



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KITALE**

**CRIMINAL APPEAL NO. 59 OF 2017**

*(Being an appeal arising from conviction and sentence in Kitale*

*Chief Magistrate's Court in Criminal Case No. 1882 of 2013*

*delivered on 13/10/2016 by C.C. Kipkorir Resident Magistrate)*

**JOEL ROBERT OMWOYO.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**J U D G M E N T**

1. The appellant was charged with the offence of **Stealing by servant contrary to Section 281 of the penal code**. The particulars of the charge were that **on diverse dates between 11/8/2009 and 30/8/2013 at Kitale Cedar ECD TTC Office in Trans Nzoia County being a servant to Enock Juma Nyangori stole Kshs 1,187,335/= the property of Enock Juma Nyangori which came into his possession by nature of his employment**.

2. He was convicted and sentenced to 4 years imprisonment. He has filed this appeal citing the grounds inter alia that the trial court failed to take into consideration his defence, the trial court relied on circumstantial evidence and that the court shifted the burden of proof.

3. The summary of the proceedings at the trial court were as hereunder. **PW1 the complainant** is the owner of Kitale ECD TTC which train teachers. The appellant had been employed as an office clerk and part of his duties was dealing with finance. He was to receipt the bank slips from the students and issue them with appropriate receipts. The complainant by chance came to discover that part of the money paid by the students were not receipted and that the appellant had fake receipts. He did order for an audit where it was discovered that indeed there were fake receipts and other banking irregularities. In his journey of discovery, two students Agnes and Joyce revealed what had taken place. He did identify various receipts which had all the anomalies. The investigations were done and the appellant arrested and charged.

4. **PW2 Wilson Wilberforce Ombima** an accountant did carry out the audit and produced his report. The long report indicated that about Kshs 1,113,035 were receipted but not banked, unauthorized receipts books were used and some banking slips were filled but not submitted to the bank later which that no money were banked. In short there was falsification of records.

5. **PW3 George Naliki Naongasi** a printer testified that he had been printing receipt books for the complainant. That on November 27 2012 he was called by the appellant, a person he knew and gave an order to print a receipt book since the old one had fallen into water. He did and the same was serialised as No. 4701-4800. The appellant paid him a sum of kshs 2100.

6. **PW4 Agnes Mayenot** a student at the said college paid the appellant a sum of kshs 5000 and was issued with a receipt. The complainant inquired whether she had paid and she confirmed. He wanted the receipt but the appellant told her not to give out. She however gave out the receipt which was in the name of Vicky Mukoya.

7. **PW5 Ezekiel Ombasu** teaches at the complainant's school during holiday. He was requested by PW1 to collect receipts of fees from the students. The original receipts had different student names and they decided to look at the bank statements. It became clear that they were not matching and there was a lot of discrepancy. They then reported the matter at the police station.

8. **PW6 P.C. Paul Oduor** carried out the investigations, recorded statements from the witnesses and charged the appellant. The substantive evidence was after the auditor had submitted his audit report as well as the discrepancies in the receipts and bank statements.

9. The appellant gave sworn defence denying the charge. He did not deny that he worked for PW1 from 2011. In 2012 because of pressure of work he told him to get someone else. In 2013 he went home for a funeral and asked him to refund the funeral expenses. His father got a job for him in Eldoret and wanted to hand over to PW1 but the latter was not amused. He was arrested by one Maxwell and later charged. He denied handling the receipts alone.

**Analysis and Determination.**

10. Having gone through the submissions by both the appellant and the learned State Counsel, I find that there is no doubt that the appellant had been employed by the complainant. That he was the only one handling cash and on very limited occasions the cash would be handled by one Maxwell whom the appellant referred him to be a son to PW1.

11. The evidence by pw2, the auditor was watertight and uncontroverted. The anomalies he noticed which included fake receipts inter alia in my view clearly showed that there was consistent theft for a long period of time.

12. It appears from the regulations of the Institutions that no cash was to be handled. If this was so why did the appellant handle cash from the witnesses. Even if he was to handle the same why did he not bank appropriately?

13. The fake receipt was well explained by PW3 who apparently had been producing receipts for the institution. I did not see any iota of collusion or at all.

14. The defence by the appellant was weak and shallow. He did not even explain whether there was actually another person mandated to handle cash apart from him. There was no evidence as he has submitted that PW1's son or wife handled cash. As was explained by PW2 the position between PW1 and the appellant seemed to have been that of trust with less internal controls.

15. Consequently I do find this appeal unmeritorious and the same is hereby dismissed.

**Delivered, signed and dated at Kitale this 27<sup>th</sup> day of September, 2018.**

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**H.K. CHEMITEI**

**JUDGE**

**27/09/18**

**In the presence of:**

**Mr. Kakoi for the Respondent**

**Appellant – present**

**Court Assistant – Kirong**

**Judgment read in open court**