



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CRIMINAL DIVISION**  
**CRIMINAL APPEAL NUMBER 75 of 2016**

**SAMUEL KANG'ARU.....APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

*(An appeal from the original conviction and sentence in the Chief Magistrate's Court at Kibera Cr. Case No. 3678 of 2013 delivered by Hon. B. Ochoi, PM on 11<sup>th</sup> May 2015).*

**JUDGMENT.**

**Background**

Samuel Kang'aru, herein the Appellant was charged in count I with the offence of stealing by servant contrary to **Section 268(1)** as read with **Section 281 of the Penal Code**. The particulars of the offence were that on diverse dates between 31<sup>st</sup> November, 2011 and 6<sup>th</sup> July, 2012, at Dalamere Flats Milimani in Nairobi within Nairobi County, being a servant to Nancy Nduta Njoroge, stole Kshs. 963,500/- the property of Nancy Nduta Njoroge which came into his possession by virtue of his employment.

In count II he was charged with the offence of making a document without authority contrary to **Section 357(a) of the Penal Code**. The particulars of the offence were that on 1<sup>st</sup> March 2012 at an unknown place within the Republic of Kenya, with intent to defraud and without legal authority or excuse made a certain document namely a lease agreement purporting it to be a genuine lease agreement duly signed by the land lord Nancy Nduta Njoroge.

In count III he was charged with the offence of uttering a false document contrary to **Section 353 of the Penal Code**. The particulars of the offence were that on 1<sup>st</sup> March, 2012 at Mozal Motors Railways Headquarters in Nairobi within Nairobi County, knowingly and fraudulently uttered a certain document, namely a lease agreement duly signed by the landlord Nancy Nduta Njoroge.

The Appellant was found guilty on all counts. He was convicted accordingly and sentenced to serve imprisonment of 12 months, 24 months and 6 months respectively. Sentences were to run concurrently. He was dissatisfied with that court's decision and has lodged the present appeal by a memorandum of appeal filed on 25<sup>th</sup> May, 2016. The grounds of appeal canvassed are that his defence was disregarded, that the prosecution evidence was contradictory, that the evidence did not support the charge, that the police investigations were biased and that the sentence was inordinately excessive.

**Submissions**

The Appellant was represented by learned counsel Mr. Kamwaro who relied on written submissions filed by the firm of Kabathi and Co. on 19<sup>th</sup> July, 2017. In summary, counsel submitted that the prosecution did not prove the three counts beyond a reasonable doubt. He set out the background to the case being that the Appellant was employed by PW1, the complainant, as an agent supervisor and massager. Amongst his tasks was to collect rent from the Milimani rental flats. He stated that the rent would be collected in either cash, mobile money transfer (M-pesa) services, cheques or direct bank deposit. The Appellant would occasionally use the money to pay PW1's utility bills. In this respect, he had explained the discrepancies in the receipts that were produced numbers 597, 599, 699 and 705 for which monies were used to pay revenue to Kenya Revenue Authority. It followed then that the Appellant could not adequately account for all the monies he received from tenant as being monies required to be transmitted to PW1. On the issue of lease agreement, the Appellant submitted that PW1 instructed him to sign it. He submitted that it was PW1 who prepared it and that his execution of the document was so as to facilitate expedient services to the tenant. Furthermore, he had transmitted all the monies received by M-Pesa to PW1 or utilized it for payment of PW1 utilities.

Counsel submitted that the evidence of the statement of the witnesses was contradictory and did not support the charges against the Appellant. He submitted that with respect to count I, the prosecution was enjoined to demonstrate that he intended to use the money he received for his own benefit a fact that was never established. He pointed to the evidence of PW5 who testified that he paid large sums of money to the Appellant but was not issued with receipts, an allegation that was contradicted by PW3 who testified that he was issued with receipts on making payments. Furthermore, the witnesses did not state whether they requested for receipts and were not issued with them.

Counsel went on to submit that the investigations were biased. This was in view of the fact that although it was alleged that PW1 lost the sum of Kshs. 963,500/=, no evidence to that effect was adduced. In any event, according to the counsel, the audit report which the court relied upon was produced in court by an unqualified person. That is to say that although the report was on a letter head of an auditor, the person who testified in court and adduced it admitted that he was not a qualified accountant or auditor; therefore that report was inadmissible. Counsel relied on the case of **Mutonyi and another vs Republic [1982] eKLR** to buttress the submission that for an expert document to be admissible, it must be produced by the maker.

In furtherance to the above, counsel submitted that the record of Mpesa transactions adduced in court showed that he transmitted various amounts of money to PW1. It was questionable in the circumstances that the trial court arrived at a sum of Kshs. 315,000/= that he sent to PW1's mobile phone. He submitted that even if that were the case, he ought not to have been charged for the amount stated in the charge sheet. In that regard, he submitted that counts II and III could not stand because the prosecution had failed to establish that the lease agreement was made with the sole intention of defrauding PW1. In the same spirit, it was not established that he uttered the said lease agreement to PW5 because he intended, knowingly, to defraud PW1. In that regard, counsel was of the view that the elements of the offences were not established beyond a reasonable doubt.

On sentence, counsel submitted that the same was harsh and excessive in the light of the fact that the Appellant was a first offender. He submitted that the appeal had merit and urged the court to allow the same.

On behalf of the Respondent, learned State Counsel, M/s Atina opposed the appeal. She filed written submission on 25<sup>th</sup> September, 2017. Her case was that the Appellant failed to deposit the amounts of collected rent into the account of PW1 as had been agreed between them. She denied that any evidence was tendered to establish that the Appellant used some of that money to either pay PW1's employees or her utility bills.

On prove of count I, Ms. Atina submitted that the prosecution ably demonstrated that the Appellant converted the money he received for his own use by the fact that he failed to transmit it for the purpose it was intended. Likewise, with regard to count II and III, the prosecution was able to demonstrate that the Appellant did not have the authority of PW1 to prepare the lease agreement and subsequently execute it

on behalf of PW1 as landlady and on his behalf as a witness. She added that the prosecution further demonstrated that it was by use of the lease agreement which was issued to PW5 that PW5 paid rent and the Appellant failed to transmit it to PW1. In any case, the Appellant did not dispute the fact that he made the lease agreement, executed it both as a 'landlady' and as a witness save to add that he was acting under the instructions of PW1.

With regard to sentence, Ms. Atina was of the view that the same was legal and reasonable. She particularly cited the sentence in count II in which the Appellant was charged with making a document without authority which offence carries a maximum of seven years imprisonment but the Appellant was only sentenced to serve two years imprisonment. Likewise, in count III, he was only sentenced to six months imprisonment against a possible term of three years imprisonment. Respectively, she was of the view that the sentence was also lenient. She urged the court not to disturb the same. In conclusion, counsel submitted that the appeal lacked merit and urged the court to uphold both the conviction and sentence.

### **Determination**

Before I delve into the merit of the case, it is important I point out that a fundamental legal procedure was omitted at the trial. This was with respect to non-compliance with **Section 211 of the Criminal Procedure Code**. The same reads;

*At the close of the evidence in support of the charge, and after hearing such summing up, submission or argument as may be put forward, if it appears to the court that a case is made out against the accused person sufficiently to require him to make a defence, the court shall again explain the substance of the charge to the accused, and shall inform him that he has a right to give evidence on oath from the witness box, and that, if he does so, he will be liable to cross-examination, or to make a statement not on oath from the dock, and shall ask him whether he has any witnesses to examine or other evidence to adduce in his defence, and the court shall then hear the accused and his witnesses and other evidence (if any).*

I need not emphasize that the provision obligates the court to personally explain to the accused person the various ways by which he should defend himself. That onus cannot be delegated. It must also be borne on the record that the court complied with explaining to the accused person the manner by which he should defend himself. The failure to comply with this provision renders the entire trial defective and ultimately a nullity. From the record of proceedings, a ruling under Section 210 of the Criminal Procedure code was delivered on 29<sup>th</sup> June, 2015. Immediately after the delivery, counsel for the Appellant, Dr. Kimaru addressed the court as follows:

*“the accused will give sworn defence, I pray for a date for defence. We shall not call any witness.”*

The court then recorded as follows:

*“defence hearing on 19<sup>th</sup> August, 2015. “*

Clearly, the trial magistrate did not record that he had complied with his mandatory duty of explaining to the accused the various ways by which he should defend himself as provided under Section 211. In the circumstances, I hold and find that the entire trial was defective and a nullity. This warrants the court to order a retrial. However, before a retrial is ordered, several factors should be considered including that the retrial would most likely result in a conviction, that the retrial should not aid the prosecution to fill up gaps in its case, that no injustice shall be occasioned to an accused person, that the retrial should be in the interest of justice and on the whole, that the case should be decided on its own merit. **See Mwangi vs Republic [1983] KLR 522.**

In count I, the Appellant was charged with stealing by servant the sum of Kshs. 963,500/=. The evidence adduced by the prosecution was that the witnesses namely; PW3, PW4, PW5, PW6 and PW7 had

transmitted a total of Kshs. 393,895/= to the Appellant. Evidence of M-pesa transactions showed that he had in turn but on separate dates sent to the complainant, PW1, a total of Kshs. 279,070/=. This makes a difference of Kshs. 116,425/= which should be assumed ought to be the amount reflected in the charge sheet. But in an interesting twist of events, PW1 too had sent to the Appellant on various dates separate amounts totaling to Kshs. 280,020/=. This can be interpreted then that there was a debit owed to the Appellant by PW1 as opposed to the Appellant owing PW1 the amount charged.

It is trite that evidence adduced by the prosecution must always support the charge. The failure to do so must always lead to the conclusion that an offence was not proved beyond a reasonable doubt. In the present case therefore, it was the onus of the prosecution to demonstrate that the Appellant had stolen the sum of Kshs. 963,500 from PW1. The evidence adduced unfortunately contrasted the charge itself. Furthermore, as rightly submitted by the Appellant's counsel, the audit report relied on as a confirmation of the amounts stolen was not produced by an expert in the field of accounts. I need then not then belabor to state that count I was not established to the required standard. Therefore, a retrial is unlikely to result in a conviction.

However, with respect to count II and III which were offences of making a document without authority being a lease agreement and uttering the same to Mozel Motors, Railways Headquarters, my view is that sufficient evidence was adduced in their respect. PW1 clearly testified that she had not authorized the Appellant to sign the lease agreement on her behalf as the landlady. He neither was also authorized to sign the same as a witness. By his own admission the Appellant conceded to having made the lease agreement and gone further to sign it on behalf of the landlady and as a witness. PW5 on behalf of Mozel Motors confirmed that the Appellant issued him with the said lease agreement. With respect, I have no doubt in my mind that if a retrial was ordered the two counts would be established beyond a reasonable doubt. They are also independent offences for which conviction would not be based on the success of proof of Count I.

However, the sentences were ordered to run concurrently which translates to a total of two years. He was sentenced on 11<sup>th</sup> May, 2015. By the time he was released on bail pending hearing and determination of the appeal on 7<sup>th</sup> March, 2017, he had already served one year, ten months thereby leaving a balance of two months to complete the sentence. It cannot therefore be in the interest of justice to order a retrial. My view is that the Appellant has served sufficient sentence.

In the result, I quash the conviction and set aside the respective sentences in all the counts. I order that he be forthwith set free unless otherwise lawfully held. It is so ordered.

**Dated and Delivered at Nairobi this 21<sup>st</sup> day of November, 2017.**

**G.W. NGENYE-MACHARIA**

**JUDGE**

**In the presence of:**

- 1. Mr. Nyamberi h/b for Mr. Kamwaro for the Appellant*
- 2. Miss Akunja for the Respondent.*