



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: Madan, Miller and Potter JJA)

CRIMINAL APPEAL NO 76 OF 1981

BETWEEN

MESHACK ODENY s/o ONYANGO)

ABSALOM OLITO s/o AKUNDA)APPELLANTS

AND

REPUBLICRESPONDENT

(Appeal from a judgment of the High Court of Kenya at Nakuru (Mead J) dated 21st December, 1971 in Criminal Appeal Nos. 328 and 330 of 1978)

REASONS FOR JUDGMENT OF THE COURT

MADAN JA

The above named two appellants Meshack and Absalom came to us on second appeal, after the dismissal of their appeals by the High Court against convictions for stealing goods in transit, contrary to section 279(c) of the Penal Code.

On February 4, we ordered Meshack's appeal to be dismissed, but allowed Absalom's appeal, quashed his conviction and set aside the sentence. We are now stating the reasons for our judgment.

On December 2, 1976, Meshack was the station master at Soy railway station which is on the Kitale – Eldoret track. On that day train No M40 left Kitale at 3.20 pm for Eldoret. The driver of the train was one Paul Omwakwe and Absalom the guard. Omwakwe was convicted together with Meshack and Absalom. He had not appealed. There were thirteen wagons making up the train M40 which was about 200 yards long. One of the wagons was CG 61694. It was the second wagon from the engine in front. When the train left Kitale wagon CG 61694 was sealed with heavy wire railway seals. It was fully loaded with 250 bags of coffee destined for Kenya Coffee Planters Union, Nairobi. The train made an unscheduled stop at Soy.

On the same afternoon a lorry was engaged in moving wheat to Soy railway station to be loaded into a wagon by seven labourers, some of whom waited there in between the lorry's trips. Among them were Kipkuris Cheptarus (PW 6), Michael Kipkoech (PW 25) and Kipkemboi Arap Toh (PW 26). When the train stopped at Soy station, Meshack cut the seals of wagon CG 61694 with shears. He asked Kipkuris, Kipkoech and Kipkemboi to assist him to carry the bags from the wagon to a nearby store. Meshack entered the wagon and began to throw out bags of coffee. The three labourers carried them into the store.

Meshack gave them Kshs 5 each. He sealed the wagon and the train left with Omwakwe and Absalom on it as the driver and guard respectively. It arrived at Eldoret at 7 pm on the same night. The wheat lorry returned to the station at about 6 pm. Meshack talked to the driver after which the driver reversed the lorry near to the store where the coffee bags had been taken. The driver instructed the labourers in the presence of Meshack to load the coffee onto the lorry which they did. They were joined by Njuguna Gitau (PW 7) and Eliud Omondi (PW 8). Gitau testified that Meshack called him at 9 pm on December 2 and asked him to escort the lorry to Kiminini farm as the goods on it had to be taken to their owner there. Omondi testified that four men, who were Meshack, Omwakwe, Absalom and Gitau came to his quarters at 9 pm on December 2. They asked him and Gitau to direct the lorry to Kiminini farm. The driver drove the lorry to Kiminini farm with Gitau, Omondi, the seven labourers and the coffee on it. The labourers unloaded the coffee into a store there.

Wagon CG 61694 became attached to train B38 en route for Nairobi. When checked at Eldoret and then again at Nakuru, the wires and seals of wagon CG 61694 were intact, and nothing unusual was seen. When the wagon reached the yard of the Kenya Coffee Planters Union in Nairobi the wires and seals were still intact. Wagon CG 61694 was opened. It was nearly half empty. 102 bags of coffee were found short.

Both Meshack and Absalom gave sworn evidence in their defence. Meshack denied having broken into wagon CG 61694, or having had anything to do with Gitau or Omondi that night. He said he was surprised when the train stopped at his station. He left his office and saw the driver and the guard coming. Absalom said that when the train made the unauthorized stop at Soy he left his brake van and ran to the driver Omwakwe whom he met with Meshack outside the latter's office. Omwakwe told them that the engine had high water temperature, and he would have to add water to rectify it, Absalom said he went back to his brake van and "sorted out packages". He saw nothing unusual happening whilst he was there. If goods were removed from a bogie he could not see it happening. His van was the last wagon at the end of the train which was stationary on a straight line where it had stopped. He booked off duty at 7.30 pm at Eldoret and went to Railway Quarters where he lived with his family.

We were of the opinion that there was overwhelming evidence against Meshack which we have related. His guilt was proved beyond reasonable doubt. We were not satisfied that Absalom was rightly convicted. The magistrate said that he regarded both Gitau and Omondi as accomplices, and he would accept only those parts of their evidence which were corroborated by the untainted evidence of other witnesses. The magistrate said that he was unable to accept that Omwakwe and Absalom were present when Gitau and Omondi were called at 9 pm to direct the lorry to Kininini farm. There was another and more tangible piece of evidence which made it highly improbable for Absalom to have been at Soy station at 9 pm. The only way for Absalom to get back to Soy from Eldoret was by road transport for which purpose he had to have a motor vehicle. The prosecutor tried to hold the situation, together for the prosecution by submitting that there was plenty of time for Omwakwe and Absalom to travel from Eldoret to Soy, a distance of 15 miles on a tarmac road, and to be in Soy at 9 pm.

The magistrate said in his judgment that the whole of the train was visible to Absalom when he left the guard's van to meet Omwakwe and also when he returned to the van. He could not have failed to see the coffee being removed from the wagon. The magistrate erred. He did not refer to any piece of corroborative evidence after he decided not to accept Gitau and Omondi's evidence without corroboration. Without their evidence, the only other evidence was that of Meshack and Absalom that he met Omwakwe outside the station master's office. Having held that no witness had testified to seeing Absalom in the vicinity of the wagon whilst it was being broached, Absalom's connection should have been proved more tangibly instead of merely saying that he could not have failed to see the coffee being removed from the wagon; therefore, the circumstances were such as to be incompatible with his innocence and were explainable only on the basis of his guilt. The magistrate seemed to accept that Absalom returned to his van after he met Omwakwe for, as we have pointed out, the magistrate said that the whole of the train must have been visible to him when he returned to the guard's van. The train was 200 yards long, and Absalom was busy sorting out packages in his van. It looks to us that the magistrate thought Absalom was involved in the theft because he was

"responsible for the safety and security of the train, responsible for the wagons and contents of the wagons."

The learned judge on first appeal to the High Court said that the magistrate sought but was unable to find any corroborative evidence of other, untainted witnesses to corroborate the evidence of the accomplices Gitau and Omondi that they saw Omwakwe and Absalom on the evening of December 2, 1976 at Soy station. The learned judge then said- The presence of Akunda (Absalom) and Mbalanya (Omwakwe) at Soy station when the bags of coffee were being stolen from the wagon in circumstances that can leave no doubt that they were aware what was happening is corroboration of the evidence of Gitau and Omondi, the circumstantial evidence against Akunda and Mbalanya can leave no doubt as to their guilt." Absalom's presence at Soy station was perfectly legitimate. It was consistent more with his innocence. He was on guard duty on the train. The learned judge fell into error from misreading the evidence when he said that Absalom walked past the wagon where the bags of coffee were packed at least twice. There was no evidence that Absalom went in the direction or past wagon CG 61694 at any time.

These are the reasons for the judgment which we pronounced in these two appeals.

Dated at Nairobi this 11th day of February, 1982.

C.B Madan

JUDGE OF APPEAL

C.H.E Miller

JUDGE OF APPEAL

K.D Potter

JUDGE OF APPEAL