



**REPUBLIC OF KENYA**  
**IN THE COURT OF APPEAL**  
**AT MOMBASA**  
**CORAM: OMOLO, SHAH & O'KUBASU, JJ.A.**  
**CRIMINAL APPEAL NO. 161 OF 2000**  
**BETWEEN**

**HUSSEIN MAYOBWE ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**(Appeal from a Judgment of the High Court of Kenya  
at Mombasa (Comm. Khaminwa, Mrs) dated 7th December,  
1999  
in  
H.C.C.R.A. NO. 110 OF 1998)  
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**JUDGMENT OF THE COURT**

The appellant, Hussein Mayobwe was tried and convicted on one count which charged him with the offence of stealing 1580 bags of urea fertilizer valued at Shs.1,580,000/= the property of Peter Otieno from motor lorries registration numbers KAE 178E, KAH 623Q and KAH 623Q whilst the said fertilizer was in transit from Mombasa to Kitale. The charge against him was contrary to **section 279(c)** of the **Penal Code** . He was sentenced to serve a six (6) year term of imprisonment on 4th May, 1998 and was ordered to receive three (3) strokes of the cane. He appealed to the High Court challenging his conviction and sentence. His appeal to the High Court was dismissed and he is now before this Court by way of a second appeal.

The evidence before the subordinate court linking him with the said offence was that the appellant and one Rajab Musa approached one Peter Nyaga (PW1) who was at the material time employed by Tanish Enterprises seeking to hire lorries to transport cement and fertilizer to Kisumu and Kitale respectively. The proposed transportation of cement did not materialize but the next day both the appellant and Rajab Musa asked Peter Nyaga to follow them to the stores occupied by Siginon Freight Limited and saw to it that the fertilizer was loaded on to the said three motor lorries and the lorries set off on their journey inland.

The drivers of the other two lorries Julius Muthama (PW2) and Gerald Mutembei (PW4) confirmed the version of events by Peter Nyaga , that is, that the appellant and Rajab Musa had met them in Mombasa at Ghana Bar and led them to the premises of Siginon Freight Limited; that the appellant had some delivery note and he along with Rajab Musa held themselves out as the owners of the fertilizer and had the fertilizer loaded onto the lorries. The three drivers were told to follow the appellant and Rajab Musa who were in a small car.

The three drivers, upon reaching Nairobi, were told by the appellant and Musa that the fertilizer, instead of being transported to Kitale, was to be off-loaded and stored at godowns belonging to Express (Kenya) Limited. The appellant and Musa went to the premises of Express (Kenya) Limited to see to it that the fertilizer was off-loaded and stored at the said premises. Musa was the prime organizer of the storage. The appellant, however, remained near the premises. When the storage was completed the appellant and Musa left the place together in a taxi. The storage actually took place on 21st and 22nd April, 1997.

Musa took four other lorries to Express (Kenya) godowns on 23rd April, 1997, got 200 bags of fertilizer loaded in each lorry and left. For release of those 600 bags he made use of certain receipts in his own name. The lorries carrying the 600 bags of fertilizer were intercepted by the police at a centre called Moi's Bridge and it transpired eventually that the goods in question belonged to a company in Kitale known as Super Expo Limited. A M. Shah, a director of Super Expo Limited confirmed that the fertilizer belonged to his company and that he had contracted a firm known as Petrosa to transport the same from Mombasa to Kitale.

There can be no doubt that the fertilizer in question belonged neither to Musa nor the appellant. The involvement, therefore, of the appellant in transportation thereof can only lead one to believe that he was unlawfully in possession thereof. The appellant himself in his statement admitted having taken the lorries to Siginon Freight godowns. The learned Commissioner of Assize (Mrs. J. Khaminwa) whilst evaluating the evidence before the subordinate court said:-

***"The evidence of Mr. Edward Maina , PW6, of that company (Express Kenya) corroborates what PW5 said and further confirmed that Rajab Musa paid for the storage and later took the delivery of fertilizer in seven lorries all identified in this witness's evidence. Three of those lorries seem to have headed towards Kitale but were arrested and detained by Police at Moi's Bridge loaded with same fertilizer. From the evidence it is obvious that the whole operation was managed by two persons jointly, namely, the appellant and one Rajab Musa . It was Rajab Musa who paid in Nairobi the charges for Mombasa/Nairobi transport. It was Rajab Musa who paid the Express Kenya Limited for storage of the goods in Nairobi and it is Rajab Musa who arranged for lorries to take away the fertilizer from the godown of Express Kenya Limited. The appellant appears to have been in the background most times. But he is the one who obtained the Mombasa Loading Order and took the lorries to Siginon Freight godowns for loading. He was with Rajab at the loading at Siginon and they told PW1 that they will meet in Nairobi. "***

As we pointed out earlier this is a second appeal. The two courts below made concurrent findings of fact to the effect that the appellant and Rajab Musa were the ones involved in the transportation of the fertilizer from Mombasa to the Express go-down. We have set out above what the learned Commissioner said of and concerning the appellant's involvement in the taking away of the fertilizer. We discern no misdirection whatsoever on the part of the two courts below in concluding that the appellant was involved in the transportation of the fertilizer without being entitled to ownership thereof. Not only did they transport it from Mombasa to Nairobi, but they also converted it to their use and sold a large portion of it. That clearly amounts to the offence of theft in transit. We saw no point of law involved in this appeal, nor do we see any inference of fact which was wrong and which could amount to an error in law.

All said and done, we must dismiss this appeal. We do so. We feel that the police ought to have made better efforts to get the prime culprit, Rajab Musa , but the failure of the police to do so cannot afford any defence to the appellant.

**Dated and delivered at Mombasa this 20th day of July,k 2001.**

**R.S.C. OMOLO**

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**JUDGE OF APPEAL**

**A. B. SHAH**

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**JUDGE OF APPEAL**

**E. O. O'KUBASU**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**