



REPUBLIC OF KENYA

**DISMAS ODHIAMBO ONJOLO APPELLANT
AND
REPUBLIC RESPONDENT**

**(Appeal from a judgment of the High Court of Kenya at Mombasa (Mwera, J) dated 19th
December, 2005**

**in
H.C. Cr. Appeal No. 101 of 2005)**

JUDGMENT OF THE COURT

The appellant herein, **Dismas Odhiambo Onjolo**, was jointly charged with one other person, Henry Onyango Monyancha, on two counts of stealing postal matter contrary to **section 277** of the Penal Code (**Cap 63 Laws of Kenya**). The particulars of the first count were that on the diverse dates between 2nd September, 2002 and 10th September, 2002 at Mails Office Docks in Mombasa District of the Coast Province, the two, jointly with others not before court stole three (3) International Transit parcel bags containing assorted items. The particulars of the second count were that in the diverse dates between 22nd and 25th November, 2002 at Mails Office Docks in Mombasa District of the Coast Province the two jointly with others not before court tampered with six International Transit parcel bags and stole therein various items as listed in the charge sheet.

The appellant's co-accused was separately charged with handling stolen goods contrary to **section 322(2)** of the Penal Code and on a third count of failing to prevent a felony contrary to **section 392** of the Penal Code. The appellant's co-accused was however acquitted on all counts and set free by the trial court.

The appellant was acquitted on the first count but convicted on the second count and sentenced to four (4) years imprisonment. The facts of the case may be briefly stated. The appellant once worked in the Mail office of Kenya Postal Corporation in Mombasa and was on leave in November 2002 when it was discovered that some postal matter had been stolen. Investigations into this incident commenced and in the course of these investigations, the house of Monyancha (the accused's co-accused) was searched. Some items which were identified as part of the stolen property were recovered from Monyancha's house. It was Monyancha's wife who was found packing these items and on seeing the investigation team she fled leaving any explanation to her husband who in turn informed the investigating team that it was the appellant who had given him the suspected goods. Although the appellant's co-accused did not repeat his explanation to the investigating team in his unsworn statement in defence, that seemed to have led the investigating team to the house of the appellant for a search but nothing was recovered from therein, except two keys (Exhibit 44) under a water tank or fridge. Those keys opened a padlock (Exhibit 45) which led to the mail bags office. So did the original keys (Exhibit 46) which were taken from Madamji (PW 2).

The appellant's defence was that these keys were planted on him.

In convicting the appellant on the second count, the learned trial magistrate stated as follows in

concluding his judgment:

“On the basis of this key and on the basis of the fact that accused (Onjolo) used to work at the mails office before hence had access to the keys I found there is evidence to prove that he stole the postal matter reported stolen. He tampered with the bags. He got access by using the key recovered from his residence.

I find accused 1 (Onjolo) guilty as charged on count II under section 277 of the Penal Code.”

Being aggrieved by that judgment of the trial court, the appellant preferred an appeal to the High Court challenging both his conviction and sentence setting out seven grounds of appeal.

The learned Judge of the superior court (Mwera, J) considered the submission of Mr. Okuthe who appeared for the appellant and in the end dismissed the appellant’s appeal. In the course of his judgment, the learned Judge said:

“In this court’s opinion, the appellant was found with the keys that opened the doors, where the violated mail bags were. It can be safely presumed that he stole the items in question. The others who held keys that could do the same thing (e.g. Adamji (sic), PW 2) had produced the sets, they were investigated including searches in their houses and the investigators did not find them involved.”

The learned Judge then considered the role of the appellant’s co-accused in the entire case and concluded his judgment thus:-

“However, for being found with the keys that opened the mail room doors a few days after the theft a strong suspicion followed, then investigations. Then with the appellant’s unwarranted remark that the keys were planted on him (by who and for what reason) the conviction was on proper evidence and the sentence was in order.”

It is from that judgment of the superior court that the appellant comes to this Court by way of second appeal, and that being so, only matters of law fall for consideration pursuant to **section 361** of the Criminal Procedure Code.

When the appeal came up for hearing before us on the 25th July, 2006, Mr. Magolo, the learned counsel for the appellant, stated that all the six grounds would be reduced only to one ground; in that the learned Judge of the superior court had failed to re-evaluate the evidence and reach his own conclusion. It was submitted that all the items listed as stolen by the appellant were the same items found in Monyancha’s possession, and yet Monyancha was acquitted on all the charges. Mr. Magolo referred to the fact that the Attorney General had conceded the appeal in the High Court which led to the appellant being released on bail pending appeal. In Mr. Magolo’s view, this meant the appellant’s conviction was not safe.

Mr. Monda, the learned State Counsel, in opposing this appeal submitted that there were concurrent findings by both the trial court and the first appellate court. He therefore asked us to dismiss this appeal in its entirety.

We have considered the rival submissions in this appeal and on the outset we would point out that the appellant’s case was riddled with confusion and contradictions. As already stated at the commencement of this judgment, the appellant was jointly charged with one Henry Monyancha (who was 2nd accused in the trial court). The alleged stolen items were recovered from the house of Monyancha. In his defence, Monyancha claimed most of the items (if not all) to have been lawfully his and some were religious materials belonging to his daughter who had been sponsored by Church of God Canada. Monyancha named the sponsor as Anna who gave these materials as gifts to be supplied to friends and neighbours. Monyancha went on and stated that indeed some of the items were later returned to him. It must be remembered that Monyancha had been separately charged with handling stolen goods contrary to **section 322(2)** of the Penal Code but acquitted after the trial. It was his explanation that the trial court found

acceptable which then led to his acquittal. We must point out that the appellant was not found in possession of any of the alleged stolen items. His conviction was based on the discovery of two keys which he disputed.

On the issue of confusion and contradictions, the learned Judge of the superior court stated as follows in the course of his judgment:

“The learned trial magistrate went over the evidence as best he could, mixed-up as it turned out to be, with some items being crossed out of the charge sheet or being returned to Henry Monyancha (Accused 2). It should be added that even the learned trial magistrate himself did appear to mix up as to who was the 1st or second accused.”

It is to be observed that the learned Judge did not submit the evidence recorded by the trial court to exhaustive examination so as to weigh conflicting evidence and draw his own conclusions. It is also to be noted that the State did not wish to support the conviction of the appellant during the hearing of the appeal in the superior court. The learned State Counsel is recorded to have stated before the superior court:-

“I concede this appeal on conviction. The reason is that after going over the lower court record, a reasonable doubt remained

Stolen goods were found in the house of accused 2 - see pp.17 line (sic). So it was accused 2 who ought to have been found guilty of the theft.”

It is now trite law that it is the duty of a first appellate court to reconsider the evidence, evaluate it itself and draw its own conclusions in deciding whether the trial court’s decision should be upheld.

In **Okeno v. R** [1972] E.A 32 the predecessor of this Court made the following observation as regards the function of the first appellate court:-

“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya v. R., [1957] E.A. 336) and to the appellate court’s own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (Shantilal M. Ruwala v. R., [1957] E.A 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court’s findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate’s findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters v. Sunday Post, [1958] E.A. 424.”

The above was cited with approval by this Court in its recent decision of **Kinyua vs. Republic** [2003] KLR 301 at p. 303.

We have considered the background to this appeal and it is our considered view that had the learned Judge re-evaluated the evidence and considered the submission of the State Counsel in which the State conceded the appeal, this matter would have been concluded in the superior court by allowing the appellant’s appeal.

In view of the foregoing, we order that this appeal be and is hereby allowed, the appellant’s conviction quashed and the sentence set aside. The appellant is to be set free forthwith unless otherwise lawfully held.

Dated and delivered at Mombasa this 28th day of July, 2006.

J.E.
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CHIEF JUSTICE

E.O. O’KUBASU

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JUDGE OF APPEAL

J.W. ONYANGO OTIENO

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR