



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL APPEAL NO. 1697 OF 1983

KIHUNGU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from the Senior Resident Magistrate's Court at Kiambu, Omondi Tunya Esq)

JUDGMENT

The appellant was convicted of stealing by servant contrary to section 281 of the Penal Code and sentenced to four (4) years' imprisonment.

Most of the facts before the learned trial magistrate were not in dispute.

The appellant was employed by the complainant company (M/s Haither Haji Abdi Transporters) as a driver. On the material date, the appellant was assigned the duty of driving a fuel tanker registration number KTT 324, with attached trailer ZA 8115. The tanker was loaded with 43,000 litres of diesel and the appellant, after collecting all the necessary documents and his *safari* allowance, set off for Bujumbura in Rwanda.

The appellant left on July 25, 1983. On July 28, 1983, the vehicle was found abandoned at the Escarpment but without the diesel. The appellant was nowhere to be seen. The appellant was finally found at his home in North Kinangop on August 4, 1983. He was arrested and later charged.

The appellant, in his unsworn statement, said that the vehicle overturned at the Escarpment and that, as a result of the accident, he got confused and went home straight. He went on to say that as he was in custody for 12 days, he decided to tell the police that he had sold the fuel so that he could be released.

Mr Kinyua, who appeared for the appellant, argued that the learned trial magistrate was wrong in evaluating evidence, as he based his decision on the unsworn statement of the appellant. Mr Kinyua pointed out that the learned trial magistrate erred in accepting confession by the appellant.

Let me pause here for a moment and deal with these points raised by Mr Kinyua. Evidence on record had to be considered as a whole and so, I find no merit in Mr Kinyua's submission about the manner in which evidence was considered. The appellant told the court that the vehicle had overturned. But those who visited the scene testified that the vehicle had indeed left the main road and branched off and that it had no diesel and there was no spillage. What the appellant said had to be considered together with the

rest of the evidence before the court. The issue of confession and cautionary statement does not arise here, since the appellant is the one who stated in court that he told the police that he had sold the fuel and he did this in order to be released. He was saying this in court when defending himself. Indeed, he must have said so at the police station and that is why the police had to visit a petrol station in Ngara. But nothing much turned on this point.

There was then a complaint that there was no evidence that diesel was loaded. I have gone through the evidence and I would have thought that no dispute really arose as regards fuel being transported. Documentary evidence and oral evidence clearly shows that this fuel was loaded. The appellant left Nairobi carrying fuel armed with all the relevant documents.

The main issue here, in my view, was whether the vehicle really overturned with fuel or not. According to the appellant, he was involved in an accident when the vehicle overturned. He however got confused and proceeded home. But those who visited the scene never saw any spillage as would have been expected. The logical inference to be drawn is that when the vehicle overturned it was empty. The appellant's conduct had to be considered. He decided to go to his home in North Kinangop. He never even reported the accident. His explanation was that he was confused and got shocked. In other words, he was suffering from shock. But he never said that he went for any treatment. I also noted that the appellant never complained of any external or internal injury to his body! We are left wondering whether this was a real accident or a plan to cover up the theft. As I read through the evidence, I found it difficult to resist an inference to the effect that the appellant stole the diesel, sold it to some person(s) and then proceeded to arrange the accident and he cleverly came out of the vehicle before he left it to roll.

Mr Kinyua complained that the evidence against the appellant was circumstantial. That may be the case, but as we know, circumstantial evidence is very often the best evidence. In *Republic v Taylor Weaver and Donovan* [1928] 21 Cr Appeal R 20 the principle as regards the application of circumstantial evidence was enunciated in the following words:

“Circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by intensified examination, is capable of proving a proposition with the accuracy of mathematics. It is no derogation of evidence to say that it is circumstantial”.

The above is what was said in England but the same principle applies in East African as was demonstrated in *Tumuheire v Uganda* [1967] EA 328 in which Sir Udo Udoma (CJ) said:

“It should be observed that there is nothing derogatory in referring to evidence against an accused as circumstantial. Indeed, circumstantial evidence is in a criminal case, often the best evidence in establishing the commission of a crime by a person as in the present case.”

Having carefully considered the evidence on record, I am satisfied that there was sufficient evidence to sustain conviction of the appellant. His defence was properly considered and properly rejected. The inculpatory facts were incompatible with the innocence of the appellant and incapable of explanation upon any other reasonable hypothesis than that of the appellants guilt. An issue was raised about Abdi not giving evidence. But we had many employees of Abdi who testified. The appellant was an employee of Abdi Transporters must be considered as special owner. Hence there was no merit in that line of argument.

As regards the sentence, the learned trial magistrate considered all the relevant circumstances and in my view, this was a serious case of a dishonest servant who clearly planned the offence and made sure that there would be no recovery. The sentence imposed was merited.

In view of the foregoing, I dismiss this appeal in its entirety. Order accordingly.

Dated and Delivered at Nairobi this 14th December 1984.

E.O.O'KUBASU

JUDGE



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