



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

CRIMINAL APPEAL NO E028 OF 2020

GEOFFREY OCHANGO INYANGALA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal from the Judgment of Hon J. Mitey (SRM) delivered at Winam Principal Magistrate's Court in Criminal Case No 102 of 2017 on 4th December 2020)

JUDGMENT

INTRODUCTION

1. The Appellant herein was charged with the offence of stealing by servant contrary to Section 281 of the Penal Code. The Learned Trial Magistrate, Hon J. Mitey, SRM convicted him of the charge and sentenced him to four (4) years imprisonment.
2. Being dissatisfied with the said Judgement, on 23rd December 2020, the Appellant lodged the Appeal herein. His Petition of Appeal was dated 22nd December 2020. He relied on five (5) grounds of appeal. He later filed an Amended Appeal on 30th November 2021 setting out seven (7) grounds of appeal on sentence and mitigation only.
3. His undated Written Submissions were filed on 31st January 2022 while those of the Respondent were dated 21st July 2021 and filed on 22nd July 2021.
4. This Judgment is based on the said Written Submissions which parties relied upon in their entirety.

LEGAL ANALYSIS

5. It is settled law that the duty of a first appellate court is to evaluate afresh the evidence adduced before the trial court in order to arrive at its own independent conclusion but bearing in mind that it neither saw nor heard the witnesses testify.
6. This was aptly stated in the case of **Selle & Another vs. Associated Motor Boat Co Ltd & Others [1968] EA 123** where the court therein held that the appellate court was not bound by the findings of fact of the trial court but that in re-considering and re-evaluating the evidence so as to draw its own conclusions, it always had to bear in mind that it neither saw nor heard the witnesses and thus make due allowance in that respect.
7. Having looked at the Grounds of Appeal and the respective Written Submissions, it appeared to this court that the issues that had been placed before it for determination were as follows:-

a. Whether or not the Prosecution proved its case beyond reasonable doubt.

b. Whether or not in the circumstances of this case, the sentence that was meted upon the Appellant by the Trial Court was lawful and/ or warranted.

8. The court dealt with the two (2) issues under the following distinct and separate heads.

I. PROOF OF PROSECUTION'S CASE

9. Grounds of Appeal Nos (1), (2), (3) and (4) of the Petition of Appeal dated 22nd December 2020 and filed on 23rd December 2020 were dealt with together under this head as they were all related.

10. This court noted that at the time of filing his Written Submissions, the Appellant amended his Petition of Appeal to appeal on his sentence only. It was therefore not clear to this court whether or not he had abandoned his original grounds of appeal. As he was unrepresented and may not have understood the process on appeal, this court deemed it prudent to also look into whether the Prosecution proved its case to the required standard, which in criminal cases, is proof beyond reasonable doubt.

11. On its part, the State submitted that the Prosecution tendered sufficient evidence that proved his guilt beyond reasonable doubt. In this regard, it placed reliance on the case of **R vs Kipkering Arap Koske & Another (1946) 16 EACA 135, Erick Odhiambo Okumu vs Republic [2015]eKLR** and **Abanga alias Onyango vs Republic Criminal Appeal No 32 of 1990** (eKLR citation not given) where the common thread was that the circumstances from which an inference of guilt was sought to be drawn had to be cogently and firmly established, the circumstances had to unerringly point towards guilt of the accused as the perpetrator of the offence and not to anyone else.

12. It submitted that the circumstantial evidence that the Trial Court relied on unerringly pointed to the Appellant as the perpetrator of the offence herein. It pointed out that it was not in dispute that Appellant herein had been employed at Chap Chap Solutions as a debt collector and a field officer between 1st February 2016 and 26th October 2016, a fact that was confirmed by Pius Were Omer (hereinafter referred to as “PW 2”) and Caroline Anyango Odongo (hereinafter referred to as “PW 3”) and evidenced by a job card that was tendered in evidence.

13. It submitted that No 51317 PC Peter Ooyi (hereinafter referred to as “PW 4”) produced documentary evidence showing that despite receiving a sum of Kshs 306,250/= from debtors, the Appellant did not remit the same to his Employer as was expected. It was therefore its averment that the Trial Court correctly held that the Appellant was guilty on the count of stealing by servant and urged this court to dismiss his Appeal.

14. According to the Group Chairman of Chap Chap, Francis Otieno Ombewa (hereinafter referred to as “PW 1”) testified that the Appellant would note the name of debtor and amount collected from the debtor and sign the Report. However, upon comparing records from its Kisumu and Kombewa’s offices, they realised that the Appellant remitted less money than he had collected between February 2016 and October 2016. A reconciliation showed that a sum of Kshs 306, 250/= was missing.

15. He added that they alerted him of the missing monies which he had agreed to pay but he stayed away from the office and did not communicate with them at all. His evidence was corroborated by PW 2 and PW 3 who confirmed the amount of the shortfall and the fact that the Appellant absconded from his duties.

16. Section 108 of the Evidence Act Cap 80 (Laws of Kenya) provides that:-

“The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.”

17. Further, Section 109 of the Evidence Act stipulates that:-

“The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

18. Notably, the Appellant did not deny having been employed by Chap Chap Solutions as a debt collector and a field officer. He was obligated to tender evidence that would have rebutted the Prosecution’s evidence, the burden of proof having shifted to him. He adduced unsworn evidence. Unfortunately, its probative value was less weighty than the sworn evidence the Prosecution witnesses adduced and consequently, his evidence did not therefore displace the Prosecution’s evidence.

19. Having critically analysed the evidence on record, this court was satisfied that the Learned Trial Magistrate did not err when he convicted the Appellant of the charged offence he had been charged with.

20. In the premises, Grounds of Appeal Nos (1), (2), (3) and (4) of the Petition of Appeal dated 22nd December 2020 and filed on 23rd December 2020 were not merited and the same be and are hereby dismissed.

II. SENTENCE

21. Ground of Appeal No (5) of the Petition of Appeal dated 22nd December 2020 and filed on 23rd December 2020 and Amended Grounds of Appeal Nos (1), (2), (3), (4), (5), (6) and (7) of the Amended Appeal on Mitigation that was filed on 30th November 2021 were dealt with under this head as they were all related.

22. The State urged this court to uphold the Appellant’s sentence. On the other hand, the Appellant stated that he was remorseful and that being a first offender, he would remain humble and if allowed to be at liberty, he would be a responsible person in the society. He begged for mercy and leniency to enable him assist his family that was currently in a mess. He averred that his two (2) old parents and his daughter’s school fees remained a major problem since he was the soul bread winner.

23. He contended that for the one (1) year he had spent in prison, he had successfully completed courses such as AFCM spiritual course, Food production and Chemical Production under RODI Kenya Programme which he believed gave him an opportunity to be self-employed and boost his finances at the village. He added that he had also done the Prisoners’ Journey Course that had strengthened and uplifted him

spiritually in every area of life as a Christian and that he was yet to receive the second and third awards as the year started. He annexed his Diploma Certificate in Biblical Studies.

24. He also urged the court to consider Section 333(1) as read with sub section (2) of the Criminal Procedure Code Cap 75 (Laws of Kenya).

25. Section 281 of the Penal Code Cap 63 (Laws of Kenya) 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.”

26. The offence the Appellant was charged with carries a maximum sentence of seven (7) years imprisonment. In the circumstances of the case, the sentence of four (4) years imprisonment was lenient. The one (1) year he had spent in prison could not be said to have been sufficient punishment in the circumstances of the case. This court was thus not persuaded that it should interfere with the same. However, to his credit, the courses he had done would assist him in being reintegrated in the society once he completed his sentence and was released from prison.

27. In the premises foregoing, Ground of Appeal No (5) of the Petition of Appeal dated 22nd December 2020 and filed on 23rd December 2020 and Grounds of Appeal Nos (1), (2), (3), (4), (5), (6) and (7) of the Amended Appeal on Mitigation that was filed on 30th November 2021 were not merited and the same be and are hereby dismissed.

DISPOSITION

28. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Petition of Appeal that was dated 22nd December 2020 and lodged on 23rd December 2020 was not merited and the same be and is hereby dismissed. The Appellant's conviction and sentence be and are hereby upheld as it was safe to do so.

29. For the avoidance of doubt, the period he spent in custody before his conviction, if any, shall be taken into account while computing his sentence as provided in Section 333(2) of the Criminal Procedure Code Cap 75 (Laws of Kenya).

30. It is so ordered.

DATED and DELIVERED at KISUMU this 26th day of April 2022

J. KAMAU

JUDGE