



REPUBLIC OF KENYA

IN THE HIGH COURT NAIROBI

CRIMINAL APPEAL NOS 189, 190, 191, 186, 185 AND 187 OF 1978

AYUB MUCHELE.....1ST APPELLANT

JEREMIAH OYOKO.....2ND APPELLANT

HENRY NYAKANDI.....3RD APPELLANT

NYAMBA MCHEMA.....4TH APPELLANT

JACKSON KALA 5TH APPELLANT

SAMUEL NGELA KANU.....6TH APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT OF THE COURT

Eight men, Ayub, Jeremiah, Jackson Kala, Jackson Otieno, Nyamba, Ndege, Samuel and Henry were charged with the theft at Mombasa on 14th July 1977 of 1320 bags of coffee worth Shs 3,300,000 from two railway wagons numbered CLB 55718 and MGB 73085 which were in transit from Kampala to the Coffee Marketing Board (Uganda) Ltd, Mombasa. The trial magistrate has composed a detailed and analytical judgment; and no useful purpose will be served if we essay the setting out of all the evidence which was led, or restating what his judgment sets out. But to set the scene. The prosecution case was that the two wagons with their coffee arrived in the Mombasa railway yard a little after 7 o'clock of the evening and, very shortly thereafter, were transferred with the aid of a shunting engine (which was ordinarily kept at the Makupa railway yard) to that yard where the coffee was unloaded into a godown, from which it later disappeared; the theft was carried out by the eight accused persons and others, and with the knowledge and participation of members of the police of varying ranks. Each of the accused persons denied the charge and at the trial Jackson Otieno and Ndege were acquitted, the magistrate finding that they had no case to answer. The other six were convicted as charged. Ayub, Jeremiah, Jackson Kala (henceforth to be referred to as Jackson) and Henry were awarded five years' imprisonment and eight strokes each; Samuel four years' imprisonment and six strokes; and Nyamba two years' imprisonment and one stroke. All six have appealed to this Court. Ayub and Henry argued their cases through counsel; the other four were content to rely on their petitions of appeal without being present. The Republic supported all that the magistrate found and awarded, except in regard to Nyamba. His conviction was not supported. Conspiracy was not charged and the evidence must be applied accordingly, ie individually against each appellant; but the case put before the magistrate was that there was such a conspiracy; thus he accepted and commented:

It is obvious that some planning went into the commission of this offence. I find as a fact each of

the accused ... were [sic] to a lesser or greater extent knowing and consenting parties to this conspiracy and to its execution.

Ayub filed a petition of appeal and his counsel filed another. The former was abandoned; the latter was argued, except for its first ground which was also abandoned. But the second and sixth grounds, although not abandoned, were hardly persevered with; rightly so. As for the other four grounds, save for the question of sentence, they were taken together. What, in essence, was urged, was that the witnesses upon whom the Court relied to convict Ayub should not have been relied on and that, had their evidence received the attention it required of the magistrate, he would not have relied on it.

The prosecution called thirty-seven witnesses, of whom five gave evidence particularly concerning Ayub who was the senior yard foreman at Mombasa. They were Okech, a pointsman, Mohamed, a yard foreman at Mombasa, Yusuf a senior yard foreman at Mombasa, now retired, Ndalo, a pointsman at Makupa railway yard, and Adey (the name is variously spelt), an assistant yard foreman at Makupa until his services with the railway were terminated. Okech said that going home on the night concerned he saw the coffee being unloaded at the Makupa godown where Henry spoke to him taking him to task for interfering or being a busybody or nuisance; Ayub called him the next day and told him first not to worry about what Henry had said and then threatened him if he disclosed what he had seen and heard. Mohamed said that at about the time when the coffee was being or had been off-loaded, he saw Ayub coming from the direction of the Makupa yard, although he (Ayub) was not at the time on duty.

Yusuf said that, when he arrived to relieve Ayub, Ayub was nowhere to be seen and the office was locked, after which he heard the Makupa shunting engine come into the yard and Ayub came to the office after that. Ndalo said that he was summoned to Ayub's office and threatened because he had been talking about the affair; and he was also offered a bribe. Adey said that Ayub specifically told him not to touch the telephone until 10·00 pm. All that the witnesses said is, of course, in the record and all that we have referred to is dealt with in the judgment.

Okech's evidence was attacked as being contradictory. We were told, for instance, that he said that the shunting engine came into the yard very fast; other evidence was that it was not so fast; that he was specific on his examination-in-chief, and less so under cross-examination; and so on. But the contradictions go only to detail and are unimportant. As for the threat, it is true that there is no mention about it in the statement which Okech made to the police; but his explanation, which found favour with the trial magistrate (as it does with us), is understandable. It was put to us that a report could have been made to the yard master, Onyango, who was in overall charge, and so it could; but Okech feared for what would happen to him if he did so. As for the threat being said to have been made when people would be "very busy at such a time" and Ayub would be "too busy allocating work", this does not attract us for it would not have taken much time, and the fact that people were close by in an adjoining office would not mean that what was said would be overheard. We are asked to say that the threat needed corroboration; but it did not do so in law or in fact. The oblique suggestion that Okech was put up to say that there was a threat when there was none, we reject, as we reject that Okech was a "suspect" witness. He and his evidence were considered by the trial magistrate, as we believe, adequately. And the threat having, as we find, been made, the question by counsel for the Republic "Why should Ayub threaten [Okech]?" is apt.

The challenge to Mohamed's evidence was more muted. It was put to us that, even if Mohamed saw Ayub coming from Makupa at the time concerned, it spelled out nothing sinister because "The senior yard foreman does not have to sit in his office. He can move around sometimes. The senior yard foreman can report late especially if he is out for duties". That is so, but Ayub denies that he was there. The magistrate is criticised for "putting weight" on this piece of evidence; but why should he not have done so? His comment "A little after this [Mohamed] saw [Ayub] come from the direction of the Makupa siding on foot. [Ayub] was supposed to have reported off at 22·00 hours [10·00 pm]" does not deserve the criticism it got. It was open to the magistrate to have made that finding. That Mohamed's estimate of speed is less than Okech's should be borne in mind; but does not suggest that he embellished his evidence. As for his saying that Ingosi (a witness for the prosecution) allowed the shunting engine to come into the yard, Ingosi having earlier given evidence without being asked about it, this cannot be put against Mohamed. Ingosi could have been recalled. Why counsel said that Mohamed (and other witnesses) were of a lower

calibre or status, and so would be susceptible of giving incorrect evidence, we do not know. If it means that a certain status is a pre-requisite to truth, we reject it; if it means (as perhaps it was intended to mean) that the witnesses were susceptible to pressure from above to give false evidence, it should not have been made for there was nothing to support it. In his statutory statement Ayub said that Mohamed “was not happy as I was promoted over him and superseded him”; but we think that we are right to say that this was not suggested to Mohamed in cross-examination. It makes no difference if it was. We do not believe it to be as Ayub says.

Yusuf’s evidence was said to have been “answered away by his later evidence” by which is meant that one may be at the yard although not on duty, and it was challenged in relation to whether the hand-over was or was not normal. As the note of the argument states:

Handing over was not normal, as the magistrate found ... This was ... wagons, magistrate implied that handing over was unusual. Wrong to find handing over not normal.

But we do not think that the magistrate so implied. It really would make no difference which way the magistrate found on this point.

Ndalo’s evidence was said to be so confused and inconsistent that it goes to the “root of credibility”. It was not. His evidence was attacked along these lines: in examination-in-chief, he said that he was told that Ayub wanted to see him, so he went to his office; and in cross-examination he said that he went to his office to check his mail and “As I was near the office this is natural. I was told by Ayub that he wanted to see me”. There is a difference; but we do not consider it a large one, or one affecting veracity. It was put to us that, Ndalo’s statement having been made when Okech was giving evidence and Okech’s evidence needing to be corroborated, there is the “possibility [Ndalo] falsely said what he did in his statement”. Why? And at whose behest? It is not so. It is true that there is no mention of the money in his written statement; but he had seen the police long before that statement was made.

We can see no reason whatever for Adey to have spoken falsely; nor did he do so. He spoke from the books and from his observation; and he was not mistaken.

The trial magistrate fully understood Ayub’s case and he dealt with it at length. Complaint was made that he neither dealt adequately with Ayub’s defence nor did he reject it. He had two different accounts before him and believed, and (as we see it) clearly and rightly believed that the prosecution case was true and the defence case was not. He said:

I have reviewed at length the evidence relating to [Ayub] mainly because [of his defence] and the evidence against [him] is slightly different from that against the others.

It is said that, nonetheless, the magistrate did not examine all the evidence as he claimed to have done. But he did. He did not, as we are asked to say, have doubts about it; and he did not seek corroboration because he had doubts. He did not, in truth, seek corroboration.

Ayub was there when the wagons arrived, he was seen coming from Makupa, he asked that the telephone be not used, and he made his threats next day. The evidence against him was entirely circumstantial, but left no room for doubting his guilt. We answer the grounds of appeal left before us as follows: (2) it is not so; (3) there were not, and the magistrate did not err; (4) on the contrary; (5) there was no misdirection; (6) it was; and (7) it was not so far as both parts of the ground are concerned. The magistrate’s findings, upon our individual assessment, were right. In any event we are concerned with a case which was essentially one of fact depending on credibility and it engaged the magistrate’s full consideration. We ought not, in any case to interfere with the findings at which he arrived; see *R v Gokaldas Kanji Karia* (1949) 16 EACA 116 and *Uganda v Khimchand Kalidas Shah* [1966] EA 30. Ayub’s appeal is dismissed.

Six witnesses gave evidence particularly concerning Jeremiah, a yard foreman, Mohamed, Yusuf, Ndalo, Bulinda, a watchman employed by Securicor Ltd, Makokha, another such watchman and Adey. Jeremiah was in charge of the Makupa shunting engine. Mohamed was on duty on the night concerned when, some

little while after 10 o'clock, he saw the Makupa shunting engine coming into the Mombasa yard with four wagons. Permission for this to be done should have been given by him; but he had not been asked for it, and he had not given it. The engine left the wagons behind and went back towards the Makupa siding. A little while after that (at about 10·40 p.m.) he saw Jeremiah come from whereabouts the wagons had been detached from the engine and spoke to him. According to the judgment:

At about 4 .00 am [Jeremiah] and his yard staff came in the Makupa engine and collected most of the wagons destined for Makupa siding including nearly all if not all, coffee wagons in the yard for the Coffee Marketing Board, Makupa.

This finding was made on this evidence which Mohamed gave:

After this no other engine left or came into the yard until 4.00 a.m. when the Makupa engine came and took some wagons. I allowed it into the yard. I do not remember who the driver was at this time, but the yard foreman was Jeremiah Ayoko ["Jeremiah"] I do not know how many wagons it took ...

Read literally, it simply says who the yard foreman was; but in its context it must mean, as the magistrate who recorded the evidence took it to mean that Jeremiah came with the engine. In other words after the words "Jeremiah Ayoko" one must read, as though they were there, the words, "was with it".

Yusuf said that he saw Jeremiah about 4.00 am when Jeremiah said that he wanted to shunt the Makupa wagons away as he had been told that he must do so by morning; but when wagon CLB 55718 was tapped, it sounded hollow and empty and a note to this effect was made on the shunting ticket. Such movement was unusual.

Ndalo said that, when he reported on duty, Jeremiah told him to report instead at 10·00 pm (by that time, of course, the wagons and coffee would have been taken to Makupa) and that, at about 10·30 pm, Jeremiah was one of those who arrived in the shunting yard aboard the engine. At about 3·30 am, the two of them went to the wagons with Adey and someone else when Adey, noting that the seals on one of the wagons was loose, pointed this out and Jeremiah said that "the wagon should be taken away as the seals were there as this was not the responsibility of the railways".

Bulinda says that Jeremiah insisted that he sign for the wagons without proper checking; this was done, but he and his co-watchman rang their superior about it particularly as they discovered that one wagon sounded hollow and had insecure seals on one side of it: Makokha supports this, although he says there were no seals on one side. Adey was also told by Jeremiah not to come on duty until 10·00 pm He made out a shunting ticket; which Jeremiah took away. He confirmed the other evidence of those who saw the wagons, but thought the seals looked intact. But one wagon sounded hollow.

Jeremiah claimed that all the witnesses had lied about him although he gives no reason why, at all events, the Securicor watchmen did so. But, in his statement to the police which he adopted, he said that he found "three Securicor *askaris* who checked those wagons and were satisfied that they were all correct". That is quite different from the evidence the watchman gave and which the magistrate believed; as we believe it. Jeremiah put off those who would otherwise have been on duty; he came on the shunting engine at the time concerned; he got the watchmen to sign without check; he took the ticket with its comment about the wagon on it away; and so on. The evidence concerning him was circumstantial but cogent, and it linked him with the theft beyond all reasonable doubt.

Jeremiah put two sets of grounds of appeal before us which we answer as follows dealing first with those dated in August: (1) and (2), it is not so; (3) he considered the case carefully; (4) they were not; (5) he did not err; (6) it is not so (we have ourselves so considered it); and (7) the magistrate did not err. The later grounds we answer as follows: (1) there was no misdirection; (2) the magistrate evaluated the evidence, and his findings were correct; (3) the magistrate was right; (4) the magistrate saw and heard the witnesses and was right, indeed obliged, to make his assessments as to credibility (upon our individual consideration, those assessments were correct); (5) it was correctly accepted; (6) the magistrate had it in

mind and dealt with it correctly; (7) the same; (8) there was no misdirection; (9) the magistrate was entitled so to find; (10) what was meant was that Jeremiah was one of those who conspired to steal, and stole; (11) the magistrate's findings were right; and (12) it was well evaluated. Ourselves independently agree with it. Jeremiah's appeal is dismissed.

Two witnesses gave evidence particularly concerning Jackson, a yard foreman at Mombasa, Okech and Ndalo. Both saw him come on the shunting engine at the time concerned; and Okech saw him again at the godown when the coffee was unloaded. Jackson denies complicity, claiming that the evidence against him relating to the time after 6:00 pm is "simply not true"; and that, in particular, he was not in the office at about 10-30 pm: "Okech has lied". But the evidence of the two witnesses was not untruthful; and there is no doubt upon the evidence that Jackson was one of those who was involved, and took part in, the theft of the coffee. He set four grounds of appeal before us which we answer as follows: (1) they did; (2) he did; (3) the magistrate had all relevant factors in mind; and (4) this is not to be done. Upon our own assessment of the evidence, Jackson's guilt was proved beyond reasonable doubt, and his appeal is dismissed.

We do not propose to deal with the evidence concerning Nyamba because, whilst we answer his grounds of appeal (1) it was borne in mind; (2) there was no error; (3) neither the magistrate nor ourselves believe it to be so; and (4) it is not clear, the evidence fell short of proving his guilt. His appeal is allowed. We quash his conviction and set his sentence aside.

The main evidence concerning Samuel, the shunting engine driver, was given by Okech and Ndalo, who saw him driving it on the night concerned. Okech also saw him near the godown when the coffee was unloaded. Samuel claimed that there being no work for him to do; he simply sat on his engine until 10:00 pm, when he went home. The magistrate believed Okech and Ndalo and did not believe him. He was entitled to do that. We independently arrive at similar findings. Samuel was undoubtedly involved in the theft. He was not just a passive by-stander at the godown. He raised four grounds of appeal which we answer as follows: (1) it is not so; (2) there was no misdirection; (3) the magistrate had all the relevant evidence in mind; and (4) assuming error, it can be of no consequence. Samuel's appeal is dismissed.

The evidence particularly concerning Henry, a stores clerk at the Mombasa yard, was given by Okech and Ndalo. Okech saw Henry at the offloading of the coffee at the godown and spoke to him. At first he appears to have taken Okech as one of those engaged in the operation, but (realising it was not so) he asked him why he was interfering. Ndalo saw Henry on the engine at the Mombasa yard; and the next day Henry told him that he was a bad man because he had learned that he had reported about the previous day's events. Henry denied involvement and claimed to have been ill at the time and off duty. Anyone claiming to have seen him on the night concerned was untruthful or mistaken; he had been at home. Nor did he say anything to Ndalo afterwards; he was not even there. The magistrate considered the evidence against and by Henry very carefully; and he was in no doubt that the evidence of Okech and Ndalo was for acceptance, and Henry's was not. His counsel abandoned all grounds of appeal, save for the first in the petition which his client had himself filed. He recognised the difficulty facing him in view of the magistrate's findings and the fact that, of all the accused in the case, only Henry was not on duty on the night concerned, and he argued his case, as counsel for Ayub did, on the basis that the evidence relied on was suspect and with adequate consideration would not have been relied on. The magistrate's conclusions concerning Henry "could not be supported", nor had the defence case been analysed, he said.

A good deal of what was put to us related to timings, but (save for those concerning shifts) they were not, generally, of particular interest to the witnesses, and differences thrown up do not make their evidence suspect. It was put to us that Okech had reason to lie because he saw the coffee being stolen and did not report the same night, and that (if his evidence were true) he would have had overtime for the night concerned, but he did not get any. But all this was before the magistrate and he was entitled to arrive at the findings he made in respect of Okech's evidence. We believe they were right. It may, perhaps, be said that the defence case as put in cross-examination could have received greater space in the judgment, but it cannot be said that findings were made without considering the defence. If one looks at a passage of the judgment to which our attention was drawn and which begins "The evidence of [Onyango] ..." and ends with "... back to yard" it is not a finding (as we were invited to hold) but a statement of evidence; the

findings come later. In the same way it cannot be said, as we were asked to do, that findings were made in another passage of the judgment beginning with "I have examined ..." and ending with "... effluxion of time" before the defence was considered for Henry's case as set out earlier in the judgment. We are unable, also, to find that it was wrong for the magistrate to say that on considering Okech's evidence there was no animosity between the two men. Just as animosity is a factor which is properly to be taken into account where required, is lack of animosity. We see nothing wrong in an appropriate case for the Court to ask "What reason had the witness to lie?" The recent decision in *Wainaina Kiarie v The Republic* (unreported) which counsel cited is of no help to him for (in that case) there was little or no inculpatory evidence against the accused man and his conviction depended on what is quoted in the judgment. We adopt what was said, however, that:

The fact that people have no grudge against someone does not mean that they cannot, at the same time, be mistaken or, for that matter, deliberately untruthful.

There are spiteful people about. It is true that the evidence about the telephone call needed, and needs, attention, but the magistrate had it in mind coming to the conclusion, fairly as we think, that it could not be definitively resolved but that there was an error somewhere and it did not affect Okech's general truth or value as a witness. We agree. As for Ndalo, his evidence about the police was challenged because the Nairobi officers had not then arrived in Mombasa; but it was Henry who, according to Okech said that "he had heard I had been seen with police from Nairobi" and that does not support the point which was made. Okech was, at the time, in touch with the Mombasa police. Nor do we see why the evidence concerning the threat was not properly for taking into account and acceptable. It is true that Ndalo's statement to the police could have been fuller, but he had no cause to be truthful and, in our finding, he was not. Henry denied his involvement. "Anyone suggesting that I was in the yard on 14th July 1977 after 9.00 pm is lying. I was not at Makupa yard office on 17th July 1977". But he was at both places at the relevant times. His evidence about the sick sheets was adequately and correctly dealt with by the magistrate. The evidence that Henry was at Makupa at the off-loading is right. And it is not to be lost sight of that he was not on duty at the time. We do not doubt at all that Henry was one of those who stole the coffee. He was properly convicted and his appeal is dismissed. The single ground left before us was said to be Henry's first, but that must be wrong; he must have meant Henry's second which we answer by saying it is not so.

We are in broad agreement with the magistrate's resume, analysis and findings, but we, of course, have made our own assessments upon the evidence. We would just add this: We said that we would not set all the evidence out and we have not done so; there was no need for it; but, whilst we have singled out certain parts of it as being particularly to do with each appellant, we have ever had in mind all the evidence in so far as it affected each of them and what was argued about it in the court below and before us.

Nyamba's appeal allowed.

Other appeals dismissed.

Dated and delivered at Nairobi this 26th day of July 1979.

E. TREVELYAN

JUDGE

S.K SACHDEVA

JUDGE