



IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Madan, Law & Potter JJ A)

CRIMINAL APPEAL NO 71 OF 1979

BETWEEN

PETER KUIBITA PAUL.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal against the dismissal by Chesoni J on 10th November 1979 in Criminal Appeal No 216 of 1979)

REASONS OF THE COURT

On 17th April 1980 we allowed this appeal, quashed the conviction and set aside the sentence. We now state the reasons for our judgment.

The appellant was convicted by a subordinate court of the first class on two counts of stealing by an agent, contrary to section 283(b) of the Penal Code. The charge on the first count was that the appellant, on 11th July 1977, stole 360 bags of sugar at Sagana railway station, the property of Kenya National Trading Corporation, Embu depot. On the second count the appellant was charged with similarly stealing 360 bags of sugar on 24th August 1977.

The appellant's conviction on the second count was quashed on appeal to the High Court. This appeal related to the conviction on the first count.

The appellant's firm (known as "Embu Packers") were the appointed transporters of sugar by road from Sagana railway station to the depot at Embu of the Kenya National Trading Corporation. The appellant arrived at Sagana railway station at 8.00 am on the morning of 11th July 1977 where he admittedly signed for the delivery to Embu Packers of the sugar bags contained in two railway wagons, Nos 55694 and 55782. His clerk, Calvin Mugare, signed for a third wagon (No 54566) which Mugare offloaded after he had off-loaded wagon No 55782. Mugare said that he never saw wagon No 55694. The appellant left Sagana for Embu at 11.00 am. He visited Sagana again on the following day, 12th July.

It was not in dispute that, as shown in the delivery book of the appellant's firm, sugar from two wagons was in fact delivered to the depot at Embu by the appellant's firm.

The sugar from wagon No 55694 was stolen. It was off-loaded; but it never reached the depot at Embu. It just disappeared, leaving the question to be decided whether it was stolen by the appellant.

The memorandum of appeal to us stated that the circumstantial evidence adduced for the prosecution did

not disclose the required degree of proof to warrant a conviction; that Calvin Mugare was a possible accomplice, whose evidence required to be corroborated, and that there was not sufficient evidence on record to warrant an inference of improper or guilty motive on the part of the appellant merely because the appellant signed for two wagons and visited Sagana again on 12th July 1977.

Chesoni J relying upon *Noon v Smith* [1964] 1 WLR 1450, as laying down the principles to be followed in respect of circumstantial evidence in cases of theft, correctly said that theft could be established by evidence tendered directly proving it or by evidence of facts from which a reasonable person could draw the inference that a theft had taken place. The judge also said there was ample material before the Court to justify the conclusion which the magistrate reached, namely that the appellant had stolen the sugar.

In a case depending exclusively upon circumstantial evidence the Court must, before deciding upon a conviction, find that the inculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other hypothesis than of guilt; see *Simoni Musoke v R* [1958] EA 715 where the following extract from *Teper v R* [1952] AC 480, 489, was quoted ([1958] EA at page 719):

It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference.

The following salutary statement appears in *Taylor on Evidence* (12th Edn) pages 66 and 67:

Admitting that the facts sworn to are satisfactorily proved, a further and highly difficult duty remains for the jury to perform. They must decide, not whether these facts are consistent with the prisoner's guilt, but whether they are inconsistent with any other rational conclusion; for it is only on this last hypothesis that they can safely convict the accused. The circumstances must be such as produce moral certainty, to the exclusion of every reasonable doubt. Moral certainty and absence of reasonable doubt are in truth one and the same thing.

The appellant signed for only two wagons and his connection was established with only two wagons. His firm's delivery book indisputably proved the delivery of sugar from two wagons to the depot at Embu. The appellant was not proved to have off-loaded or to have been connected with the off-loading of the sugar from wagon No 55694. The circumstances of this case were not inconsistent with some other rational explanation, as the possibility of a mistake could not be excluded with moral certainty, or that the sugar was stolen by someone else, so that the inference of the appellant's guilt was weakened if not destroyed.

The appellant's visit to Sagana on 12th July, or the fact that he dismissed Calvin Mugare from his employment on 19th July on the ground of redundancy, were not conclusively incriminating factors, as State counsel would have us say. These two incidents did not, in our view, provide sufficient proof to enable an inference of improper or guilty motive to be drawn which made the inculpatory facts incompatible with the appellant's innocence and incapable of explanation upon any other hypothesis than that of his guilt. A readily available explanation was that it was a requirement of the appellant's business to visit Sagana railway station in connection with the transport of sugar by road by his firm. And the appellant must have had enough sense to know that Calvin Mugare's dismissal would not put an end to his giving testimony against the appellant if the situation arose. In fact, when carefully scrutinised, Mugare had very little to state against the appellant in his evidence in connection with the offence.

We do not think that Calvin Mugare was an accomplice. A servant does not automatically assume the role of an accomplice because he obeys his master's orders in the course of his duty. In any event his evidence did not implicate the appellant with the theft of the sugar from wagon No 55694.

For these reasons we allowed the appeal.

Appeal allowed.

Dated and delivered at Nairobi 23th April 1980

C.B MADAN

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JUDGE OF APPEAL

E.J.E LAW

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JUDGE OF APPEAL

K.D POTTER

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR