REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CRIMINAL APPEAL NO. 139 OF 2012

LUKA CHEBII MITEI.....APELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An Appeal from the Judgment of the Resident Magistrate Honourable

G. Adhiambo in Kapsabet Criminal Case No. 3400 of 2010,

dated 24th July, 2012)

JUDGMENT

1. The appellant *Luka Chebii Mitei* was charged in three counts with the offences of Stealing by a person employed in the Public Service contrary to *Section 280* of the *Penal Code* and in two counts with the offence of Stealing by Servant contrary to *Section 281* of the *Penal Code.*

2. After a full trial, he was convicted in count 2 of the offence of stealing from a servant Contrary to *Section 281* of the *Penal Code* and was acquitted of counts I and count 3 for lack of sufficient evidence.

3. Upon his conviction in count 2, he was sentenced to pay a fine of Ksh 40,000 in default to serve eight months' imprisonment.

4. The appellant was aggrieved by his conviction and sentence. He proferred an appeal to this court vide a petition of appeal dated 6th July 2012 in which he raised the following five grounds;

i. ***That the learned trial magistrate erred in law and in fact in convicting the appellant against the weight of evidence which failed to meet the required standards as required by law.***

ii. ***That the learned trial magistrate erred in law and in fact by grossly shifting the burden of proof to the appellant.***

iii. ***That the learned trial magistrate erred in law and in fact by failing to consider the appellant's defence to the allegations of payments made by way of M-PESA.***

iv. ***That the learned trial magistrate erred in law and in fact by convicting the appellant on charges based on a defective charge sheet.***

v. ***That the learned trial magistrate erred in law and in fact by awarding the appellant an excessive sentence.***

5. At the hearing, the appellant was represented by learned counsel *Mr. Kipnyekwei* while learned prosecuting counsel *Ms. Oduor* appeared for the state.

In his submissions, *Mr. Kipnyekwei* argued that the trial magistrate erred in law in convicting the appellant on the basis of a defective charge sheet; that the trial court failed to appreciate that the charges in count 2 were not proved beyond any reasonable doubt and that the court erred by failing to consider the appellant's defence. Counsel further submitted that the prosecution's case was full of contradictions especially regarding amount of money allegedly owed by Cheptil Secondary School and the amount allegedly received by the appellant through M-pesa on behalf of the employer the NSSF but which he never acknowledged receipt; that the prosecution failed to call crucial witnesses like the principal of the school and that the learned trial magistrate failed to consider the appellant's defence but instead dismissed it as a mere denial.

6. The state did not contest the appeal. Learned prosecuting counsel conceded to the appeal on grounds that the charge sheet was defective;

that there was discrepancy in the amount allegedly stolen from NSSF by the appellant; that considering that PW5 the school's bursar confirmed that he was the appellant's friend and that they used to send each other money through M-Pesa, there was doubt whether the money received from him by the appellant through M-pesa was a personal loan and not money meant for NSSF; that the evidence disclosed that the appellant was charged with the offence before PWI received confirmation about remittance of money owed to NSSF through the appellant.

7. This is a first appeal to the High Court. I am alive to the duty of the first appellate court which is to re-evaluate, re-assess and re-analyse all the evidence tendered before the trial court to reach my own independent determination while bearing in mind that unlike the trial court, I did not have the advantage of seeing or hearing the witnesses testify.

See: ***Okeno V Republic (1972) EA 32; Kinyanjui V Republic (2004)2 KLR 364; Patrick & Another V Republic (2005)2 KLR 162.***

8. I have carefully considered all the evidence on record; the grounds of appeal; the judgment of the learned trial magistrate and the submissions made on behalf of the appellant and the state. Having done so, I do not agree with *Mr. Kipnyekwei* and *Ms Oduor's* submissions that the charge in count 2 was defective. On the face of it, the charge as filed does not reveal anything to suggest that it was defective. It contains the statement of the offence; the law creating the offence and sufficient particulars in support thereof.

9. I however agree with learned counsel's submission that the evidence adduced before the trial court regarding what was owing to NSSF and what was actually received by the appellant through M-pesa allegedly on his employer's behalf did not tally. According to the evidence of PWI who was the prosecution's star witness, the NSSF Kapsabet Branch had received a cheque of Ksh 11,600 from Cheptil Secondary school in payment of dues owed by the school to the NSSF. The cheque however bounced and PWI asked the school for its replacement.

10. In a letter dated 8th December, 2010 (Pexbt2), the school's principal confirmed that the bounced cheque had been replaced by cash payment of Ksh 13,500 to the appellant through Mpesa on 9th March, 2010. The appellant was one of NSSF's enforcement officers and was supposed to have received the money on behalf of his employer. The money was to cover the debt of Ksh 11,640 and a penalty of Ksh 1860.00. But the letter did not specify what penalty that was and how it had been computed. PWI in her evidence claimed that she just demanded that the bounced cheque for Ksh 11,640 be replaced. She did not say that the school was liable to pay any penalty.

11. It is also important to note that for undisclosed reasons, the author of the said letter was not availed as a witness to authenticate its contents.

PW4 *A.G Abdulai Surau* who carried out an audit on the NSSF Kapsabet Branch did not mention that the fund was owed Ksh 13,500 by Cheptil Secondary school.

12. In his defence, the appellant gave a sworn statement and denied having committed the offence charged in count 2. He admitted that he was employed as an enforcement officer at NSSF Kapsabet Branch; that cheque No. 000068 for Ksh 11,640 meant to pay NSSF remittances by Cheptil Secondary school had bounced and that through phone calls and letter dated 14th April 2010 (DEhxbt 2(b), he had directed the school Principal to replace the cheque. He claimed that by the time he was interdicted in June 2010, the school had not complied with his demand. He swore that the money amounting to Ksh 13,500 received via M-pesa from PW5, the school's bursar was a personal loan and was not meant to be payment of money owed by the school to NSSF.

13. In his evidence, PW5 admitted that the appellant was a long term friend and that they used to have financial dealings.

A perusal of the letter produced by the appellant as Dexbt 2(b) shows that the school had been directed to replace the bounced cheque only and no penalty was levied on the amount due. Secondly, the replacement was to be made by way of a banker's cheque not through cash payment by M-pesa or otherwise.

14. In view of the foregoing, it is my finding that the prosecution in this case did not prove the charges in count 2 against the appellant beyond any reasonable doubt. The evidence on record amounted to the word of PW5 that the money received by the appellant on M-pesa was meant for his employer against the appellant's word that it was a personal loan advanced to him by PW5. And considering the discrepancy between the amount allegedly owed to NSSF by Cheptil school and the amount received by the appellant coupled with PW'5's admission that the two were friends and had previous financial dealings, it cannot be said that the appellants claim in defence was farfetched.

15. In criminal cases, the burden of proof rests on the prosecution throughout the trial to prove all elements of a preferred charge against an accused person beyond any reasonable doubt. That burden does not shift to an accused person.

In this case, I am satisfied that the appellant in his defence raised a reasonable doubt in the prosecution's case which doubt should have been resolved in his favour.

16. The learned trial magistrate failed to properly analyse the evidence placed before her in its entirety and thereby reached an erroneous conclusion that count two had been proved against the appellant beyond reasonable doubt. I thus find that the appellant was not properly convicted in count 2. His conviction was not safe and cannot be allowed to stand.

17. I consequently find merit in the appeal and it is hereby allowed. The conviction in count 2 is accordingly quashed and the sentence set aside. The fine of Ksh 40,000 paid by the appellant on 24th July, 2012 should be refunded to him.

It is so ordered.

C.W GITHUA

JUDGE

DATED, SIGNED and **DELIVERED** at **ELDORET** this 28th day of February 2017

In the presence of:

The appellant

Mr. Kipnyekwei for the appellant

Ms . Kigegi for the State

Mr. Lobolia Court Clerk.