



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: E. M. GITHINJI, HANNAH OKWENGU &

J. MOHAMMED, J.J.A)

CRIMINAL APPEAL NO. 163 OF 2014

BETWEEN

JOHANES ALFRED OMONDI.....1<sup>ST</sup> APPELLANT

ELISHA OKETCH ODHIAMBO .....2<sup>ND</sup> APPELLANT

AND

REPUBLIC.....RESPONDENT

*(Appeal from a judgment of the High Court of Kenya at Kisumu (Ali-Aroni, J) dated 4<sup>th</sup> July, 2011*

*in*

HC.CR. A No. 82 of 2010)

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JUDGMENT OF THE COURT

Background

[1] This is a second appeal arising from the Judgment of the High Court, (**Ali-Aroni, J**), dismissing the appellants' appeal against conviction and sentence.

[2] **Johanes Alfred Omondi** and **Elisha Oketch Odhiambo** (the appellants) were tried and convicted by the Chief Magistrate's Court at Kisumu of the offence of stealing contrary to section 275 of the Penal Code. The particulars of the charge, was that on 27<sup>th</sup> August, 2009 at Kisumu Township location, Kisumu District within Nyanza province jointly they stole five power cables, two main consumer power switch all valued at Kshs. 49,000/- the property of **Peter Ogara Omondi (Omondi)**.

[3] The prosecution called three (3) witnesses in support of the charge. The evidence of Omondi was that he was a hotel manager at Hotel River Side, Accra Street in Kisumu town; that on 27<sup>th</sup> August, 2009 while in his office, **Washington Ochieng, (Washington)**, an employee of the hotel reported to him that the appellants who were working as electricians at a construction site in the hotel, were leaving the construction site with a huge black bag; that upon inspecting the bag, Omondi found three rolls of cable wires. It was the complainant's further testimony that he had issued the wires to the 1<sup>st</sup> appellant earlier that morning; that he called the police and the appellants were arrested. **Washington** testified that he was a cleaner at the hotel; that on the material day he saw the 2<sup>nd</sup> appellant carrying a heavy black bag and became suspicious; that he reported the incident to Omondi. **P.C George Roeya (P.C Roeya)**, the Investigating Officer testified that he was in his office when the appellants were taken to the police station; that they had three (3) rolls of wire in a black bag; that he arrested the appellants and caused them to be charged. In cross examination, **P.C Roeya** testified that he asked the appellants for a receipt for the wires found in their possession but they did not have any and that the appellants did not claim that the wires found in their possession belonged to them.

[4] The 1<sup>st</sup> appellant in his unsworn statement of defence at the trial stated that he was an electrician; that he had bought the 3 cables of wire for use on another site; that he produced a receipt in support of his claim; that the items belonged to him and he wanted them returned. The 2<sup>nd</sup> appellant in his unsworn statement of defence stated that on the material day he was working under the 1<sup>st</sup> appellant; that the 1<sup>st</sup> appellant

informed him that he had brought wires for another site to the hotel construction site by mistake and wished to take them to the other site.

[5] The trial magistrate being satisfied with the evidence presented by the prosecution rejected the appellants' defence, found them guilty, and convicted them as charged. The trial magistrate considered the appellants' mitigation and sentenced each to pay a fine of Kshs. 20,000/-, in default of which each appellant was to serve three months' imprisonment.

[6] Aggrieved by the decision of the trial court, the appellant appealed to the High Court on the grounds *inter alia* that the trial court: failed to appreciate that Omondi did not produce any evidence regarding ownership of the alleged stolen items that were produced in court; that the trial court relied on the weak prosecution case and disregarded the strong defence case; that the trial court erred in law and fact in shifting the burden of proof; that the charges were defective and failed to comply with Section 137 of the Criminal Procedure Code (CPC); that the judgment of the trial court failed to comply with Section 169 of the CPC. The High court after a careful re-evaluation of the evidence on record found the evidence against the appellants to be overwhelming. The learned Judge also found the sentence meted out on the appellants to be reasonable. The learned judge therefore dismissed the appellants' appeal against both conviction and sentence.

[7] In their memorandum of appeal lodged before this Court, the appellants raised three grounds of appeal. These were: that the High Court failed to re-evaluate the evidence; that the charge sheet was incurably defective as the same was brought under the sentencing section of the Penal Code and not the section which creates the offence; and that the appellants' defences were not considered.

### Submissions

[8] When the matter came for hearing, learned counsel **Mr. Onsongo** appeared for the appellants while **Mr. Mule**, Senior Assistant Director of Public Prosecution (SADPP) was present for the State. Counsel relied on their written submissions which they orally highlighted.

[9] **Mr. Onsongo**, submitted that the appellants had paid the fines and were only pursuing the appeal for purposes of their records; that the trial court introduced evidence which was not given by any of the prosecution witnesses thereby went beyond its mandate; that the respondent's case was not within the four corners of the definition under section 268 of the Penal Code; that ownership of the wires by the appellants was established through production of receipt; and that section 169 of the Criminal Procedure Code was not complied with.

[10] **Mr. Mule**, opposed the appeal and submitted that the first appellate court set out the reasoning of the trial court, re-evaluated the evidence independently backed by evidence and arrived at its own conclusion; that the appellants had legal representation throughout trial but failed to raise the issue of the charge sheet being defective and therefore the appellants were not prejudiced by the charge sheet as framed; and that the appellants' defence did not displace the prosecution case.

### Determination

[11] This is a second appeal and section 361(1) of the Criminal Procedure Code enjoins this Court to consider matters of law only.

[12] In *Njoroge -vs- Republic (1982) KLR 388*, this Court at page 389 held;

***"...On this second appeal, we are only concerned with the points of law and consider ourselves bound by the concurrent findings of fact arrived at in the courts below, unless shown to be based on no evidence..."*** See *Karani v. Republic [2010] 1 KLR 73*.

[13] We have carefully considered the record of appeal, the written submissions by counsel, authorities and the law.

[14] It was the appellants' contention that the charge sheet was defective as it did not indicate the items that were stolen. We have perused the record and note that the charge sheet did not clearly indicate and or give the description of the stolen property save for the names and numbers of stolen items. The test applicable by an appellate court when determining firstly the existence of a defective charge, and secondly, its effect on an appellant's conviction is whether the conviction based on the alleged defective charge occasioned a miscarriage of justice resulting in great prejudice to the appellant.

[15] In *JMA v. Republic (2009) KLR 671*, it was held *inter alia* that:

***"It was not in all cases in which a defect detected in the charge on appeal would render a conviction invalid. Section 382 of the CPC was meant to cure such an irregularity where prejudice to the appellant is not discernible."***

[16] Applying this principle to the rival submissions by the parties, we are satisfied in the instant case that this was an omission and discrepancy which did not prejudice the appellant and that no miscarriage of justice has been occasioned as a result of failing to indicate the size, colour or length of the cables. The omission does not render the charge sheet defective or the conviction a nullity. Further, the issue of the charge sheet being defective was not raised at trial and was an afterthought on appeal.

[17] On the claim that the appellants' defence was not considered by the both the trial and the first appellate court, we find that the same was properly considered. The trial court in addressing the appellants' defence stated:

***"It is completely inconceivable that the accused persons would buy their items and bring them to site, where they were contracted to do cabling and attempt to move out the items, the receipt the accused persons produced is an afterthought meant to mislead this court. It is all mischief."***

The High Court stated as follows:

**“Indeed the defence evidence the minor (sic) did not contradict displace the evidence of the prosecution in the least. Why would the appellants carry wires similar to those being used at the site being referred to here? Why would they be removing/moving the wires shortly after being supplied with similar wires within minutes of receipt of the same? The evidence against the appellants is overwhelming in my view.”**

[18] From the evidence, we are satisfied that the appellants’ defences were considered and rejected in light of the evidence that was before the trial court. From the foregoing, we are satisfied that the prosecution’s case against the appellants was overwhelmingly credible and that the High Court properly directed itself in dismissing the first appeal. There is therefore no basis for this Court to interfere with the concurrent findings of the two courts below.

[19] The upshot is that this appeal has no merit and it is hereby dismissed in its entirety.

Orders accordingly.

**DATED and delivered at KISUMU this 19<sup>th</sup> day of June, 2019.**

**E. M. GITHINJI**

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**JUDGE OF APPEAL**

**HANNAH OKWENGU**

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**JUDGE OF APPEAL**

**J. MOHAMMED**

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**JUDGE OF APPEAL**

*I certify that this is a true*

*copy of the original.*

**DEPUTY REGISTRAR**