REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NUMBER 126 AND 130 OF 2019 (CONSOLIDATED)

BETWEEN

SILAS AMANGA SINGORO.....1ST APPELLANT

MICHEAL WECHE OTWERA.....2ND APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal against the conviction and sentence in the Chief Magistrate's Court at Makadara Cr. Case No. 329 of 2012 delivered by Hon. A. R. Kithinji, SPM, on 15th February, 2019 and 8th March 2019, respectively).

JUDGMENT

Background.

1. Silas Amanga Singoro, Michael Weche Otwera, hereafter the 1st and 2nd Appellants respectively were charged alongside one Aggrey Onyango Avendi of committing two counts of stealing by servant contrary to Section 268 as read with Section 281 of the Penal Code. The particulars of the first count were that on diverse dates between 16th November, 2011 and 24th December, 2011 at Equity Bank Kariobangi and Luanda branches jointly being servants of Maendeleo Afya Kwa Wote Korogocho (MAKWK) stole from the said Maendeleo Afya Kwa Wote Korogocho (MAKWK) cash Kshs. 650,000/- which came into their possession by virtue of their employment. The particulars of the second count were that on 23rd August, 2011 at Equity Bank Kariobangi Branch in Nairobi within Nairobi County jointly being servants to Maendeleo Kwa Wote Korogocho (MAKWK) stole from the said Maendeleo Afya Kwa Wote Korogocho (MAKWK) cash Kshs. 300,000/- which came into their possession by virtue of their employment.

2. The Appellants were arraigned before the trial court and pleaded not guilty but were subsequent found guilty at the conclusion of the trial and each sentenced to a fine of Kshs. 50,000/- in each count in default serve 18 months imprisonment. They were further ordered to pay the complainant, Maendeleo Afya Kwa Wote Korogocho(MAKWK) Kshs. 200,000/- each. They are dissatisfied with the decision of that Court and have lodged the present appeal against their conviction and sentence.

3. Their grounds of appeal are laid out in their Petition of Appeal dated 27th May, 2019 and are that;(i)The learned trial magistrate erred by failing to note that the Complainant in the matter, one Aggrey Willis Otieno, withdrew the case, (ii)The learned magistrate erred in allowing a second count to be added yet they had initially been charged with only one count, (iii) the learned magistrate erred in failing to allow them access documents which were necessary to prove their cases, (iv) the trial magistrate erred in failing to note that no member of the complainant gave evidence in the matter, (v) the learned magistrate erred in failing to note that the arresting officer did not testify in the matter, (vi) the Honorable Magistrate erred in failing to appreciate their testimonies, and (vii) the trial magistrate erred in allowing a probation report that only reflected the views of one member of the organization.

4. The appeal was canvassed before me on 15th July, 2020 via Google Teams Video Link with Mr. Mitullah appearing for the Appellants and Ms. Kibathi for the Respondent. Mr. Mitullah relied on written submissions filed on 15th July, 2020 which he highlighted. He demarcated three issues for determination, namely; (i) whether the Appellants were servants of the complainant Sacco, (ii) whether the essential ingredients of the offence were proved beyond a reasonable doubt and (iii) whether the sentence imposed was lawful.

5. On the first issue he submitted that the offence with which the Appellants were charged is defined under Section 281 of the Penal Code which requires that the thing stolen is the property of the employer or came into the possession of the accused person on account of their employment. He submitted that it was not proved that the Appellants were employees of the complainant which PW2 admitted during cross examination. The second issue he submitted was that there was a failure to comply with Section 106B of the Evidence Act and that therefore

all the exhibits produced in the case were inadmissible as no bank official came to verify the documents. He then submitted that the intent to defraud as defined in Section 268 of the Penal Code, that is the *mens rea* of the offence was not proved. Further, that the Appellants demonstrated that they had used the money in question for the purposes of the complainant; hence they could not be accused of stealing. On the third issue he submitted that the sentence passed was unlawful and did not pass the test set out under Section 28(2) of the Penal Code.

6. Ms. Kibathi opposed the appeal. On the first ground she conceded that the Appellants were not employees of the complainant and therefore the ingredients of the offence charged were not proved. She submitted that although the offence of stealing by servant was not proved, a cognate offence of stealing was proved. With regards to the submission that the bank statements were inadmissible she submitted that the statement in question was a document kept in the ordinary course of business and fell within the meaning of Section 33 of the Evidence Act. On the production of a certificate under section 106B of the Evidence Act, she urged the Court to refer to Section 175 of the Evidence Act whereby an irregularity can be overlooked where there is other independent evidence. She submitted that in the present case the independent evidence was given by PW2 which corroborated that of PW1 and confirmed that both Appellants were signatories to the account. Further, she urged the Court to be guided by exhibit 3(b) which was a letter in which the Appellants admitted that they would pay the loan and proposed a payment plan. She submitted that the Appellants were therefore estopped from denying that fact under the provisions of Section 17 of the Evidence Act. She concluded by urging the Court to invoke the provisions of Section 179 of the Criminal Procedure Code and find that the prosecution did prove a case of simple stealing and mete out the appropriate sentence.

7. In rejoinder, Mr. Mitullah submitted that the amount charged in count 1 was Kshs. 650,000/- yet the amounts in evidence added up to Kshs. 520,000/- thus the conviction was not supported by the evidence. He submitted that there were multiple signatories to the bank account and as such the Appellants' conviction was circumstantial at best. With regards to the second count he submitted that the Appellants indicated that they were guarantors of the loan and that they gave an explanation of how the money in question was utilized. With regards to the letter that they wrote seeking to have the matter settled out of court, it was his view that the same could not be relied upon as constituting evidence to warrant a conviction. He thus urged the Court to allow the appeal.

Evidence.

8. **PW1,** Francis Kinyati, testified that he was a community organizer and a member of Maendeleo Afya Kwa Wote Korogocho in which he was the vice-chairperson. He recalled that between 16th November, 2011 and 24th December, 2011he received information that some money had been deposited in their group account in the sum of Kshs. 650,000/-. The money was from a donor and was meant to be used in a project for tuberculosis (TB) patients. He testified that together with Aggrey Onyango, Samuel Otieno and Nancy Edo they proceeded to Equity Bank Kariobangi Branch where they received statements that showed that a loan of Kshs. 300,000/- had been taken by the Appellants without following the procedures of the group. Further, they did not know what the money was used for. They also found that the Kshs. 650,000/-that had been deposited in the account had been withdrawn.

9. He testified that after discovery they made a report to the police leading to the arrest of the Appellants and their co-accused. He produced a copy of the organization's Constitution, statements of account number 0150100059682 for the period 30th July, 2011 to 31st December, 2011 and a letter of commitment by the Appellants to repay the money. He testified that a letter used to procure the loan used his forged signature. In cross examination, he stated that the 2nd Appellant was an employee of the organization as he was the group secretary and that he failed to produce documents indicating how he had spent the money. Further, that the 3rd Accused was not a signatory to the account in question.

10. **PW2, Nancy Edo Musa** was as member of Maendeleo Afya Kwa Wote Korogocho where she acted as the treasurer. She testified that the group was meant to help the sick and was a welfare organization. That the 1st and 2nd Appellants were the chairman and secretary respectively. She recalled that in January, 2012 she was off duty and had left the cheque book in the care of the chairman when one Aggrey Onyango informed her that money was being withdrawn from their account without her knowledge. She informed a number of members and they proceeded to the bank to ascertain the validity of the information. She corroborated the evidence of PW1 on what they found out at the bank. She stated that after the Appellants' arrest they asked for time to repay the monies within an eighteen months period. In cross examination, she stated that the loan of Kshs. 300,000/- and the withdrawal of Kshs. 650,000/- was undertaken without her knowledge. Further, that the Appellants were not employees of the group.

11. **PW3, PC Mercy Wameo** attached to Kariobangi Police Station took over the matter from the former investigating officer in 2017. She produced a number of documents that had been referred to by PW1 and PW2. In cross examination, she stated that the Appellants were employed by the group and had withdrawn the money in question without the group's consent.

12. When put on their defence the Appellants chose to give unsworn statements. **DW1,** 1st Appellant, said that he withdrew the money that was donated by a well-wisher and bought medicine with it as was required by the organization. That he was surprised when he was asked how the money was spent. That the secretary, 2nd Appellant, had all the necessary documents to show how the money was spent.

13. **DW2**, 2nd Appellant said that he was the secretary of the organization and recalled that they had received Kshs. 650,000/- that was to be used for the building of a testing center and to buy medicines. That they used the money for that purpose and that the file indicating the manner in which the money was used was in the possession of the company. Further, that members who were not attending the group meetings went to report the same to the police yet he had explained to them that he withdrew the money and paid for the services. He explained that they had been paying off the Equity loan and after their arrest the loan remained in arrears. He produced bank receipts, purchase of medicine receipts, copy of letter detailing their work and letter committing themselves to pay the loan.

Determination.

14. When exercising its appellate jurisdiction this court is under a duty to re-evaluate and re-examine the evidence adduced before the trial court before arriving at its own independent findings. However, in so doing the court is under a duty to take into account that it has neither heard nor seen the witnesses and give due regard for that. With that in mind this court has considered the proceedings before it and the submissions of the respective parties before arriving at the following issues for determination:

a. Whether the documents adduced in court were admissible in evidence.

b. Whether the offence was proved beyond a reasonable doubt.

c. Whether the sentence passed was lawful.

***Admissibility of exhibits*:**

15. The issue of the admissibility and reliance on certain documents was raised in relation to two sets of exhibits, namely; exhibits 2(a) and 2(b) – bank account statements and exhibits 3(a) and 3(b) which were letters from the Appellants and their co-accused.

16. On the issue of the admissibility of exhibits 3(a) and 3(b), Mr. Mitullah submitted that the letters in question were written seeking to have the matter settled out of court and could not therefore be used against the Appellants. The proceedings of the trial court show that there was a clear and concerted effort to settle the matter the basis on which the letters were written. They were written by the Appellants committing themselves to repay the monies in question. It appears apparent that the documents fall within the ***"without prejudice"*** rule which was ably described in **Rush & Tompkins Ltd *v.* Greater London Council[1989] AC 1280** thus:

> ***"The 'without prejudice' rule is a rule governing the admissibility of evidence and is founded on the public policy of encouraging litigants to settle their differences rather than litigate them to a finish."***

17. While there was no direct reference to the 'without prejudice' rule in the documents, I find that the surrounding circumstances within which the documents were created, in the course of an attempt of a settlement and negotiations, makes the rule applicable. I again find guidance from the decision in **Rush & Tompkins**(supra), that:

> ***"…, the application of the rule is not dependent upon the use of the phrase 'without prejudice' and if it is clear from the surrounding circumstances that the parties were seeking to compromise the action, evidence of the content of those negotiations will, as a general rule, not be admissible at the trial and cannot be used to establish an admission or partial admission."***

18. It thus behooves the Court to consider whether the letters were properly admitted in evidence given the general rule that such documents ought to have been treated on a "'without prejudice" basis. I refer to **Lochab Transport Limited *v.* Kenya Arab Orient Insurance Ltd[1986] Eklr** in which it was stated:

> ***"…if an offer is made "without prejudice", evidence cannot be given on this offer. If this offer is accepted, a contract is concluded and one can give evidence of the "without prejudice" letter.***

19. There is no doubt that the attempt to settle the matter was a welcome move in view of our constitutional provisions under Article 159 (2) of the Constitution in furtherance of promoting alternative dispute resolution mechanisms. This was also echoed in **Rush & Tompkins Ltd**(supra) thus:

> ***"…the question has to be looked at more broadly and resolved by balancing the different public interests namely the public interest in promoting settlements and the public interest in full discovery between parties to litigation."***

20. The Appellants herein did not deny offering the terms of settlement to the members of the organization (Sacco) and the terms were accepted by the organization as was clear from the evidence of PW1 and PW2. Nevertheless, it is trite that the burden of proof always lies with the prosecution to prove its case beyond a reasonable doubt. This burden can never shift to the accused person save as may be expressly provided under a law.

21. In as much as the Appellants may have admitted to paying the loans, they said this in unsworn statements whose veracity was not tested by way of cross examination. Further, although the admission was intended to promote alternative dispute resolution, by the fact that subsequently, the Appellants failed to honour the intention meant that the prosecution was obligated to discharge its burden; of proving the Appellants' culpability to the required standard.

***Whether offence was proved beyond reasonable doubt*:**

22. One means by which the proof would have been discharged was by a proper admission of the bank documents. This related both to counts I and II.

23. With regards to exhibits 2(a) and 2(b) which were bank statements the Appellants sought to have the exhibits deemed inadmissible on the basis of Section 106B of the Evidence Act. Mr. Mitullah submitted that a certificate confirming the origin of the documents was never produced in court and no bank official testified on their validity. He relied on this court's decision in **Peter Gichuhi Wachira *v.* Republic [2020] eKLR**.

24. Ms. Kibathi in response submitted that the exhibits were documents kept in the normal course of business and were admissible under Section 33 of the Evidence Act. Further, that with regards to the failure to produce a certificate under Section 106B of the Evidence Act, Section 175 of the Evidence Act applied whereby an irregularity can be overlooked where there is other independent evidence.

25. The relevant part of Section 33 of the Evidence Act is sub section (b) which in my view was not applicable. The same provides that:

"Statements written or oral or electronically recorded, of admissible facts of a person who is dead or who cannot be found or who has become incapable of giving evidence or whose attendance cannot be procured, or whose attendance cannot be procured without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable, are themselves admissible in the following cases-

(b) made in the course of business

when the statement was made by such person in the ordinary course of business, and in particular when it consists of an entry or memorandum made by him in books or records kept in the ordinary course of business or in the discharge of professional duty; or of an acknowledgement written or signed by him of the receipt of money, goods, securities or property of any kind; or of a document used in commerce, written or signed by him, or of the date of a letter or other document usually dated, written or signed by him. "

26. In the present case, PW2, who was the treasurer of the organization did not testify that the bank officials could not be found or procured without an amount of difficulties, reasons wherefore, none could testify. She was not the maker of the bank statements and as such, the source of the statements ought to have been authenticated by production by the source or at least by consent. In my view therefore, the assertion by Miss Kibathi that PW1 and PW2 's evidence filled the gap for a bank official pursuant to Section 175 of the Evidence Act was untenable. For avoidance of doubt, Section 175 of the Evidence Act provides that:

"The improper admission or rejection of evidence shall not of itself be ground for a new trial or for reversal of any decision in a case if it shall appear to the court before which the objection is taken that, independently of the evidence objected to and admitted, there was sufficient evidence to justify the decision, or that if the rejected evidence had been received it ought not to have varied the decision.''

27. As earlier stated, proof of a case in a criminal trial is always beyond a reasonable doubt and an accused person cannot be convicted on mere suspicion, however strong the suspicion may be. In this regard, the burden lay strictly upon the prosecution to proof the theft of the amount charged. As demonstrated above, the evidence adduced demonstrated theft of Kshs. 583, 575/. Upon such disclosure, the prosecution failed to apply to amend the charge sheet to reflect the correct amount in issue. For this reason, it means that the prosecution failed to prove that the Appellants stole Ksh, 650,000/.

28. In the foregoing, it falls that the prosecution did not discharge its burden to the required standard to prove both counts beyond a reasonable doubt. I do however agree that had the prosecution discharged its burden, this court would have substituted the offence of stealing by servant to that of ordinary theft as it was not established that the Appellants were servants of the complainant organization.

29. The total sum of my findings is that this appeal finds merit. I quash the conviction, set aside the sentences and order that the Appellants be set at liberty forthwith unless otherwise lawfully held. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 28TH DAY OF JULY, 2020.

G.W.NGENYE-MACHARIA

JUDGE

In the presence of:

1. Mr. Mitullah for the Appellants.

2. Mr. Momanyi for the Respondent.