



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL APPEAL NO. 41 OF 2017

(Consolidated with HCRA NO. 42 OF 2017)

CAROLINE MUMBI NGONDI.....1ST APPELLANT

JOHN KARIUKI IRERI.....2ND APPELLANT

VERSUS

REPUBLICRESPONDENT

J U D G M E N T

1. The appellants were aggrieved by the judgment of Embu Senior Resident Magistrate in CM Criminal Case No. 591 of 2014 delivered on 23rd March 2017. The first appellant who was the second accused was charged separately with count I with the offence of fraudulent false accounting contrary to Section 330(b) of the Penal Code. In count II the two appellants were jointly charged with the offence of stealing by servant contrary to Section 281 of the Penal Code.

2. In count III, count VI, count IX and count XII, the second appellant was separately charged with separate offences of forgery contrary to Section 349 of the Penal Code. In count V, VIII and XI the second appellant was charged with separate offences of stealing by servant contrary to Section 268(1) as read with 281 of the Penal Code. In counts IV, VII and X the second appellant was charged with separate offences of fraudulent false accounting contrary to Section 330(b) of the Penal Code.

3. The appellants were convicted of all the counts as charged. In counts I the 1st appellant was sentenced to seven (7) years imprisonment while in Counts II, both appellants were sentenced to serve seven (7) years imprisonment. In Counts III, VI, IX and XII, the appellants were sentenced to serve three (3) years imprisonment on each count. In Counts IV, V, VII, VIII, X and XI, the 2nd appellant was sentenced to serve seven (7) years imprisonment on each count.

4. The sentences were ordered to run concurrently.

5. The first appellant raises several grounds of appeal which can be summarized as follows:-

a) *That the case against her was not proved beyond any reasonable doubt and that the evidence consisted of errors, contradictions, and that some witnesses were not called to testify.*

b) *That Article 50(2a) of the Constitution was violated in that the appellant was charged with similar cases in different files whereas the same witnesses were called to testify.*

c) *That her alibi defence was not considered by the trial magistrate.*

6. The second appellant cited several grounds of appeal condensed as follows:-

a) *That his case was not proved to the standards required in criminal cases.*

b) *That some crucial witnesses were not summoned to give evidence.*

c) *That the trial magistrate rejected the evidence of the complainant and gave the prosecutor a chance to go and coach him.*

d) *That the documents produced in evidence including payment slips were not reliable and that books of account were not produced.*

e) **That** the appellant was remanded in custody for more than 24 hours without being arraigned before the court.

7. The prosecution called fourteen witnesses in this case. The evidence of PW1 was that he worked with Alexander Mugo M'Tetu a distributor of Keroche Breweries products based in Embu town. At the time of the incidents, PW2's business had been in operation for about nine years. He said that the 1st appellant was an employee serving as a cashier while the 2nd appellant was the depot manager.

8. It was PW1's further evidence that he was tasked by the company to check on business stocks at the Mutunduri depot due to some loss of funds that had been detected. Later PW1 was questioned by CID Embu on five banking slips for stock suspected to be fake. The 2nd appellant was the manager who was tasked with the duties of maintaining the stock register. The slips in question had a forged signature resembling that of the witness. PW1 denied having banked the amounts contained therein as follows:-

i) Ksh.156,000/- dated 08/08/2013 by Siakago "A".

ii) Ksh.176,400/- dated 24/08/2013 by Jenaro

iii) Ksh.179,150/- dated 11/09/2013 by Jenaro

iv) Ksh.156,000/- dated 04/11/2013 by Mwaniki

v) Ksh.162,000/- dated 16/11/2013 by Mwaniki

9. It was PW1's evidence that the forged banking slips were all for the period the second appellant worked as the manager and the first appellant as the cashier.

10. PW2 testified that he was a super distributor of Keroche Breweries products. He produced his business licence and distributor agreement in evidence. He said payments by customers are done through banking in the company's account at Barclays Bank Embu. PW2 said that he learnt from his watchman that his employees were stealing and selling stock at night. He conducted investigations which revealed that the 2nd appellant was involved in the malpractice including making fake banking slips.

11. PW3 testified that he sold Keroche products which he obtained from PW2's company and banked the money for purchase of stock in PW2's business account at Barclays Bank Embu. He said he was surprised when PW2 called him and informed him that he had not paid the company Ksh.93,000/- for purchase of stock. He was also shown a banking slip of Ksh.176,400/- allegedly banked by him on 24/08/13 whose funds had not been traced in the bank. PW3 denied having banked the said slip.

12. PW4 told the court that he distributes Vienna products at Gachoka and that he purchases his stocks from Alex Mugo Depot in Embu. The mode of payment was depositing funds in the depot's business account at Embu Barclays Bank. The practice was that the banking slips were presented to the Embu depot at the time of collecting the beers.

13. PW5 was a customer of PW1 at his Embu depot. He was a distributor of Keroche products and paid for them in cash or through banking in the account of PW1 at Barclays Bank Embu in the year 2013. He recalls that on 4/04/2014 he was called to Embu CID office where he was shown two banking slips of Ksh.156,000/= and Ksh.162,000/- in his name "Mwaniki" as the depositor. He denied making the said deposits. He identified the banking slips in court.

14. PW6 conducted bank reconciliation for Alexander Mugo M'tetu. He was Chief accountant of the firm at the material time. He found discrepancies between the bankings slips, stock registers and bank statements. The following bank slips were not reflected in the bank statements for the relevant period:-

i. Ksh.176,400/- dated 24/8/13

ii. Ksh.179,150/- dated 11/09/13

iii. Ksh.156,000/- dated 4/11/13

iv. Ksh.162,000/- dated 16/11/13

The stock books reflected entries for the said pay slips entered on the dates indicated as those of the disputed bankings. PW6 concluded that some money in the business had been lost.

15. PW7 said he sells Keroche products at Siakago and he is known as "Councillor" or "MCA". He testified that he used to buy the products from PW2's depot through banking the cash in the business account at Embu Barclays Bank. The name of the depositor was indicated as "Councillor" or "MCA" on the reverse. He denied that he banked Ksh.160,500/= on 22/07/2013 and Ksh.156,000/= on 8/08/2013 in Alexander Mugo's business account.

16. PW8 testified that he used to deliver beer to one Robert Ngari at Runyenjes using his pick-up registration No KAW 851 D. On 2/03/14, the second appellant went to the sales depot and demanded to be given Ksh.168,000/= which had already been paid to him at Embu depot by PW8 and a slip raised.

17. PW9 worked at the Embu depot and used to be sent by the second appellant to bank cash. He confirmed with the bank that the slips were fake for the money had not been banked on the account as the second appellant claimed to have done. The slips indicated that the depositor was one Mwaniki from Runyejes depot. Investigations revealed that Mwaniki who is PW5 had paid the money in cash to the second appellant who was in charge of receiving and banking cash. He denied having banked the amounts indicated on the disputed banking slips.

18. PW10 was an auditor who was tasked to conduct a special audit on sales and banking transactions by PW1 in his business for the period between 1st May 2013 to 3rd March 2014. He was given documents including bank statements, banking slips and sale ledgers covering the period under investigation. He found some discrepancies in the records. Some banking slips were not reflected in the bank statements for the period between 4th June to August 2013 as follows:-

a) Slip for Ksh.130,000/- dated 2nd May 2013

b) Slip for Ksh.14,400/- of 12th July 2013

c) Slip for Ksh.162,000/- for 14/02/13

A payment from Siakago depot of Ksh.854,800/= for the period covering 23rd August to 9th September 2013.

A payment of Ksh.335,550/= for the month of January 2013.

A payment of Ksh.964,500/= for the period from 2nd November 2013 to 22nd March 2014 from Mwaniki.

The witness prepared and handed over his report to PW1 which showed that a total of Ksh.2,608,280/= could not be accounted for. The report was produced as an exhibit.

19. PW11 the Operations Manager with Barclays Bank Embu testified that the banking slips particulars of which were contained in a letter from the bank dated 8/04/2014 (Ex.20) were not genuine. He said the amounts indicated therein were not banked in A/c No. 2023177512 for Alexander Mugo M'Tetu as shown in the documents. The rubber stamps used No. 4 and No. 8 were fake and had never been used by the cashiers at the bank. According to him, the paper quality of the slips in question was poor as compared to genuine bank slips issued by the bank.

20. He showed the court the genuine stamps of the bank which differed from the ones on the disputed slips. The amounts allegedly banked were not reflected in the bank statements issued by the bank for the relevant periods.

21. PW12 the document examiner compared the specimen handwriting of the second appellant with that on the banking slips and found that they were made by the same author. He also examined stock records with the specimen handwriting of the first appellant and found them to have been made by the same author. He produced his report in evidence.

22. The case was investigated by PW13 of CID Embu who charged the two accused persons with the offence. His investigations were based on documents including stock registers, bank statements, banking slips and ledgers provided to him by PW1. He sent specimen signatures and hand writings of the appellants together with the disputed documents to the document examiner and received the report which was positive.

23. PW13 is the one who sent the 17 banking slips to the bank for Verification. The bank confirmed that the amounts purported to have been banked in the account No. 2023177512 had not been banked. The slips were fake and the sums in question could not be accounted for.

24. The defence of the first appellant was that she was an employee of Keroche depot Embu from 1st July 2013 to 27th February 2014. She worked as a cashier at the depot and was normally assisted by PW7 to deposit the sale proceeds. She said that she did her work as required but has been framed. She denied all the allegations against her.

25. The second appellant told the court that he worked for PW2 as the manager of the Keroche Depot Embu from 2010 to 2013. His duties involved overseeing running of the depot. Any banking slips were handed over to the accountant who also used to check and take stocks and verify any payments made. It was the duty of the salesmen to bank the money and avail banking slips. He denies having stolen any funds from the complainant.

26. The issues for determination in this appeal are identified as follows:-

i) Whether this case was proved to the standards required in criminal cases,

ii) Whether the constitutional rights of the 1st appellant were violated by being charged with two cases with similar charges.

27. The 1st appellant attached the court proceedings in Embu Criminal Case No. 593 of 2014 where she was jointly charged with twelve (12) counts the 2nd appellant and convicted of five (5) counts. The charges were of stealing by servant contrary to Section 268(1) as read with Section 281 of the Penal Code; fraudulent false accounting contrary to Section 330 (b) of the Penal Code and forgery contrary to

Section 349 of the Penal Code.

28. I have looked at the charges in that case and in Embu Criminal case no. 591 of 2014 which gave rise to this appeal. I note that in each of the twelve counts in both cases reflect different amounts of money allegedly stolen on different dates. The charges of forgery and fraudulent false accounting relate to the relevant document supporting the offence of stealing. I see no duplicity of charges in any of the files.

29. It was held in the case of **PETER OCHIENG VS REPUBLIC [1985] eKLR** cited with approval in the case of **Otieno Kopiyo Gerald Vs Republic [2010] eKLR** that:

It is undesirable to charge an accused person with so many counts in one charge sheet. That alone may occasion prejudice. It is proper for a court to put the prosecution to its election at the inception of the trial as to the counts, upon which it wishes it to proceed. Usually, though not invariably, no more than twelve counts should be laid in one charge sheet. The others can be withdrawn under Section 87(a) of the Criminal Procedure Code (cap 75)

30. I believe this is the principle that guided the investigations officer. It is my finding that the constitutional rights of the 1st appellant were not violated.

31. The issue of being remanded for over 24 hours was not raised by the 2nd appellant during the trial. However, the court will nevertheless address it at this stage.

32. Article 49 of the Constitution provides:-

(1) An arrested person has the right—

(a) to be informed promptly, in language that the person understands, of—

(i) the reason for the arrest;

(ii) the right to remain silent; and

(iii) the consequences of not remaining silent;

(b) to remain silent;

(c) to communicate with an advocate, and other persons whose assistance is necessary;

(d) not to be compelled to make any confession or admission that could be used in evidence against the person;

(e) to be held separately from persons who are serving a sentence;

(f) to be brought before a court as soon as reasonably possible, but not later than—

(i) twenty-four hours after being arrested; or

(ii) if the twenty-four hours ends outside ordinary court hours, or on a day that is not an ordinary court day, the end of the next court day;

(g) at the first court appearance, to be charged or informed of the reason for the detention continuing, or to be released; and

(h) to be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released.

(2) A person shall not be remanded in custody for an offence if the offence is punishable by a fine only or by imprisonment for not more than six months.

33. I have gone through the submissions of the 2nd appellant and note that he has not indicated the date of arrest and the date he was arraigned in court. From the court file it appears that the date of plea was 17/04/2014. The charge sheet gives 3/04/2014 as the date of arrest and 7/04/2014 as the date the accused was arraigned in court.

34. It is trite law that where an accused person's rights have been violated under Article 49 of the Constitution, he has a right to sue the state for damages.

35. The Court of Appeal held in the case of **JULIUS KAMAU MBUGUA VS REPUBLIC Criminal Appeal No. 5 of 2008** which was cited with approval in the case of **John Mwangi Wachira Vs Republic [2016] eKLR** that extra-judicial incarceration has no relation to the criminal

trial process and each process must be dwelt with separately. The court pointed out the provisions of Section 72(6) of the repealed Constitution that allowed victims of such incarceration to seek compensation through a civil process.

36. The 2nd appellant herein has a right to seek a civil remedy for damages. The prosecution adduced evidence to demonstrate that the two appellants were employees of the complainant. Alexander Mugo M'Tetu based at the main office in Embu.

37. The first appellant was the cashier while the second appellant was the company manager. The company was carrying out business of distribution of Keroche Breweries products and had several depots outside Embu town. The letters of appointments were produced and supported by the evidence of PW1 and PW2.

38. It was explained that the customers used to bank money in the company account No. 2023177512 at Barclays Bank Embu and present slips to the office as they collected their stocks. The practice was that customers rarely paid for stock purchases. Any cash paid was received by the cashier and subsequently banked. Some malpractices in handling cash, stealing stock and cash was discovered by the company. This theft was covered using fake banking slips purportedly showing that the amount had been banked in the account.

39. In count I PW1, PW7 and PW confirmed that the banking slip of Ksh.156,000/- was fake. The amount was not banked in PW2's bank account. This evidence was supported by a letter from the manager of Barclays 1st appellant made a false entry in the stock register that the said amount was banked by PW7 who denied it in his evidence.

40. In count II, the banking slip of Ksh.156,000/= dated 8/03/2013 was found to have been prepared by the 1st appellant. The evidence of the document examiner PW12 corroborated that of PW1, PW6 and PW11 proving that the money indicated in the banking slip was stolen.

41. The 1st appellant made the false entry in the stock records while the 2nd appellant prepared the banking slip. This is evidence of theft in that the money was not banked in the business bank account. As the learned magistrate rightly found, the prosecution proved that the appellants jointly stole Ksh.156,000/= from their employer on the date of 8/08/2013.

42. Count III is supported by the evidence of PW1, PW6, PW10, 11 and PW12. The banking slip in question was made by the 2nd appellant and was used to steal funds of the company. The prosecution established that the two appellants made the document without authority and with intent to defraud. With the handwriting and signature having been confirmed to be that of the 1st appellant, the denial in the defence was not plausible.

43. In regard to count IV PW1 testified that some signatures had been forged in the fake banking slip of Ksh.176,400/= purporting that other people including himself had banked the money. PW3 testified that he did not bank the money for purchase of stock. PW11 confirmed that the money was never banked in PW2's account on the 28/3/13. The so called official stamp of the bank was found to be fake. The bank statements for the relevant period showed that there was no such banking done.

44. The 2nd appellant made a false entry in the register with an intent to defraud the complainant of the said sum. He also made the fake banking slip. He was the depot manager charged with overseeing the running of the complainant's business. The funds under his care was not accounted for.

45. The document examiner PW12 confirmed that forgery and fraudulent false entries in the stock registers had been made by the 2nd appellant.

46. It is my considered opinion that the prosecution established that the offences in counts IV, V and VI against the second appellant.

47. In count VII the second appellant was charged with making fraudulent entries that Ksh.179,150/- had been banked by PW3 on 11/09/2013. The evidence of PW3 was that he never made the banking of the said amount. The document examiner corroborated the evidence of PW1 and PW11 that the second appellant had forged the slips and made a false entry in the stock register with intent to defraud.

48. PW7 testified that the bank did not receive the funds in the business account on the 11/09/2013. The funds were not traced and the 2nd appellant was responsible from the evidence adduced.

49. I find the evidence of PW1, PW6, PW11 and PW12 overwhelming in respect of counts VI, VII and VIII.

50. In count IX, the second appellant faced the charge of fraudulent false accounting in regard to Ksh.156,000/= The banking slip dated 04/11/13 was found to be forged from the evidence of PW11 by PW12. It was established that the second appellant had prepared the slip and with intent to defraud his employer. The evidence of PW1, PW6, PW10, PW11 and PW12 supported the charge of fraudulent false account in the register, the forgery of the banking slip and the fact that the funds were not accounted for.

51. This evidence was overwhelming in support of counts IX, X and XI against the second appellant. His defence did not shake the prosecution's evidence.

52. In counts XII the second appellant is charged with forging banking slip for Ksh.162,000/- on 16/02/13. PW11 testified that the banking slip was fake as detected from the fake official stamps and in comparison with the bank statements. This evidence corroborated that of PW2, PW3, PW10, PW11 and PW12.

53. I have considered the defences of appellants and find that they are not plausible. The learned magistrate rightly rejected them as mere denials. This case was strongly backed by documentary evidence which was not shaken by the denials of the appellants. I find that the convictions in counts I, II, III, IV, V, VI, VII, VIII, IX, X, XI and XII were supported by cogent evidence and are safe. I hereby uphold the convictions in all the said counts.

54. The sentences provided for the offence of fraudulent false accounting contrary to Section 330(b) of Penal Code is a maximum of seven (7) years imprisonment. For the offence of stealing by servant contrary to Section 268(1) as read with Section 281, the maximum sentence provided is seven (7) years imprisonment. The maximum sentence for the offence of forgery contrary to Section 349 of the Penal Code is three (3) years imprisonment.

55. The appellants were sentenced to seven years imprisonment for the offences of fraudulent false accounting and for stealing by servant on each count. For the offences of forgery, the two appellants were sentenced to three (3) years imprisonment for each count. The sentences in all the counts were to run concurrently.

56. The appellants were first offenders at that time. The second appellant said he was married with children while the first appellant said she was a mother of a two year child.

57. The sentences meted out were not excessive and were within the law. However, I am of the considered opinion that the mitigation of the appellants ought to have been taken into consideration during sentencing.

58. For this reason I hereby review the sentences in counts I, II, IV, V, VII, VIII, X and XI from seven (7) to four (4) years imprisonment.

59. In respect of counts III, VI, IX and XII the sentence is reviewed from five (5) to two (2) years imprisonment for each count. The sentences will run concurrently as ordered by the trial court.

60. The appeal is hereby dismissed save for the review of the sentences.

61. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 30TH DAY OF MAY, 2018.

F. N. MUCHEMI

J U D G E

In the presence of:-

Appellants

Mr. Mate for Respondent