



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 32 OF 2019

REPUBLIC.....APPELLANT

-V/S-

MOHSIN RANATUNGA.....RESPONDENT

(Being an appeal from the decision of the Hon. H. Nyakwera (PM) on 6th March 2019 in Mombasa Criminal Case No. 1495 of 2016).

JUDGMENT

Background

1. The accused, MOSHIN RANATUNGA, was charged with stealing by servant contrary to Section 281 of the Penal Code. Particulars of the offence are that on diverse dates between the month of July 2012 and the month of September 2015 at RANFER TEAS (KENYA) Limited offices in Mombasa City within Mombasa County, jointly with others before court, being servants to RANFER TEAS (KENYA) Limited Mombasa branch, stole cash US dollars 2,450,377/- property of RANFER TEAS (KENYA) Limited which came into his possession by virtue of his employment.

2. The Appellant being dissatisfied with the ruling of the Learned Honourable Chief Magistrate acquitting the Respondent appeals against the acquittal of the Respondent on the following grounds:-

- i) That the Learned Magistrate erred in law and fact by finding and holding that the prosecution did not establish a *prima facie* case against the Respondent against the weight of evidence.
- ii) That the Learned Magistrate erred in law and misdirected himself on the standard of proof required to establish a *prima facie* case thus his decision to acquit the Respondent occasioned a miscarriage of justice.
- iii) That the Learned Honourable Magistrate misdirected himself in law and fact by relying on issues not raised in the trial thus his decision to acquit on the basis of the same amounted to a gross misdirection on the principles of law applicable in evidence.
- iv) That the Learned Honourable Magistrate erred in law by failing to address his mind to documentary evidence on record hence acquitting the Respondent.
- v) That the Learned trial Magistrate erred and misdirected himself in law by failing to find that the prosecution led evidence that accused was an employee of Ranfer Teas (Kenya) Ltd.
- vi) That the Learned trial Magistrate erred and misdirected himself in law in making a finding that the charge drawn was bad for ambiguity without any justification.
- vii) That the Learned trial Magistrate misdirected himself in law by failing to analyse, interpret and appreciate evidence adduced by the prosecution thereby arriving at a wrong decision to acquit the accused person.
- viii) The Learned Magistrate erred and misdirected himself in law when he held that the decision in *Re Kingstone Cotton Mills Company* case applied to the circumstances of this case when he in fact found that the auditor never called witnesses to justify that conclusion.
- ix) That the Learned Magistrate erred and misdirected himself in law by taking into account extraneous matters which were not

borne by the evidence.

x) That the Learned Magistrate misdirected himself in law by failing to put the accused on his defence despite finding that the prosecution proved that the sold the tea, received the cash and converted it to his own use after he failed to remit the same.

xi) That the Learned trial Magistrate erred in law by failing to appreciate that the overall evidence adduced met the standard set in the Remanal Bhatt Case and that if the accused had opted to keep quiet in his defence, he would have been safely convicted.

3. The Appellant prays that the court be pleased to quash the trial court's decision of acquitting the Respondent and order that they be placed on their defence and the matter proceed to its logical conclusion.

4. 10 prosecution witnesses testified in the case. PW1, Mr. Francis Kiarie Kariuki, a practicing advocate in the name and style of Kiarie Kariuki & Co. Advocates based in Mombasa who incorporated Ranfix Teas (Kenya) Ltd. PW2, Chandika Patalianage Prodi, an employee at Ranfer Teas (Kenya) Ltd as director administration who invited auditors by way of phone call and later a letter who conducted an annual audit in June 2015. PW3, Victor Ochieng' Owino, an employee of Ranfer Tea (Kenya) Ltd as a data base administrator since the year 2012 whose duties include updating the system as tea is purchased once it is shipped out and to key in data as shown in the catalogue. PW4, Benjamin Gitonga Mutugi is a businessman selling tea at Kingarani and participates in tea auction. He purchases tea either from other buyer's factories or at the auction. PW5, George Njoroge Rama, has been a tea trader for over 10 years, who buys and sells tea from factories, auction and private dealers to sell to clients both locally and internationally.

5. PW6, Shariff Michael Omondi, a manager at Ranfer Teas (Kenya) Limited for close to 17 years whose duties include dirty leaf grading, tea testing, marketing, auction buying and advise clients on purchases on tea action, manning of the purchase sheet and reshipment verification. PW7, Nyawanyara Morara George, a senior warehouse supervisor at Ufanisi Freighters (K) Ltd whose client was Ranfer Teas (Kenya) Ltd whom they offered storage, transport and clearing services. PW8, Larian Benedict Savio Abreu an accountant provides business advisory services and audit tax compliance and financial consultancy was approached to reconcile movement inventory for purchases and sales of teas for Ranfer Teas (Kenya) Ltd. PW9, Shadrack Mayumbe Wasike, the managing director of Ufanisi Traders (K) Ltd received a request vide email from Ranfer Teas (K) Ltd to confirm whether some of the tea in the warehouse had been blended or shipped. PW10, No. 61999 Cpl Moses Mureithi, DCI Mombasa, the investigating officer herein.

Appellant's Submissions

6. The Appellant submitted by quoting Section 268 of the Penal Code Cap 263 which defines stealing as:-

'A person who fraudulently and without claim of rights takes anything capable of being stolen or fraudulently converts to the uses of any person, other than the general or special owner thereof any, or property, is said to steal that thing property.'

7. The Appellant also quoted the case of *Okeno v Republic* [1972] EA32 which states as follows:-

"An Appellant on the first appeal is entitled to expect the evidence as a whole to be subjected to a fresh and exhaustive examination (Pandya v R [1957] EA 338) and to the Appellate courts own decision on the evidence. The first appellate court must weigh conflicting evidence and draw its own conclusion (Shantilal M Ruwala v R [1957] EA570). It is not the function of the appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower courts findings and conclusions, it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported."

8. The Appellant submitted on *prima facie* case that the question that the trial magistrate needed to answer was whether based on the evidence placed on record by the prosecution before the trial court, there was sufficient evidence to convict even if the Respondent opted to keep quiet in his defence. In submitting, the Appellant quoted *Remanal Trambakland Batt v Republic* [1957]EA 332 where it was held that:-

"It may not be easy to define what is meant by a prima facie case but at least it must mean one on which a reasonable tribunal, properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence."

9. On whether the prosecution evidence proved the element of theft, the Appellant submitted by quoting Section 4 of the Penal Code Cap 63 which defines possession. The Appellant further stated the Black's Law dictionary 10th edition definition of the term possession. The Appellant submitted that evidence established beyond doubt that the Respondent cleverly issued release orders and in return got paid for the tea instead of payments being deposited in the company's bank account, as was the norm.

10. On whether the US\$2,450,377 was properly capable of being stolen, the Appellant submitted by quoting Section 4 of the Penal Code Cap 63 which defines property as follows:-

'...includes any description of movable or immovable property, money, debts and legacies, and all deeds and instruments relating to or evidencing the title or right to any property, or giving a right to recover or receive any money or goods, and also includes not only such property as has been originally in the possession or under the control of any person, but also any property into or for which the same has been converted or exchanged, and anything acquired y by such conversion or exchange, whether immediately or otherwise.'

11. On the issue of whether the Respondent herein was a servant of the Complainant, Ranfer Teas (K) Ltd, the Appellant submitted that the Learned Magistrate erred in fact in finding that the accused was charged in his capacity as a Director of Ranfer Teas (K) Ltd when the charge

before court was very specific that the accused was charged in his capacity as a servant of Ranfer Teas (K) Ltd. The Appellant submitted that the learned magistrate grossly erred in finding that there was nothing to show who exactly the employer of the accused was when the prosecution proved beyond doubt that the Respondent was an employee of Ranfer Teas (K) Ltd, a subsidiary of the Ranfer groups of companies.

12. On the issue of whether the aforesaid amount of money came into the possession of the Respondent by virtue of his employment, the fact that the Respondent cleverly issued duly stamped release order on the company letterheads as the authorised person from Ranfer Teas (K) Ltd, clearly demonstrates his scheme of hoodwinking Ufanisi Freighters that the release of the tea was authorised, yet he would convert the proceeds of the sale of tea to his personal use.

13. On the issue of whether the charge as drawn is bad for ambiguity, the Appellant submitted that the learned trial magistrate erred in concluding that the charge was ambiguous by basing the conclusion on erroneous apprehension of the fact that by finding that evidence disclosed that it is the accused person who sold and received cash in return.

14. On the issue of whether evidence to establish the link between the Ranfer Group of Companies and Ranfer Teas (Kenya) Ltd was tendered, the Appellant submitted that the evidence of PW6, a manager at Ranfer Teas (Kenya) Ltd under cross examination clearly stated that Ranfer Teas (K) Ltd is a subsidiary of a parent company based in Sri-Lanka by the name Ranfer Teas Port Ltd which authorised all auctions by Ranfer Teas (K) Ltd. The learned magistrate failed to take into consideration the Exhibit No. 1 which is the certificate of incorporation for Ranfer Teas (Kenya) Ltd vis a vis Exhibit No. 4 the letterhead in which it is clearly shown that Ranfer Teas (Kenya) Ltd is a member of the Ranfer Group. Further, the Appellant submitted that the learned magistrate misdirected himself in law by holding that the decision in *Re Kingstone Cotton Mills Company* (No.2) (1896) 2 – ch. 279 at 2785, applied to the circumstances of this case when in actual sense the context in which the passage he quote did not apply to the instant case. The Appellant submitted that the learned magistrate's failure to apprehend and contextualize the decision in *Re Cotton Mills Company* case led him to arrive at a wrong decision that the auditor's report at Exhibit No. 2 was inaccurate and occasioned a grave miscarriage of justice.

15. The Respondent chose not to file submissions.

Analysis and Determination

16. This is the first appellate court and its duty is to reanalyze and reevaluate all the evidence from the lower court before making its conclusion. Duties of the first appellate court were set out in the case of *Okeno v Republic* [1972] EA 32 where it was held as follows:-

“An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (*Pandya vs. Republic* (1957) EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (*Shantilal M. Ruwala vs. R.* (1957) EA. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see *Peters vs. Sunday Post* [1958] E.A 424.”

17. I have gone through the evidence tendered by all the prosecution witnesses. This court as an appellate court is being called upon to overturn a finding of no case to answer to a positive finding of a case to answer.

18. The main issue for determination in this appeal is whether the trial magistrate erred by concluding that no *prima facie* case was established.

19. In the instant case, the accused is facing a charge of stealing by servant contrary to **Section 281** of the **Penal Code**. What is stealing by servant in law? Under Section 281, it is defined as:-

“If the offender is a 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.”

20. However, Article 50 (2) (a) of the Constitution states that an accused person is presumed to be innocent until the contrary is proved. The evidence Act Cap 80 of the Laws of Kenya at section 107 (1) provides thus: **“whoever desires any court to give judgement as to any right or liability dependent on the existence of facts which he asserts, must prove those facts exist.”**

21. In light of the above, **Miller v Minister of Pensions** [1947] 2 ALL ER 372 – 373 on what constitutes the burden of proof beyond reasonable doubt states as follows:-

“That degree is well settled. It needs not reach certainly, but it must carry a high degree of probability. Proof beyond a reasonable doubt does not mean proof beyond the shadow of doubt. The law would prevail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility of his favour which can be dismissed with the sentence of course it is doubt but nothing short of that will suffice.”

22. The burden of proof of an accused guilt rests solely on the prosecution throughout the trial save where there are admissions by the accused person. So likewise at the close of the prosecution case under **Section 211** of the **Criminal Procedure Code** the prosecution must satisfy by way of the evidence presented so far that a *prima facie* case exist to warrant the accused person to be called upon to answer.

23. When PW1, Mr. Francis Kiarie, the advocate in incorporating Ranfer Teas (Kenya) Ltd, testified, he stated that the company was incorporated to be part of Ranfer Group based in Sri-Lanka with branches in Malawi and Vietnam. The certificate of incorporation for Ranfer Teas (Kenya) Ltd was produced as Exhibit 1. Further the letterhead of copies of release orders tendered as evidence in court showed that Ranfer Teas (Kenya) Ltd is a member of the Ranfer Group. However, PW1 only dealt with legal issues and not daily operations.

24. The Appellant tendered to court a letter dated 21st February as Exhibit 4 for the appointment of the Respondent, Mr. Muhsin Ranatunga, as an employee to the post of a tea buyer on contract basis. PW2, the director of administration in his evidence to court stated that tea was released from the company to buyers upon release orders issued by the Respondent. PW3, Victor Ochieng the database administrator stated that the Respondent Mr. Muhsin authorised removal of unutilised tea from the system. The letter had Ranfer Teas (Kenya) Ltd letterhead which also showed that the company was a subsidiary of Ranfer Group. During cross examination, PW1 stated that he did not know how many shares were held by the Respondent as one of the directors of the company. Further, the Appellant did not present any evidence to court showing who the directors of the company are and the number of shares held by each one of them.

25. The procedure of releasing tea from Ranfix Teas (Kenya) Ltd was that once money for the tea is paid to the company, a release order is issued by the Respondent Mr. Muhsin for release of tea from the warehouse. This position was confirmed by PW2 the director of administration, PW4 the businessman who bought tea from Ranfer Teas (Kenya) Ltd, and PW5 Mr. Njoroge a tea trader at Jawai Tea. The Appellant presented to court copies of the said release orders that had been signed by Mr. Muhsin.

26. PW6, Shariff Michael Omondi the manager at Ranfer Teas (Kenya) Ltd stated in his testimony to court that the company is licensed to export tea only. PW10 in his testimony stated that it is only after buying tea in bulk with a close expiry date that it could be sold locally. PW2 stated that buyers of tea were to make payments directly to the company. PW8 Larian Benedict Savio Abreu the accountant further stated that whenever the company received proceeds from the tea released, it was either in cheque or electronic transfer. Not in cash. PW1 stated that in 2015, he received information from the Chairman of the company one Mr. Ramasimba that there was suspicion of tea theft. PW2 engaged the services of auditors which involved PW8 who were approached to reconcile the movement inventory for purchases and sales of tea for the period and they found out that 985,710kgs valued at USD 2,450,377.00 was the value of untraced tea. PW4 stated that he bought tea from Ranfer Teas severally and there are times he paid in cash directly to Mr. Muhsin. However, on cross examination, he did not know exactly how much was paid to Mr. Muhsin and there was no proof of the said payment. PW5 a tea trader a Jawai Tea stated that he dealt with the Respondent Mr. Muhsin while buying tea locally and payments were made through the bank or cash and cash payments were made to Mr. Muhsin upon his request. PW8 the accountant stated that Ufanisi traders provided release orders that they had paid in cash but there is no record that the company received anything from the proceeds. The Appellant presented to court copies of the said release orders.

27. In conclusion, I find no merit in this appeal and uphold the decision of the trial court delivered on 6th March 2019 that the Respondent had no case to answer.

DATED, SIGNED AND DELIVERED IN OPEN COURT/ONLINE THROUGH MS TEAMS, THIS 21ST DAY OF OCTOBER 2021

HON. LADY JUSTICE A. ONG'INJO

JUDGE

In the presence of:-

Ogwel- Court Assistant

Mr. Mulamula for Appellant

Mr. Muganda for Respondent

HON. LADY JUSTICE A. ONG'INJO

JUDGE