to two years' imprisonment. His first appeal was dismissed by Schofield J in the High Court. This is his second appeal based on eight grounds.

The appellant was, prior to his conviction, an assistant chief in West Kisumu Location. On November 6, 1982, Beswell Muchila (PW 1) was robbed of his motor vehicle registration No KUG 040 near Ojola market. He had Kshs 30,000 in the vehicle behind the driver's seat at the time of the robbery. Two men dressed in police uniform stopped Beswell after passing Ojola market, one called Beswell outside the vehicle, asked him to open the boot of the vehicle and Beswell did so. After the boot had been checked and was closed one of the two men pulled out a pistol, got hold of the collar of Beswell's jacket, started pushing Beswell and ordered him to surrender his car keys. While one of the two bogus policemen snatched the keys from Beswell the other one ordered Beswell's wife and employee who had been with him in the vehicle to get out and the two then drove the vehicle away with Beswell's Kshs 30,000 in it. As they drove off Beswell drew his pistol and fired at the driver, but the vehicle had been driven away. A *matatu* came by and Beswell pursued his robbers with the *matatu* until he caught up with them and found them changing themselves from the police uniform. They fired at Beswell and his group twice missing everybody on both rounds. Beswell fired until he ran out of bullets. He ran to the men and caught one of them but the man managed to escape with the other one who was putting the money from Beswell's vehicle into a gunny bag. They entered the *matatu* in which Beswell had pursued them and drove away towards Ndugoa quarry. Beswell was joined by a police officer in search of the robbers and they found them already arrested.

What had happened was that Joseph Adika (PW 3) while in his *shamba* heard shouts of "thief" and he saw people chasing a man who was carrying a gunny bag and armed with a pistol. The man was arrested by Joseph in his *shamba* with the help of the appellant and another man. The appellant took the pistol and told Joseph to guard the robber while he, the appellant, took care of the contents of the gunny bag. The other robber was arrested and the two robbers were tied together. Boniface Genga (PW 4) who helped in

the arrest also saw Shem take the pistol and there was a uniform and a pistol in the gunny bag. The three men who arrested the robbers were Joseph, Boniface and the appellant. When Joseph and Boniface were escorting the robbers to the vehicle the appellant went to his home with the gunny bag and returned with it. When Corporal Rono (PW 5) arrived where the arrested robbers were he took possession of the pistol and gunny bag. The day was wet and Shem told Cpl Rono that he was going to his house to change his clothes which were dirty from mud. Shem returned from changing his clothes and as Cpl Rono drove away with him and the robbers they met with Inspector John Maingi (PW 7) who was accompanied by Beswell. Beswell stated that he had been robbed of Kshs 30,000. Inspector Maingi asked Shem about the money and the appellant went pale, but promised to produce it. Shem took Inspector Maingi to his father's house and produced a black paper bag containing Kshs 5, 134.50. When all the money was not recovered Constable Stephen Ndungu (PW 6) suspected Shem and so the police team comprising of Inspector Maingi and Constable Ndungu accompanied by Shem, Beswell, Joseph and Boniface went to Shem's home where a search was carried out in his mother's house used as store for maize and Kshs 20,000 was recovered. Constable Ndungu who conducted the search also found Kshs 315 on Shem's body which he took possession of. The appellant was charged with stealing Kshs 30,000.

Chief Inspector Munyoki Kaminde (PW 8) recorded the appellant's charge and caution statement which was admitted in evidence. The learned judge, however, ignored it because, according to him, the trial magistrate had not referred to it in his judgment. This was a misdirection because the trial magistrate said this in his judgment:

"The complainant (PW 1) was also present when the Kshs 20,000 was found. This was to corroborate the confession by the accused that he had stolen the money."

The learned judge must indeed have forgotten that as a first appellate court it was his duty to reconsider the whole evidence and evaluate it himself drawing his own conclusion before deciding whether or not the judgment of the trial court should be upheld - see *Okeno v Republic* [1972] EA 22. We, however, do not share Mr Menezes' view that the appellant was put at a disadvantage by the learned judge ignoring the confession.

It was clear that after the arrest of the robbers the bag said to have contained the money was handled by Joseph who gave it to the appellant and the appellant gave it to Inspector Maingi, but at that stage it contained only Kshs 5,134.50. The appellant in his unsworn statement in court said:

"I noticed somebody very new carrying a sack and Adika was carrying a pistol. I ran at them. I took the pistol and then the paper bag. I noticed there were some money in the handbag. We walked downwards and I kept the money we got another information that another thief was hiding somewhere. I left Adika and Gongga so with the gunny bag."

Shem added that the complainant who was present said he had Kshs 30,000. As we have said when Shem took the police to his home and one of the houses was searched Kshs 20,000 was found among the maize. There was no explanation of how this large sum of money was in that house and Shem did not even claim it. Had Shem not known about the presence of the money in the maize he would have said so and would have claimed it were his property or someone else's whom he knew about. What he said was that nothing was found after the search which was untrue for even his own father, Elisha Apue (PW 2), said that when the home was searched money was recovered from the accused mother's house used as a store. Both sums of Kshs 5,134.50 and Kshs 20,000 were, in our view found in possession of the appellant within a very short time after Kshs 30,000 had been robbed from Beswell and the robbers of the Kshs 30,000 had been arrested by members of the public who included the appellant. He admitted Kshs 5,134.50 was part of the stolen cash but he had kept it; he, as we have observed, offered no explanation for Kshs 20,000. The only logical inference one can draw from these proven facts is that he stole the two sums, which were both part of Beswell's Kshs 30,000.

There were no material discrepancies in the prosecution evidence and if there were, none have been brought out. The evidence or record irresistibly pointed to the appellant's guilt and was incapable of explanation on any other hypothesis than his guilt.

Section 280 of the Penal Code (cap 63) under which the appellant was convicted provides as follows:

“If the offender is a person employed in the public service and the thing stolen is the property of the government or came into the possession of the offender by virtue of his employment.”

Under the section the prosecution must prove that:

- (a) the offender is a person employed in the public service;
- (b) the thing stolen is either the property of the government or came into the offender’s possession by virtue of his employment.

It was common ground that Shem being an assistant chief was an employee in the public service. It was, however, not proved that the money he stole was Government property, but the offence was still complete if the money, even not being government property, came into his possession by virtue of his employment. Elisha said:

“On November 6, 1989 at 8 am a boy came and informed the accused about a vehicle which was suspicious.”

The appellant must have been given that information because of his position as assistant chief, otherwise the boy would have informed anyone else like Elisha, the appellant’s father. So the appellant joined into the sequence of events of that day by virtue of his employment. Both Joseph and Boniface who with the appellant arrested the robbers and who gave him the gunny bag, the money and a pistol each referred to the appellant separately as “my assistant chief.” They, by inference, handed him the money because he was an assistant chief and not because he was one of the members of public who had arrested the robbers and recovered the stolen property. In our view the money in question was not government property, but it came into the appellant’s possession by virtue of his employment. Indeed there may be other occasions when such goods may come into possession of a public servant not by virtue of his employment, but this was not one of those occasions. We therefore do not accept Mr Menezes’ submission tat there was no evidence that the appellant was given the money for safe keeping as an assistant chief, and that what he committed was simple theft, contrary to section 275 of the Penal Code.

Although the appellant was a first offender we do not consider the sentence of two years’ imprisonment manifestly excessive as to interfere.

For the reasons given we are satisfied that the appellant was correctly charged and convicted, and we order the appeal against conviction and sentence to be dismissed.

Dated and Delivered at Kisumu this 23rd day of June 1983.

A.A.KNELLER

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JUDGE OF APPEAL

A.R.W.HANCOX

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JUDGE OF APPEAL

Z.R.CHESONI

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AG. JUDGE OF APPEAL

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

DEPUTY REGISTRAR