



REPUBLIC OF KENYA



**Makokha v Republic (Criminal Appeal E007 of 2022)
[2023] KEHC 22725 (KLR) (28 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 22725 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CRIMINAL APPEAL E007 OF 2022
PM MULWA, J
SEPTEMBER 28, 2023**

BETWEEN

MWANAIIDI KHEYO MAKOKHA APPELLANT

AND

REPUBLIC ACCUSED

(Being an appeal from the original conviction and sentence of Hon. Omodho delivered on 20th January 2022 in Kiambu criminal case no. 2705 of 2016)

JUDGMENT

1. This appeal arises from Kiambu Criminal Case No. 2705 of 2016 where the Appellant herein Mwanaidi Kheyo Makokha was charged in count 1 with the offence of Stealing by Servant Contrary to Section 283(c). The particulars were that on diverse dates between 10th November 2011 and 26th June 2016 at Lodwar Township in Turkana county an agent of Real Medicine Foundation (RMF) stole Kshs. 40,696,203/= the property of Real Medicine Foundation
2. In count nos. 2 to 10 she was charged with the offence of Making Documents without Authority Contrary to Section 357 of the Penal Code. The particulars were that on diverse dates between the 10th November 2011 and 26th June 2016 at an unknown place within the Republic of Kenya with intent to defraud without lawful authority made cash sales receipts of various amounts.
3. The prosecution called a total of 12 witnesses. Pw1 - Dr. Martina Fuchs testified she lived in America and is the CEO of Real Medicine Foundation (RMF), which is presence in 19 countries. In 2011 there was funding to upgrade Lodwar District Hospital in terms of infrastructure and equipment. The accused was appointed as the project coordinator and her duties included to inform the headquarters (in America) of what was required. The accused was a signatory of the Bank Account. That the accused was funded to visit Nairobi monthly to make purchases and deliver the equipment to the hospital. She confirmed that in 2011 and 2012 the supplies were done. In 2016 anomalies were noted and forged



- receipts were isolated. That a private investigator was engaged and he found that approximately Kshs. 55M was stolen. She testified the accused was charged alone as money was moved to her account, despite there being 3 signatories.
4. Pw2 - Dr. Caleb Ochieng testified that he is a pharmacist working in Lodwar County and Referral Hospital. He submitted the report dated 26th September 2016 which he had prepared involving the investigations. He told the court he did not know the role of the accused at the hospital.
 5. Pw3 - Emma Frida Muthoni testified that she worked at RMF since 2016. She told the court she was not privy to the operations of the organization while the accused was the project manager, that she would be sent to deliver drugs at Lodwar market. she received an email from Dr. Martina who asked her to confirm purchase of certain drugs but she involved Pw2 as she was not aware of the operations of the organization at the time.
 6. Pw4 - Collins Kiptoo Ngetich testified that he worked at Muthaiga Travel Ltd. He told the court of receipts that were not genuine and the company only retrieved four receipts which they had issued to different clients and not the accused. He confirmed RMF was their client for a long time but had never dealt with them since 2016. He denied knowing the accused.
 7. Pw5 - Eliud Wakwabubi testified that he operated a chemist at the Dagoretti area. He told the court the amounts in the receipts adduced differed from the actual sales of the day. He denied ever transacting with the RMF and denied knowing the accused.
 8. Pw6 - Paul Githaiga Gichuhi testified he operates a hardware business called Salama Sycomat Hardware, he stated that the bundle of receipts Pmf1 19(a- g) bear the name of his shop but denied that some items were bought from his shop. He denied making huge sales of that amount. H did not know the accused.
 9. Pw7 - Wilfred Simiyu Wekesa testified that he resides in Kimilili Bungoma and runs a retail shop called Uchumi Slopes where he sells foodstuffs. He denied having sold the items in the receipts marked as Pmf1 20 (a-e). He neither knew the accused nor the complainant.
 10. Pw8 - Robert Wasike Wanjala testified that he worked in Turkana county as a programme Officer Mental Health but previously worked at Lodwar County Referral Hospital at pediatric ward between 2007 and 2013. He stated that during this time he was head of Real Medicines and dealt with the accused as head of RMF. That the accused would forward the requirements of the hospital to the sponsors and they would receive the equipment and drugs. He also confirmed repairs were done. He stated that the accused would take photos of jobs done and supplies and send to the sponsors.
 11. Pw9 - Charles Chemirmir testified that he was the Operations Manager KCB Lodwar. He produced RMF account statements and confirmed there was no problem with the account dealings.
 12. Pw10 - Victor Amuiya Achesa a resident of Soi Lukyayi informed the court he was testifying on behalf of KENRASS Medics Limited with whom he was working with since 2012. He told the court that the accused bought equipment from their shop for delivery to Lodwar through Daya Express. He confirmed that 4 receipts being 4936, 4918, 4994 and 4906 did not belong to KENRASS Ltd; that together with Dr. Kroumoua Galina they issued receipts to their clients on behalf of KENRASS Ltd. He denied the signature in the 4 receipts and said they did not originate from their office.
 13. Pw11 - Corporal John Musembi attached to DCI Railways Nairobi and the investigating officer in the case, told the trial court that in the course of the investigations he discovered some receipts were forgeries as suppliers denied knowledge of them. He told the court there were no complaints for lack of supplies in the hospital.



14. Pw12 - Dr. Gilchrist Lokoel testified he was a medical doctor at Turkana County in Lodwar where he worked with the accused. He told the court the accused would coordinate and collect requests from Samuel Towett to seek approval and get authority to utilize funds. Any two of the account signatories could sign. He told the court he left the organization in 2010 and returned in 2014. When the accused left he stepped into her position, and in 2016 he discovered some anomalies of quantities and payouts and it raised eyebrows. He called for investigations to be conducted. He confirmed he was a signatory to the bank. He stated that he could not tell the amount lost and confirmed there was never a time the supply was lacking.
15. The Appellant having been put on her defence testified that she worked for RMF between 2011 and 2016 where she got funds from the donor and implemented the project. She confirmed having renovated the wards, painted the play area and repaired beds. She told the court she would get the needs of the wards and department heads and then arrange for supplies and repairs. That there were two accounts, one for KES and another a USD account. And further that the KES account became dormant and she would withdraw money in USD and exchange the same at a bureau. She stated that she sourced for goods from suppliers but the complainant visited most of the suppliers and approved them. The accused/appellant told the court that she received a total of Kshs 52,855,152 which she utilized as approved. After every purchase she sent reports to the headquarters. She told the court that she first resigned in 2015 but the complainant rejected her resignation. Eventually she resigned in 2016. According to her, she did not steal any money from the hospital. She stated that annual reports were prepared and sent to the donor.
16. After a full trial she was found guilty on 8 counts, that is counts 1, 2, 3, 4, 5, 6, 8 and 10. She was convicted and sentenced accordingly. In count 1 the Appellant was fined Kshs. 6,000,000/= in default 4 years imprisonment, and in each of the other 7 counts she was fined of Kshs. 50,000/= in default 12 months' imprisonment. The sentences were to run consecutively.
17. The Appellant, being dissatisfied with the court's decision has now lodged the current appeal by a petition dated 14th February 2022, citing the following 7 grounds:
 - i. That the learned trial magistrate erred in law by failing to consider the Appellant's Defence.
 - ii. That the learned trial magistrate erred in law and fact by convicting and sentencing the Appellant without sufficient and independent evidence.
 - iii. That the learned trial magistrate erred in law and in fact by sentencing the Appellant herein excessively taking into account all circumstances of this case, Appellant's mitigation and the fact that the Appellant was a first offender before sentencing.
 - iv. That the learned trial magistrate erred in law and in fact in failing to find and rule that there was no cogent, substantial, credible and direct evidence connecting the Appellant to the offence of stealing by agent.
 - v. That the learned trial magistrate erred in fact and in law in finding and/ or holding that the Appellant was guilty of the offences charged when the prosecution had not established a prima facie case as required by the law contrary to sections 109 and 110 of the Evidence Act.
 - vi. That the learned trial magistrate erred in law and in fact in analysing and/or evaluating the Respondent's evidence separately, forming a considered opinion/impression thereof and then laying the burden of disproving and/ or dispelling the pre-meditated impression upon the appellant contrary to the established principle in criminal law, which casts the burden of proof upon the Respondent.



- vii. That the trial magistrate convicted the Appellant on entirely wrong principles and conclusions without addressing himself on whether or not the ingredients of the offence the Appellant was accused of had been proven beyond reasonable doubt.
- 18. It was proposed to ask the court to vary, quash and or set aside the unlawful sentence of the trial court.
- 19. At the hearing of the appeal the court directed that the appeal be heard by way of written submissions. Only the appellant filed written submissions.

Appellant's submissions

- 20. By the submissions filed on 12th May 2023 by J. K. Ngeresa counsel for the Appellant submitted that the trial magistrate did not have sufficient evidence connecting the Appellant to the offence of stealing by agent. That the prosecution had failed to establish a prima facie case and prove the alleged fraudulent receipts made from different entities that supplied Lodwar Hospital with medicine were authored by the Appellant. There was no direct link between the Appellant's handwriting and the forged receipts. The prosecution evidence constituted of hearsay as the Sales Personnel was not called as a witness.
- 21. Counsel contended that the Respondent could not account for the amount allegedly claimed to have been stolen by the Appellant. The Respondent failed to demonstrate how a project could run without supplies from 2011 to 2016. Counsel argued there was no sufficient evidence adduced by the prosecution to prove the case beyond reasonable doubt, as the evidence adduced amounted to a hearsay.
- 22. Counsel further argued that the Appellant was a first-time offender, and based on her mitigation the trial court ought to have meted a lenient sentence on the appellant. According to counsel the trial court failed to take into account the social report filled in favour of the Appellant. Counsel stated that the sentence imposed on the Appellant was excessive and urged this court to review and alter the sentence in addition to finding that the key ingredients of the offence were not established.

Analysis

- 23. This is the first appellate court. I am reminded of the duty to evaluate afresh the evidence adduced before the trial court in order to arrive at its own independent conclusion but bearing in mind that I neither saw nor heard the witnesses testify.
- 24. The issues that arise from the appeal are:
 - i. whether the prosecution proved to the required standard the essential ingredients to the charge of stealing by a servant
 - ii. whether the trial magistrate failed to consider the Appellant's defence.
 - iii. whether the sentence meted out to the appellant excessive?

Whether the prosecution proved to the required standard the essential ingredients to the charge of stealing by a servant

- 25. For the prosecution to prove the charge of theft by servant, it must establish the following: -
 - a. that the Appellant was an employee of the complainant,
 - b. that the Appellant stole the property of the employer that came to her possession in the course of the employment, and



- c. that the appellant dishonestly appropriated the said property thereby depriving the employer of the same.
26. It was not disputed that the accused was an employee of Real Medicine Foundation (RMF) but having resigned in the year 2016. She was employed in 2011 and worked till her resignation. It was the Appellant's testimony that during her tenure the hospital never lacked in supplies as she delivered what was ordered and submitted the purchases receipts, photos of work done, and at the end of each quarter prepared reports to the complainant after every transaction. The Appellant also argued that before making any purchase the complainant had to approve the same and send the funds to the Appellant through the Bank Account. Most of the prosecution witnesses testified that during the time the Appellant was in employment the facility never lacked suppliers. They also confirmed that repairs and renovations were done and the conditions of the hospital improved.
27. Looking at the evidence adduced, it is clear the prosecution relied on circumstantial evidence as the same did not directly link the Appellant to the forged receipts. Pw6, Pw7, Pw9 and Pw10 denied that some of the receipts emanated from their offices. According to the prosecution the issue was that the Appellant obtained money from the complainant by falsifying receipts of the supplies done. It is not in dispute that the Appellant was the one tasked with the duty to order supplies, and pay for the goods and services. the Appellant was also tasked with the duty to communicate directly through email to the complainant and notify it on the needs of the facility.
28. It is also clear from the prosecution case that the Appellant came into contact with the cash sent by the complainant as she was a signatory to the bank account(s), where she took advantage of her position to obtain money from the complainant for her own use. According to prosecution the actions of the Appellant were discovered after she left employment in the year 2016 when the complainant sought for the confirmation of the authenticity of a receipt that involved purchase of goods.
29. The prosecution proved that the accused did most of the cash withdrawals. It was alluded by the prosecution that the accused made money withdrawals and failed to use them for the intended purpose. To support its position, the prosecution adduced copies of the forged sale receipts to establish to the required standard of proof the complaint lost money during the time the Appellant was in office.
30. The trial court in its judgment found that the Appellant "had failed to address the issue as to why the suppliers would deny the receipts issued by them while others raising the issue of their credibility." The court went on to find that ... "it leads to one finding that the amount indicated in the receipts therein had been misappropriated by the accused...the amount which this court finds to have been misappropriated is Kshs 12,190,161/=."
31. In the circumstances therefore, this court finds the prosecution proved the Appellant misappropriated money entrusted to her by the complainant and converted it to her own use, which amounts to stealing by a servant.

Whether the trial magistrate failed to consider the Appellant's defence.

32. I have considered the impugned judgment and note the trial magistrate indeed considered the evidence adduced by the Appellant. The learned trial magistrate stated the Appellant had failed to raise the issue with the suppliers of the receipts denied. I am not persuaded to find otherwise.



Whether the sentence meted out to the appellant excessive?

- 33. The trial magistrate convicted and sentenced the Appellant on 8 counts, that is; counts 1, 2, 3, 4, 5, 6, 8 and 10. For count 1 she was fined Kshs. 6,000,000/= in default 4 years imprisonment and in the other 7 counts each she was fined Kshs. 50,000/= in default 12 months’ imprisonment.
- 34. Section 281 of the Penal Code provides that: - “If the offender is a clerk or servant, and the thing stolen is the property of his employer or came into the possession of the offender on account of his employer, he is liable to imprisonment for seven years.”
- 35. The trial court in sentencing considered the circumstances of the case and settled on the fine. The Judiciary Sentencing Policy Guidelines at para. 11.10 and 11.11, stipulate as follows: -

“Determination of a Fine

11.

- 10 The fine fixed by the Court should not be excessive as to render the offender incapable of paying and thus liable to imprisonment. In determining such a fine, the means of the offender as well as the nature of the offence should be taken into account. Except in petty cases in which case the necessary information is within the court’s knowledge, a pre-sentence report should be requested from the Probation Officer to provide information which would assist the court in reaching a just quantum.

Imprisonment in Default of Payment

11.

- 11 The period of imprisonment in default of a fine must not exceed six months unless allowed by the law under which the conviction has been obtained (See section 342 of the Criminal Procedure Code). The Penal Code, for instance, allows for imprisonment for twelve months where the amount exceeds Ksh. 50,000/=. Where the law does not expressly set the period of imprisonment in default of payment of a fine, the court must be guided by the scale laid out in section 28 (2) of the Penal Code.

- 36. This court is not persuaded that the trial magistrate erred in sentencing the Appellant. Considering the evidence adduced by the prosecution, I find that the sentence was within the law.

Determination

- 37. From the foregoing, I find that the appeal herein lacks merit and is dismissed. The conviction and sentence of the trial court is hereby upheld.

It is so ordered

JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 28TH DAY OF SEPTEMBER 2023.

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P.M. MULWA

JUDGE

In the Presence of:

Kinyua/Duale – Court assistants

Dr. Khaminwa - for the Appellant

Mr. Gacharia - for the Respondent

