



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
OF KISII**

Criminal Appeal 13 of 2008

SIMION PEYWA ODIORI APPELLANT

VERSUS

REPUBLIC RESPONDENT

**(From the original conviction and sentence in the Resident Magistrate's
court at Kehancha Criminal Case No.611 OF 2007 by J. R. NDURURI, RM)**

JUDGMENT.

The appellant was charged with stealing contrary to **section 275** of the Penal Code. The particulars of the offence were that on diverse dates between 22nd and 23rd May 2007 at Nyamaharaga sub-location in Kuria district, the appellant stole a water pump valued at Kshs.18,000/= the property of **Paul Ndung'u Njenga**. After a full trial the appellant was convicted of the said offence and sentenced to two years' imprisonment.

The appellant was aggrieved by the said conviction and sentence and preferred an appeal to this court.

He argued that there was insufficient evidence to connect him with the said offence.

The complainant, **Paul Ndung'u Njenga, PW1**, testified that on 23rd May 2007 he received a telephone call from one **Mr. Njue** who informed him that he had seen the appellant carrying a water pump that looked like one which had been stolen from the complainant's borehole. PW1 reported the matter to the police. A search was conducted and the water pump was recovered in a house belonging to one **Paul Kibuga, PW2**. When PW2 was questioned by the police he said that the appellant and one **Peter** had offered to sell the said pump to him. The police arrested the appellant but the said Peter was

not traced. Prior to the disappearance of the said water pump the appellant was the complainant's landlord. The complainant alleged that shortly thereafter he was evicted by the appellant. As a result the complainant filed a case at the Business Premises Rent Tribunal. From the evidence of PW1 it was evident that the relationship between him and the appellant was strained even before the alleged theft of the water pump occurred.

David Kibuga, PW2, confirmed that the appellant approached him on 23rd May 2007 and offered to sell a water pump to him.

Police Constable Paul Kiprop, PW3, testified as to how the appellant was arrested after a report was made to the police by PW1. In his cross examination by the appellant, the witness stated that the complainant had been a tenant of the appellant but the appellant evicted him and started selling his property. He added that on 15th May 2007 the appellant had reported to the police that the building had been broken into.

In his defence, the appellant stated that PW1 had been his tenant but he defaulted in payment of rent and therefore gave him a quit notice. As a result, he started removing his items from the house without the appellant's consent. Shortly thereafter thieves broke into the appellant's house and stole some items. The police began their investigations and the complainant was arrested but was later released. After a short while the appellant was arrested and when he was in custody, the complainant collected some other items from his house. He alleged that it was the complainant who had taken his water pump to the house of his brother-in-law, PW2.

The appellant called **Carolyn Aruma, DW2**, as a witness. DW2 testified that she used to sell chips next to a hotel that was being operated by PW1. DW2 used to wash her potatoes at a water point which was next to the hotel. One day she went to wash her potatoes and found no water following from the tap. On 10th January 2007, DW2 saw PW1 and PW2 in the premises. DW2 asked PW1 why he was removing the water pump. PW1 responded that he was removing it because it was not being used due to some blockage. The witness saw PW1 wiping the pump. She was therefore surprised to hear that the appellant had been charged with theft of the water pump which, according to her, had been removed by PW1.

When the appeal came up for hearing **Mr. Kemo, Principal State Counsel**, conceded the same, and in my view rightly so. He stated that **Mr. Njue** who had allegedly telephoned PW1 ought to have been called as a witness since he was the one who was informed PW1 that he had seen the appellant carrying a water pump that resembled his. I respectfully agree with Mr. Kemo. It is trite law that where the prosecution fails to call a witness whose evidence appears material and necessary to establish the truth, the court may infer that the evidence would have tended to be adverse to the prosecution; see **BUKENYA & OTHERS VS UGANDA** [1972] E.A. 549. PW1 and PW2 are close relatives and the evidence of DW2 ought to have created serious doubts in the mind of the trial magistrate as to whether the appellant actually stole the water pump or it was removed by PW1 and taken to the house of PW2. There was no reason advanced as to why the alleged Mr. Njue was not called as a prosecution witness. PW1 and the appellant were not in good terms and either of them could have made false allegations against the other. It was therefore important to weigh carefully the evidence of PW1 against that of the appellant.

It is an established practice that where doubt arises as to whether a charge has been proved to the required standard the benefit of such doubt is always given to the accused person. In the circumstances of this case, I find that the prosecution did not prove its case beyond reasonable doubt. I allow the appeal, quash the conviction and set aside the sentence that was pronounced by the trial court.

The appellant is set at liberty unless otherwise lawfully held.

DATED, SIGNED and DELIVERED at KISII this 4th Day of November, 2008

D. MUSINGA.

JUDGE.

Delivered in the open court in the presence of:

Appellant absent

Mr. Kemo, Principal State Counsel for the Republic

D. MUSINGA

JUDGE.



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