



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

ACEC APPEAL NO. E006 OF 2021

KEPHA OSEKO MARERI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the conviction and sentence of Hon. L. Mugambi (CM)

in Nairobi Chief Magistrate's Anti Corruption Case No. 13 of 2014

dated 10th March 2021

JUDGMENT

1. The appellant, *Kepha Oseko Mareri*, was the 5th accused in the lower court's Anti Corruption Case No. 13 of 2014. He was charged jointly with five others in five substantive counts and three alternative counts as follows:

Count III - Conspiracy to defraud contrary to *Section 317* of the *Penal Code*.

In this count, the particulars were that on or about 19th June 2008 at the Ministry of Higher Education, Science and Technology offices in Nairobi within Nairobi County, the appellant and three others, being accountants at the aforesaid Ministry, with intent to defraud, jointly conspired to defraud the public of public property, to wit a sum of KShs.2.5 million withdrawn as imprest from the Central Bank of Kenya for recurrent expenditure at the Ministry of Higher Education, Science and Technology (the Ministry) which had been entrusted to their custody.

2. Count IV - Conspiracy to defraud contrary to *Section 317* of the *Penal Code*.

The particulars alleged that on or about 23rd June 2008, at the Ministry offices in Nairobi within Nairobi County, the appellant, jointly with two others, being accountants at the said Ministry, with intent to defraud, jointly conspired to defraud the public of public property, to wit a sum of KShs.2.5 million withdrawn as imprest from the Central Bank of Kenya for recurrent expenditure at the Ministry which had been entrusted to their custody.

3. Count V - Fraudulent acquisition of public property contrary to *Section 45 (1 (a))* as read with *Section 48 (1)* of the *Anti- Corruption and Economic Crimes Act No. 3 of 2003*.

In this count, it was alleged that on or about 26th June 2008 at the Ministry offices in Nairobi within Nairobi County, the appellant together with two others being accountants at the said Ministry, with intent to defraud, jointly conspired to defraud the public of public property, to wit a sum of KShs.2.5 million withdrawn as imprest from the Central Bank of Kenya for recurrent expenditure at the Ministry which had been entrusted to their custody.

In the alternative, the appellant and his two co-accused persons were jointly charged with the offence of conspiracy to defraud contrary to *Section 317* of the *Penal Code*. It was alleged that on the same date and place with intent to defraud, the appellant and his co-accused conspired to defraud the public of public property, that is, KShs.2.5million withdrawn as imprest from the Central Bank of Kenya for recurrent expenditure at the Ministry which had been entrusted to their custody.

4. Count VI - Fraudulent acquisition of public property contrary to *Section 45 (1 (c))* as read with *Section 48 (1)* of the *Anti- Corruption and Economic Crimes Act No. 3 of 2003*.

The particulars alleged that on or about 27th June 2008 at the Ministry offices in Nairobi within Nairobi County being accountants at the said Ministry, with intent to defraud, the appellant and *Perminus Njoroge Kamau* (1st Accused) jointly conspired to defraud the public of public property, to wit a sum of KShs.2.5 million withdrawn as imprest from the Central Bank of Kenya for recurrent expenditure at the Ministry which had been entrusted to their custody.

In the alternative, they were charged with the offence of Conspiracy to defraud contrary to *Section 317* of the *Penal Code*. The particulars supporting the alternative count were similar to the particulars supporting the charge in Count VI.

5. Count IX - Fraudulent acquisition of public property contrary to *Section 45 (1) (a)* as read with *Section 48 1* of the *Anti- Corruption and Economic Crimes Act No. 3 of 2003*.

In this count, the particulars were that on or about 20th November 2009 at the Ministry offices in Nairobi within Nairobi County, the appellant and the 1st Accused, being accountants at the said Ministry, with intent to defraud, jointly conspired to defraud the public of public property, to wit a sum of KShs.2.5 million withdrawn as imprest from the Central Bank of Kenya for recurrent expenditure at the Ministry which had been entrusted to their custody.

Alternatively, the appellant and his co-accused were charged with the offence of stealing by a person employed in the Public Service contrary to *Section 280 of the Penal Code*. The particulars were that on or about 20th November 2009 at the Ministry offices in Nairobi within Nairobi County, the appellant and the 1st Accused, being persons employed in the Public Service in the Ministry as accountants, jointly stole KShs.2.5 million the property of the Government of Kenya which came to their possession by virtue of their employment.

6. After a full trial, the appellant was convicted of the offence of conspiracy to defraud contrary to *Section 317* of the *Penal Code* charged in count 3 and as alternative charges to Counts IV and Count VI. He was also convicted in the alternative Count to Count IX in which he was charged with the offence of stealing by a person employed in the public service.

7. In the three counts in which he was convicted of the offence of conspiracy to defraud, the appellant was sentenced to serve two years imprisonment.

For the offence of stealing by a person employed in the public service, he was sentenced to serve 3 years imprisonment. The sentences were ordered to run concurrently.

8. Aggrieved by his conviction and sentence, the appellant proffered the instant appeal vide his petition of appeal dated 22nd March 2021. In his petition of appeal, the appellant relied on five grounds of appeal but in the submissions made on his behalf by learned counsel *Mr. Mogikoyo*, the appellant collapsed the five grounds into two main grounds namely, that his conviction in all the substantive and alternative counts was against the weight of the evidence presented before the trial court and that the sentence meted out on him was manifestly harsh and excessive considering his plea in mitigation and the circumstances of the case.

9. At the hearing, both parties chose to prosecute the appeal by way of written submissions which were orally highlighted before me on 20th September 2021. During the hearing, learned counsel *Mr. Mogikoyo* represented the appellant while learned prosecuting counsel *Ms Ndombi* appeared for the respondent. I will revisit the parties' submissions shortly.

10. As the first appellant court, I am fully conscious of my duty which is to re-evaluate and reconsider all the evidence presented before the trial court to draw my own independent conclusions remembering that unlike the trial court, I did not have an opportunity to see and hear the witnesses as they testified and give due allowance for that disadvantage. See: ***Okeno V Republic, [1972] EA 32; Gabriel Kamau Njoroge V Republic, [1987] eKLR***.

11. In summary, the undisputed facts in the evidence presented before the trial court by a total of 14 witnesses is that at the material time, the appellant was employed as the Chief Accountant and Head of the Accounting unit of the Ministry of Higher Education, Science and Technology. The Ministry operated a recurrent bank account at the Central Bank of Kenya from which it was authorized to withdraw KShs.2.5 million per week as standing imprest to cater for its official expenditure.

12. In the event that there was a shortfall between cash at hand and what was required for payment, the cashier either accused 1 or accused 4 (when acting as the cashier) would initial the process of payment of additional imprest by writing a requisition which would be authorized by the Head of Accounting Unit (the appellant) or his deputy.

13. On the basis of that authority, the cashier would write cheques which would be presented to the signatories for signature together with supporting documents. The appellant or his deputy together with two junior accountants were the authorized signatories. Once the cheques were signed, they would be handed over to endorsers (PW1 and PW2) who would encash the cheques at the Central Bank of Kenya and hand over the money to the cash office where it would be received by the cashier on duty. The cashiers would then make the necessary payments.

14. According to the evidence of PW3, a Senior Internal Auditor in the Ministry, he was instructed to conduct a cash management audit for the period 2007 to 2011. Subsequently, an in-depth audit was conducted by among others PW8 following instructions from the Auditor General. After the forensic audit, PW8 prepared a report which he produced as *Pexhibit 22*.

15. The above report reinforced PW3's earlier findings that some internal controls regarding the management of the Ministry's cashbook (*Pexhibit5*) were not being followed as there were several cheques which had been encashed at the Central Bank but their withdrawals had not been posted in the cash book. Other revenue collected on behalf of the Ministry had not also been posted in the cash book. The encashed cheques whose proceeds were not reflected in the cash book were produced as *Pexhibits 1, 2, 5, 8, 9, 10, 11 and 17*.

The in depth audit revealed a total loss of KShs.61,613,353.25 but the loss attributed to cash withdrawals not posted in the cash book was KShs.17,800,000. This amount however reduced to KShs.16,400,000 after investigations by PW14.

16. When placed on his defence, the appellant gave an unsworn statement and did not call any witness. He admitted that at the time the offences were allegedly committed, he was the Chief Accountant and Head of the Accounting Unit in the Ministry. In his defence, he described his duties which included authorizing imprest and vouchers and signing cheques. He stated that he only signed cheques which were supported by necessary documents. He denied having committed any of the offences charged saying that all the cheques were properly processed according to Government Financial Regulations and that in the course of his duties, he never received or handled any cash.

17. Turning to the submissions made on behalf of the parties, it was submitted on behalf of the appellant that the learned trial magistrate erred in convicting him with the offences of conspiracy to defraud since the evidence on record disclosed that the appellant was not personally responsible for checking the entries made in the cashbook and ascertaining daily balances; that he had delegated this task to other officers including PW4 who were to report to him if they detected any anomalies in the cash book.

18. Further, counsel submitted that as all the cheques were properly drawn and processed and there was no evidence to prove that the appellant was at any time the custodian of the sum of KShs.2.5m subject of the charges in the counts in which he was convicted, the prosecution had failed to prove the charges facing the appellant beyond any reasonable doubt.

19. In opposing the appeal, learned prosecuting counsel *Ms. Ndombi* supported the appellant's conviction and sentence. She submitted that the appellant was properly convicted because as the Head of the Accounting Unit, he was responsible for all transactions undertaken in the unit by those working under him. Counsel further submitted that all the offences for which the appellant was convicted were proved beyond any reasonable doubt and the appellant's appeal ought to be dismissed for want of merit.

20. I have carefully considered the evidence on record together with the rival submissions made on behalf of the parties. I have also read the very lengthy and elaborate judgment delivered by the trial court.

Having done so, I find that the key issue which crystalizes for my determination is whether the prosecution proved its case in the offences in which the appellant was convicted beyond any reasonable doubt and if so, whether the sentences imposed on him were harsh or manifestly excessive.

21. I will start addressing the above issue in relation to the appellant's conviction in the offences of conspiracy to defraud. The offence is founded on *Section 317* of the *Penal Code* which states as follows:

“Any person who conspires with another by deceit or any fraudulent means to affect the market price of anything publicly sold, or to defraud the public or any person, whether a particular person or not, or to extort any property from any person, is guilty of a misdemeanour and is liable to imprisonment for three years.”

22. *Black's Law Dictionary 10th Edition* at page 375 defines conspiracy as:

“An agreement by two or more persons to commit an unlawful act, coupled with an intent to achieve the agreement's objective, and (in most states), action or conduct that furthers the agreement; a combination for an unlawful purpose....”

23. In *Archibald's Criminal Pleadings Evidence and Practice 2010 Sweet & Maxwell* pages 3025 and 3026, the learned author expounded on the essential ingredients of the offence of conspiracy to defraud and stated as follows:

“The offence of conspiracy cannot exist without the agreement, consent or combination of two or more persons..... so long as a design rests in intention only, it is not indictable; there must be agreement...”

The agreement may be proved in the usual way or by proving circumstances from which the jury may presume it....Proof of the existence of a conspiracy is generally a matter of inference deduced from certain criminal acts of the parties accused, done in pursuance of an apparent criminal purpose in common between them.”

24. It can be deduced from the foregoing that the offence of Conspiracy to defraud has two essential elements, namely:

- i. An agreement between two or more people to execute an unlawful act with the common intention of defrauding the complainant, in this case the public.
- ii. The agreement may be express or can be implied from the conduct of the parties accused of having committed the offence.

25. In convicting the appellant in Count 3 and the alternative charges to Counts 5 and 6, the learned trial magistrate stated as follows:

“...On the other hand, the actions of the 5th accused in authorizing the requisitions by the 1st accused without caring to confirm the cash book position yet it was an integral part of cash management; a fact which is as the Head of the Accounting Unit he was very well aware of, his apparent failure to address the concerns of his juniors regarding anomalies in the cash book can only lead this court to make one conclusion, there was a deliberate flirtation between the 1st and 5th accused to continue requisitioning for more money without accountability which signifies that he was part of the grand thievery that was being orchestrated in the cash office.”

26. Whereas it is clear from the learned trial magistrate's judgement that he carefully summarized the material presented before him during the trial and that he properly addressed his mind to the applicable law, it is my finding he failed to correctly apply the law to the facts established by the evidence presented before him.

After my own independent appraisal of the evidence on record, I am unable to agree with the trial court's conclusion that the appellant's failure to ascertain the cash balances shown in the cashbook before authorizing additional withdrawals and his alleged failure to address concerns raised by PW4 in the memo produced as *Pexhibit 15* constituted sufficient evidence of collusion between him and the 1st accused to defraud the public of the monies subject of the counts in which he was convicted.

27. The appellant's statement in defence that he only authorized or approved requisition of imprest on the basis of supporting documents availed to him was in tandem with the evidence adduced by the prosecution witnesses who confirmed that all cheques in question were regularly processed and paid only that the 1st accused who was the main cashier did not post receipt of monies proceeds of the cheques in the cashbook. This was the net effect of the investigating Officer's findings. PW14 in her evidence under cross-examination confirmed that processing of the cheques and the withdrawals was not fraudulent. The problem was that the withdrawals were not reflected in the cashbook.

28. The evidence on record does not show that apart from their interaction in the normal course of their duties, the 1st accused and the appellant were engaged in conduct from which it could reasonably be inferred that they were acting in concert to execute a common intention to defraud the public through failing to account for imprest received on behalf of the ministry.

29. As confirmed by PW3, PW4, PW5 and PW14 among other prosecution witnesses and *Chapter 5 of the Government Financial Regulations*, the duty of updating the cashbook was the exclusive responsibility of a cashier. And although the appellant as Head of the Accounting Unit had an additional responsibility of supervising staff working under him including accused 1 to ensure proper management of the cashbook in order to protect public funds from theft or misappropriation, failure to check the cashbook balances before authorizing additional withdrawal of imprest without more was not sufficient evidence to prove a conspiracy between the appellant and the 1st Accused as alleged. In my view, such failure pointed to irresponsibility or negligence in the manner in which the appellant executed his administrative duties and not criminal culpability.

30. In addition, the finding by the learned trial magistrate that the appellant's failure to address concerns raised by junior officers about anomalies in the cash book was further evidence of a scheme to allow the appellant and the 1st accused to continue pilfering public funds was another misdirection on the trial court's part. In making that finding, the trial court was obviously referring to the internal memo by PW4 dated 7th December 2010 produced as *Pexhibit 15*. As is evident from the date of the memo, the memo related to a different period of time and had nothing to do with the cheques subject matter of the charges preferred against the appellant.

31. From the evidence on record, I am satisfied that the prosecution did not adduce any evidence which established the offence of conspiracy to defraud in either the substantive or the alternative counts preferred against the appellant. It is little wonder then that the investigating officer (PW14) admitted in her evidence in cross examination that her investigations did not reveal any evidence of criminal conduct against the appellant. In fact, she recommended that only administrative action should be taken against the appellant.

32. Regarding the alternative Count to Count 9, the appellant was charged with the offence of stealing by a person employed in the Public Service contrary to *Section 280 of the Penal Code*. This was in relation to cheque no. 013523 for KShs.2.5 million (*Pexhibit 8*). *Section 280 of the Penal Code* provides that:

“If the offender is a person employed in the public service and the thing stolen is the property of the Government, or came into the possession of the offender by virtue of his employment, he is liable to imprisonment for seven years.”

33. A reading of the above provision shows that in order to prove the offence, the prosecution must prove beyond doubt the following:

- i. that the accused person was employed in the public service;
- ii. That there is property which was stolen from the Government; and;
- iii. That the thing stolen came into possession of the accused person by virtue of his employment.

34. As correctly found by the learned trial magistrate, it is not disputed that the appellant was at the material time employed in the Public Service and that the money in question constituted public funds since it had been withdrawn from public coffers for official use at the Ministry.

35. The evidence on record shows that the appellant signed the aforesaid cheque which was encashed by one of the endorsers and money was received by the 1st accused who failed to account for it.

In convicting the appellant, the learned trial magistrate said the following:

“...The 5th accused was a full participant in planning and scheming to commit these offences. He cannot have participated by giving his support merely for purposes of benefitting some ghosts and not himself. I find that in count 9, where the alternative charge of stealing by servant indicts him and the 1st accused, he is equally guilty for aiding in commission of that crime...”

36. Like I stated earlier, there is absolutely no evidence on record to prove that the appellant conspired or planned with any of his co accused to commit the offences charged in this case. Having combed through the evidence tendered by the prosecution, I have not come across any evidence demonstrating that the appellant through acts of commission or omission deliberately aided the 1st accused to steal any of the money in question. It is therefore not clear how the learned trial magistrate concluded that the appellant had aided or abetted the crime and he could be treated as a principal offender under *Section 20* of the *Penal Code*.

37. There is also no evidence to prove that the appellant received the money in question from the first accused and converted it into his own use without any colour of right. PW14 in her evidence admitted that she did not come across any evidence that the appellant benefitted from proceeds of the aforesaid cheques.

38. For the foregoing reasons, I find that the learned trial magistrate erred in finding that the prosecution had proved the charges preferred against the appellant in the Count 3 and in the Alternative Counts to Counts 5, 6 and 9 beyond any reasonable doubt. It is consequently my finding that the appellant's appeal is merited and it is hereby allowed. All the convictions entered against the appellant are hereby quashed and the resultant sentences set aside.

The appellant shall be released forthwith unless otherwise lawfully held.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 21ST DAY OF DECEMBER, 2021

C. W. GITHUA

JUDGE

In the presence of:

Mr. Mogikoyo for the appellant

Appellant present in person

Ms Akunja for the respondent

Ms Karwitha: Court Assistant