



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

CRIMINAL APPEAL NO. 14 OF 2019

JAMES BEECHER KIURA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. The appellant, *James Beecher Kiura* was in the first count charged with the offence of stealing by servant contrary to *Section 281* of the *Penal Code*. He was also charged with an additional eleven counts with the offence of forgery contrary to *Section 349* of the *Penal Code*.

2. The particulars supporting the first count alleged that on diverse dates between 5th October 2011 and 30th September 2012 at Rianjagi Farmers' Co-operative Society Limited in Mutunduri within Embu County, he stole a total of KShs.6,800,000, the property of Rianjagi Farmers' Co-operative Society Limited (the Co-operative Society) which came into his possession by virtue of his employment.

3. In the other eleven counts in which he was charged with the offence of forgery, the particulars thereof alleged that on different dates between the months of October 2011 and 5th April 2012, at Rianjagi Farmers' Co-operative Society Limited, with intent to defraud, he forged several payment vouchers for amounts totaling KShs.6,800,000 purporting them to be genuine payment vouchers for goods and services delivered to the co-operative society.

4. After a full trial, the appellant was convicted in each of the twelve counts. In count one, he was sentenced to pay a fine of KShs.100,000 in default to serve seven years imprisonment.

In counts two to twelve, he was sentenced in each count to pay a fine of KShs.50,000 in default to serve three years imprisonment. The sentences in default of payment of fine were ordered to run concurrently.

5. The appellant was aggrieved by his conviction and sentence hence this appeal. In the eight grounds of appeal encapsulated in his petition of appeal filed on 25th April 2019, the appellant principally complained that the trial magistrate erred in law and fact by convicting him in each of the twelve counts on the basis of evidence which was insufficient to prove the charges to the standard required by the law; that the learned trial magistrate seriously misdirected himself in his finding that the appellant's sworn statement amounted to mere denials yet it raised serious doubts on the credibility of the prosecution's witnesses; that the learned trial magistrate erred in law by being biased against the appellant as illustrated by the numerous undeserved adjournments he granted the prosecution during the trial; that the sentence meted on the appellant was harsh and manifestly excessive.

6. At the hearing, parties consented to having the appeal prosecuted by way of written submissions which both parties duly filed. Those of the appellant were filed on 12th August 2020 while those of the respondent were filed on 2nd September 2020.

7. This being a first appeal to the High Court, it is an appeal on both facts and the law. I am fully conscious of my duty as the first appellate court which as summarized in *Okeno V R, [1972] EA 32* is to subject the evidence presented before the trial court to a fresh and exhaustive examination in order to arrive at my own independent conclusions bearing in mind that unlike the trial court, I did not have the benefit of hearing and seeing the witnesses testify and give due allowance to that disadvantage.

8. I have carefully considered the grounds of appeal, the evidence on record, the rival written submissions made on behalf of the parties and all the authorities cited. I have also read the judgment of the learned trial magistrate.

9. I wish to start by addressing the appellant's complaint that the learned trial magistrate was biased against him since he allowed numerous adjournments at the instance of the prosecution during the trial. My reading of the court record reveals that though most of the adjournments were indeed granted at the behest of the prosecution, the defence also sought and obtained a few adjournments. Be that as it may, it is trite

that whether or not to grant an adjournment depends on the exercise of discretion by the trial court taking into account the reasons advanced in support of the application.

10. The decision regarding whether to allow or to reject an application for adjournment being an exercise of the court's judicial discretion cannot form the basis for an allegation of bias unless it is accompanied by other overt acts or pronouncements by the trial court which on their face value demonstrates bias against one party in the proceedings. In this case, the trial court's record reveals that all applications for adjournment were supported by various grounds which the trial court considered before allowing the applications. The record does not contain any evidence or indication that the learned trial magistrate was biased against the appellant or that he favoured the prosecution side. In the premises, nothing turns on that ground of appeal.

11. Having resolved that preliminary issue, I now turn to consider the merits of the appeal. The grounds of appeal and the parties' rival submissions show that the gravamen of this appeal is the appellant's grievance that he was wrongly convicted as the evidence adduced by the prosecution did not prove the charges preferred against him beyond reasonable doubt. This being the case, the key issue that arises for my determination is whether the evidence offered by the prosecution before the trial court was sufficient to prove the essential elements of the offences charged in each count beyond any reasonable doubt.

12. In order to effectively address the above issue, it is important to briefly summarise the evidence that supported the conviction entered by the trial court in each count.

13. It is clear from the evidence on record that it is not disputed that at all material times, the appellant was the Secretary cum Manager of the Co-operative Society. He was its Chief Executive Officer in charge of its daily operations including managing its books of accounts. He used to work under a management committee and was one of the signatories to the Society's bank accounts at Co-operative Bank and Nawiri Sacco. The other signatories were the Chairman, Secretary and Treasurer of the management committee.

14. Briefly, the prosecution case according to PW1 and PW2 is that on 11th April 2013, they were elected as members of the complainant's management committee after the previous committee and the appellant were voted out of office. PW1 was elected as the new Chairman of the management committee. During the handing over exercise, members of the new management committee noted erasures, alterations of figures and over writings in the Society's cash book journals and payment vouchers. They suspected fraud and requested the County Co-operative office to investigate the matter further by auditing the books of accounts to confirm whether or not the Society's funds had been misappropriated.

15. *Stephen Kamau Njoroge*, then the Embu County Co-operative Officer conducted an audit of the Society's books of accounts as requested. He testified as PW4. He stated that in the course of his audit, he discovered that in the course of his duties, the appellant would prepare payment vouchers accompanied by supporting documents indicating actual amounts payable to the Society's creditors but once the payment vouchers were approved, the appellant would alter the amounts approved and would insert different figures inflating the amounts payable so that together with one *David Mbogo*, the book keeper, they would steal the difference.

16. PW4 testified that as a result of the alterations of the journals, cash sale receipts and payment vouchers, the Society lost a total of KShs.6.8 million which forms the subject matter of the first count. He compiled an audit report which he produced as *P exhibit 4 (b)*. On the basis of this report, the management committee reported the matter to PW5, *PC Albert Onyancha* who after his investigations arrested and charged the appellant with the offences for which he now stands convicted.

17. When put on his defence, the appellant gave a sworn statement and denied having committed the offences as alleged. He testified that the complainant's source of income was coffee sales whose proceeds was remitted directly to its bank account and could only be withdrawn through cheques duly signed by its bank signatories. He denied that he stole any money from the Society as alleged and referred to the audit report for the year 2011- 2012 which was compiled and produced by PW4 as *P exhibit 4 (a)*. It is worth noting that this report which largely related to the period the offence charged in count 1 was allegedly committed was duly signed by PW4 and the officials of the previous management committee confirming that the Society's books of accounts had been properly kept.

18. Regarding counts two to twelve, the appellant denied having forged payment vouchers as alleged and maintained that any alterations or over writings on them were done before they were presented to the committee members for signature to authorize payments. He claimed that the charges were a fabrication by the new management committee to justify his removal from office.

19. Having summarized the evidence presented before the trial court, I must now consider whether the learned trial magistrate properly interrogated it and whether he erred in his finding that the prosecution had proved the charges against the appellant beyond any reasonable doubt.

20. Starting with count one, it is apposite to note that the appellant was charged with the offence of stealing by servant contrary to *Section 281 of the Penal Code*. The essential ingredients of the offence of stealing which the prosecution needed to prove before demonstrating that the theft was committed in the appellant's course of employment are clearly set out in *Section 268 (1) of the Penal Code* which defines theft as follows:

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

21. In this case, the prosecution did not adduce any evidence to show or prove that the Society had funds in its bank account or elsewhere in the sum of KShs.6.8 million at the material time which was capable of being stolen. The prosecution did not also tender any evidence to prove that the appellant actually stole that money by fraudulently converting it to his own use without the Society's management committee's knowledge or authorization.

22. It is pertinent to note that there is undisputed evidence that the only way funds belonging to the Society could be accessed was through withdrawals from its bank account using cheques signed by three signatories to the account. The prosecution did not however tender evidence in the form of bank statements; cheque counterfoils or any other evidence to prove that the amounts indicated in the alleged forged payment vouchers was actually withdrawn from the Society's bank account and was converted to the appellant's use. In fact, no evidence was adduced to prove that the appellant ever received the said money.

23. The fact that there were erasures, over writings or alterations on some payment vouchers cannot by itself, in the absence of any other evidence, amount to evidence of theft of money. In this finding, I am fortified by the provisions of *Section 37* of the *Evidence Act* which clearly stipulates that:

“Entries in books of account regularly kept in the course of business are admissible whenever they refer to a matter into which the court has to inquire, but such statements shall not alone be sufficient evidence to charge any person with liability.”

24. The learned trial magistrate therefore misdirected himself and erred in law when he found that the alterations and over writings of figures in the payment vouchers by themselves constituted sufficient evidence to prove the charges preferred against the appellant in count one beyond reasonable doubt. The trial magistrate does not appear to have considered the appellants contention in his defence that any erasures or alterations in the documents had been made before they were presented to the management committee members for authorization of payments.

25. Regarding counts two to twelve, forgery is defined in *Section 345* of the *Penal Code* as the making of a false document with intent to defraud or to deceive. A person makes a false document if he *inter alia* changes the document purporting it to be what it is not or alters it or introduces changes to it which changes its effect without authority.

26. In this case, the forgeries charged in counts two to twelve relate to alterations allegedly made to amounts stated in several payment vouchers after the payment vouchers had been approved and signed by the management committee. The offences were allegedly committed between October 2011 and April 2012 when the former management committee was in office.

27. The appellant in his defence denied having altered the payment vouchers as alleged and maintained that it was normal for journals and payment vouchers to have erasures and alterations and that the payment vouchers had been signed and approved with the alterations alleged to be forgeries.

28. In order to prove its case, the prosecution ought to have called members of the previous management committee as its witnesses to testify on the condition of the payment vouchers when they signed them. This is the only way that the trial court would have been able to make a finding of fact on whether the erasures, over writings or alterations had been made before or after the documents had been approved and signed by the management committee. For undisclosed reasons, the prosecution did not avail any member of the management committee to testify in this case.

29. In the absence of evidence from members of the previous management committee, it is my finding that there was no basis for the learned trial magistrate to find that the appellant had falsified the alleged 11 payment vouchers by altering amounts initially authorized by the management committee with intent to defraud the Society.

30. From my independent analysis of the court record, it is evident that the learned trial magistrate misdirected himself by failing to address his mind to the elements that constitute the offence of theft and forgery and thereby came to the wrong conclusion that the prosecution had proved its case against the appellant to the standard required by the law.

31. It must be remembered that in criminal cases, the onus is always on the prosecution to prove the charges preferred against an accused person beyond any reasonable doubt. This onus does not shift to an accused person except in certain circumstances which do not apply to this case. As correctly submitted by learned counsel for the appellant *Mr. Kathangu*, an accused person does not have an obligation to prove his innocence. See: ***Kiarie V Republic, [1984] KLR 739; Kaingu Kasomo V Republic, Court of Appeal at Malindi Criminal Appeal No. 504 of 2010 (Unreported).***

32. As the appellant denied all the charges preferred against him, it was incumbent upon the prosecution to prove its case against him in each count beyond any reasonable doubt which as demonstrated above, the prosecution failed to do. It is thus my finding that the appellant was not properly convicted.

In the circumstances, I find that this appeal is merited and it is hereby allowed. The appellant's convictions in counts one to twelve are consequently quashed and the sentences set aside.

33. As the record shows that the appellant paid the fine imposed by the trial court in each count, I direct that the fines paid pursuant to the sentence be refunded to the appellant forthwith.

It is so ordered.

DATED, SIGNED and DELIVERED at EMBU this 30th day of October 2020.

C. W. GITHUA

JUDGE

In the presence of:

Mr. Kathungu for the appellant

Ms. Mati for the respondent

Wambugu Court Assistant