



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CRIMINAL APPEAL NO. 74 OF 2014

CORAM: D. S. MAJANJA J.

BETWEEN

REPUBLIC APPELLANT

AND

MILTON ANUNDA RESPONDENT

(Being an appeal from the original acquittal of Hon.L. Kaitany, RM dated 3rd May 2012 at the Chief Magistrates Court at Kisii in Criminal Case No. 448 of 2011)

JUDGMENT

1. The appellant, **MILTON ANUNDA** faced three charges before the subordinate court. The first count was stealing by servant contrary to **section 281** of the *Penal Code (Chapter 63 of the Laws of Kenya)*. The particulars of the offence were that on diverse dates between January 2011 and May 2011 at Invesco Assurance Company Limited Kisii branch within Kisii County, being a cashier at the said Company, the appellant stole 11 certificates of insurance covers all valued at Kshs. 78,793/- the property of Invesco Assurance Company which came into his possession by virtue of his employment.
2. The second count was breaking into a building and committing a felony contrary to **section 306(a)** of the *Penal Code*. The particulars were that on diverse dates between January 2011 and May 2011 at Invesco Assurance Company Limited office Kisii Branch within Kisii County, the appellant broke and entered a building namely the manager's office and committed therein a felony namely stealing. The third count was fraudulent false accounting by a clerk contrary to **section 330(c)** of the *Penal Code*. The particulars were that on diverse dates between June 2010 and December 2010 at Invesco Assurance Company Limited office Kisii Branch within Kisii County, the appellant, being a cashier to the said company with intent to defraud omitted from the books of account of the said Company the employer, a material particular that is to say the official receipts on the said day of Kshs. 78,793/-.
3. The appellant was acquitted on the three counts. The respondent now appeals against conviction and sentence based on the grounds set out in the petition of appeal dated 19th November 2014. In summary the grounds of appeal were that the trial magistrate failed to consider the entire evidence of the prosecution and defence and failed to find that the evidence was favourable to the prosecution. That the trial magistrate also failed to consider the effect of the failure to call one Rosemary Makee as a prosecution witness and that the trial magistrate erred in law in believing the credible evidence of the defence and disbelieving the evidence of the branch manager, PW 1 which was corroborated by the evidence of PW 2, PW 3, PW 9. The appellant also complained that the trial magistrate erred in acquitting the respondent on non-existent charges as the original charges had been substituted with new charges on 29th September 2011.
4. The prosecution case was that Invesco Insurance ("the Company") decided to do an audit of the financial affairs of their Kisumu branch where the respondent was at all material times a cashier. George Njuguna Mungai (PW 2), the Company Chief Internal Auditor, testified that he conducted an audit in May 2011. The audit revealed that certain insurance certificates were issued yet no money was collected on that account. The audit concluded that Kshs. 78,793/- was missing.
5. PW 2 explained that the insurance certificates belonged to the Company and once they are sold, a receipt is issued and the money banked in the Company account in relation to each certificate. He told the court that the certificates were recovered from the appellant's house by one Rosemary Makee who was the appellant's girlfriend.
6. Joseph Morara (PW 1), the manager of the Company's Kisii branch, confirmed that the respondent was a cashier at the branch at the material time. During the audit, on 2nd June 2011, he received a call from Rosemary Makee. She was in a state of distress and she alleged that the respondent had assaulted her. After she had sought treatment at the hospital and reported to the police, she proceeded with PW 1 and her cousin, David Osawe (PW 3) to the appellant's house. PW 3 recalled that Rosemary told him that the respondent had assaulted her. They all proceeded to the respondent's house at Jogoo Estate. PW 1 and PW 3 testified Rosemary came out of the house with some certificates and

a motorcycle logbook. PW 1 recalled that she also had the office key.

7. An office assistant with the Company, Mercy Moguti Nyaboke (PW 5) testified that in November 2010, she gave the appellant the office keys. She later learnt from the manager that someone had accessed his office although she admitted she never saw the appellant accessing the office. When the keys were shown to her in evidence, she could not identify them.

8. The prosecution also called several insurance agents to testify. Abel Ogle Omwambia (PW 4), an insurance agent at Keroka, testified that on 21st July 2010, he went to the Company's Kisii office, paid money to the appellant to purchase insurance and was issued with an insurance certificate. He was however not issued with a receipt. Cosmas Oguto (PW 6), an insurance agent operating from Gucha, testified that on 10th August 2010, he paid cash to the appellant and received the insurance cover but he never received the receipt. Jackson Opiyo (PW 7), an insurance broker in Rongo, recalled that on 30th August 2010, he paid cash to the appellant for a one-month insurance cover. He was not given the receipt but was given a certificate. Bethwel Nyachai (PW 8), an insurance agent operating in Kisii testified that on 28th August 2010 that he spoke to the appellant on behalf of one of his clients to accept less cash for issue a certificate. He took cash to the appellant and received the certificate but was not paid.

9. The investigating officer, Corporal Collins Opiyo (PW 9) was instructed to conduct investigation into the matter on 2nd June 2001 after receiving a report from PW 2 that the appellant had stolen some insurance certificates and hidden them in his house. He testified that the report was received from Rosemary who was staying with the appellant at the time. By the time she reported to the police, she had the appellant's personal effects, some insurance certificates and a key which upon investigation was a duplicate of that of the manager's office. The certificates recovered were those that the auditor noted were missing and that money had been paid but not remitted to the Company. He recorded statements and decided to charge the respondent.

10. The respondent (DW 1) denied the charges against him in his defence. In sworn testimony, the respondent confirmed that he was employed by the Company as a cashier. He alleged that PW 1 did not want him at the branch when he was deployed there as he had previously reported him to the head office for improper accounting resulting in missing money being deducted from his salary. DW 1 told the court that he got married to Elizabeth Bosibori (DW 2) in June 2010 and after marriage they resided at Nyamatato although Rosemary Makee had been his girlfriend. DW 1 told the court that on 31st May 2011, she called him outside the offence and asked him to marry her but he refused. He was informed on 2nd June 2010 that certificates had been recovered in his house by Rosemary Makee. DW 2 testified that the respondent was her husband and that they had married on 6th June 2010 under customary law. She confirmed that they lived in Nyamatato.

11. It is the duty of this court, being a first appellate court, to subject the evidence on record to a fresh review and scrutiny and come to its own conclusions all the time bearing in mind that it did not see the witnesses testify as to form its own opinion on their demeanour (see **Okeno v Republic [1972] EA 32**). Having reviewed the testimony, I have outlined above, I find as follows.

12. As I understand, the prosecution case in respect of the first count was that the respondent had access to the manager's key which he had duplicated and then took the insurance certificates which he kept in his house. The central character supporting this charge was Rosemary Makee who the prosecution alleged was the girlfriend of the respondent and that they were living together. She was not called as a witness. The question is whether she was an essential witness. **Section 143 of the Evidence Act (Chapter 80 of the Laws of Kenya)** states, "No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for proof of any fact." Further in **Bukenya and Others v Uganda [1972] EA 549**, the East Africa Court of Appeal held that that where essential witnesses were not called, the court was entitled to draw an inference that if their evidence had been called, it would have been adverse to the prosecution case.

13. Rosemary Makee is the person who took PW 1 and PW 3 to Jogoo Estate where the respondent is alleged to have been residing and recovered the 11 certificates. What is noteworthy is that the primary witnesses to the recovery PW 1 and PW 3 did not identify the certificates that were recovered nor were the certificates identified by PW 2 shown to them to identify them as the ones recovered from the house. Thus the only person who could positively verify that the certificates recovered from the house were those that were produced was Rosemary Makee.

14. The second issue is whether the house where the certificates were recovered belonged to the respondent. If indeed the certificates were recovered from his house, then the respondent would obviously be in possession within the meaning of section 4 of the Penal Code and would be required to explain why. In this case apart from what Rosemary told PW 1, PW 3 and PW 9, there was no independent confirmation that the respondent lived in that house. This is particularly significant when this evidence is considered alongside the respondent's case that he was married to DW 2 and lived in Nyamatato. The prosecution did not exclude the possibility of this beyond reasonable doubt.

15. Although the evidence of PW 4, PW 6, PW 7 and PW 8 point to some suspicious activity involving the respondent, the fact is that their evidence required to prove Count 1 was that the respondent stole the certificates. Rosemary Makee was an essential witness who would have connected recovery of the certificates to the respondent. Since she was not called, the charge was not proved.

16. Since the second count was predicated on stealing the certificates, it must necessarily fail. I would further add that the prosecution sought to prove that the respondent had the key to PW 1's office which he accessed and stole the certificates. PW 1 and PW 3 confirmed that a key was recovered from the respondent by Rosemary Makee but when the key was shown to PW 5 in evidence, she stated she had never seen the key before though she is the one who is alleged to have given the office keys to the respondent. The totality of the evidence is that the second count was not proved.

17. The third count of fraudulent false accounting must likewise fail following the finding that the 11 certificates were not stolen. In any case, PW 1 and PW 3 did not connect the certificates to anything the respondent did or recorded that would indicate that he did issue the 11 certificates to specific named persons who paid cash to the appellant and he failed to record the transaction and issue receipts. PW 4, PW 6, PW 7 and PW 8 all testified that they paid cash to the appellant, received certificates and were never issued with receipts. None of them pointed to the 11 certificates that were allegedly stolen and the amounts the stated they paid did not amount to Kshs. 78,793/-.

18. Like the trial magistrate, I have come to my own independent conclusion that the prosecution failed to prove the three charges against the respondent. The appeal is dismissed.

DATED and DELIVERED at KISII this 26th day of September 2018.

D.S. MAJANJA

JUDGE

Mr Otieno, Senior Prosecution Counsel, instructed by the Office of the Director of Public Prosecutions for the appellant.

Mr Njagi instructed by Wamiti Njagi and Associates for the respondent.

Mr Murigori, Advocate for Invesco Insurance Company Limited.