



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUSIA
CRIMINAL APPEAL NO. 2 OF 2017

1. BENSON KIBET CHUMO
2. ROBERT KIZITO KWENA.....APPELLANTS

VERSUS

REPUBLIC.....RESPONDENT

(From the original conviction and sentence in criminal case No.1116 of 2014 of the Chief Magistrate's Court at Busia by Hon. H.N Ndung'u (Miss) – Chief Magistrate)

JUDGMENT

BENSON KIBET CHUMO and **ROBERT KIZITO KWENA** the appellants, were charged with an offence of stealing by servant contrary to section 281 of the Penal Code. They were alternatively charged with an offence of conspiracy to commit a felony contrary to section 393 of the Penal Code. They were convicted in the alternative charge.

The particulars of the offences were that on diverse dates between 1st and 18th October 2010, at the **KENYA POST OFFICE SAVINGS BANK**, Busia Branch, in Busia County, being servants of the said Bank, jointly stole Kshs.7,006,256.60, the property of the said **KENYA POST OFFICE SAVINGS BANK**, which came into their possession by virtue of their employment. Alternatively, at the same period, they conspired to steal Kshs. 7,006,256.00, the property of the said **KENYA POST OFFICE SAVINGS BANK**.

Each appellant was sentenced to serve twenty four months imprisonment.

They have appealed against both conviction and sentence.

The first appellant was represented by Mr. Nyegenye, learned counsel while the second appellant was represented by Mr. Jumba learned counsel.

The first appellant raised some five grounds of appeal which did not challenge the conviction but the sentence. The second appellant raised eight grounds of appeal that can be summarized as follows:

1. That the learned trial magistrate erred in law and in fact by ignoring glaring contradictions in the prosecution case.
2. That the learned trial magistrate erred in law and in fact by failing to find that all the ingredients of the charge of conspiracy were not proved.

3. That the learned trial magistrate erred in law and in fact by ignoring the appellant's defence.

The state conceded the appeal through Ms. Ngari, the learned counsel.

The facts of the prosecution case were briefly as follows:

A red flag was raised when some anomalies were detected from the system on the activities at the Busia Branch of the Kenya Post Office Savings Bank. When the Branch was visited and a physical check was done, some theft was established. The same was linked to the 1st and the 2nd appellant who were manager and assistant manager of the Branch respectively.

Both appellants denied any involvement in either of the offences.

This is a first appellate court. As expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court and I have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated case of **OKENO vs. REPUBLIC [1972] EA 32**.

From the evidence on record, it was established that the first appellant was the Branch manager. Amongst other duties, he managed and controlled the safe exclusively with the second appellant, who was his assistant. The first appellant held the combination to the safe while the second appellant held the key. The two had to operate together to gain access to the safe and none of them could gain access to the safe in the absence of the other. These were undisputed facts. The other undisputed facts were that the opening balance on the 21st October 2010 was Kshs. 7,524,359/= However the actual cash at hand after counting was Kshs. 18,104/=.

In his defence, the first appellant blamed the anomaly on system failure. However, during cross examination he testified that if the system broke down, the operations stopped and no services could be offered to customers. His contention that the anomaly was brought about by the system failure has no basis.

As against the both appellants the following evidence was adduced and can be discerned from the record:

1. None of them was able to give a satisfactory explanation as to why there was a big variance between the opening balance on 21st October 2010 and the cash at hand.
2. Though the safety measures undertaken by the Bank was to have the two and another to jointly and independently control access to the safe, on the 21st October 2010, the first appellant had the key to the door, key to the safe and the combinations to the safe. No explanation was forthcoming from them as to why this was so.

When the first appellant was asked by **GABRIEL OMOLO OSIMBO (PW2)** to open the safe at about 8:30 a.m, he declined. He went away from the office and returned at 12 noon where he only agreed to open after he was prevailed upon. This is not conduct of an innocent man. No wonder he never appealed against conviction.

My perusal of the entire record indicate that there was sufficient evidence to convict the appellants on the substantive charge. I accordingly quash the conviction on the alternative charge and thereof substitute it with a conviction on the charge of stealing by servant contrary to section 281 of the Penal Code.

Section 281 of the Penal Code states as follows:

If the offender is a clerk or servant, and the thing stolen is the property of his employer, or came into the possession of the offender on account of his employer, he is liable to imprisonment for seven years.

In the circumstances of this case the sentence of two years was extremely lenient. I will not disturb it. Both appellants to serve the sentence from the date of conviction. Since they were out on bond pending appeal, they will serve the remainder of the sentence they had served before they were released on bond. The appeal by both appellants is dismissed.

DELIVERED and SIGNED at BUSIA this 21st day of June, 2017

KIARIE WAWERU KIARIE

JUDGE