



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NO. 176 OF 2011

MICHAEL KIBUCHI GITUTO.....APELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

FACTS

1. The Appeal arises from the judgment delivered on 10th August, 2011 by the Hon. S.M.Muketi (CM) in **Nyeri CMCCR No.656 of 2007**. The appellant had been charged with two (2) counts of falsification and four (4) counts of misappropriation of government funds.
2. Counts I and III relate to offences of Falsification of Register contrary to Section 361 of the Penal Code; that on the 17th June, 2005 and the 3rd January, 2006 the appellant without lawful authority knowingly made entries in a cash book and a register purporting to have banked Kshs. 62,620/20 and Kshs.454,904/40, respectively, which facts he knew were false or untrue.
3. Counts II, IV, VI and VII relate to the offences of Stealing By a Person Employed in the Public Service contrary to Section 280 of the Penal Code; that on the 17th June, 2005; and on the 3rd January, 2006; and on diverse dates between 29th June and 8th March, 2006; and on the 13th March, 2006 the appellant being a person employed in the Public Service stole the sum of Kshs.62,620/20, Kshs.454,904/10, Kshs.306,047/- and Kshs.134,454/95, respectively, which had come into his possession by virtue of his employment.
4. He was found guilty on all the Counts and was convicted and sentenced as follows; On Counts I and III the appellant was fined Kshs.100,000/= on each count or in default to a term of two (2) years imprisonment on each count; On Counts II, IV, VI and VII to a fine of Kshs.50,000/- on each count or in default to a term of twelve (12) months imprisonment on each count.
5. The appellant being aggrieved with the decision preferred this appeal both on conviction and sentence and listed eight (8) Grounds of Appeal in his Petition of Appeal which are inter alia;
 - i. That the Learned trial magistrate erred in law and in fact in finding that the prosecution proved its case beyond any reasonable doubt despite the inconsistencies, contradictions and loose ends in its evidence.
 - ii) That the learned trial magistrate erred in law and in fact in finding that the prosecution had proved its case beyond any reasonable doubt while there lacked sufficient evidence in support of any of the VII counts preferred against the appellant.
 - iii) That the learned trial magistrate erred in law and fact in finding that the prosecution had proved their case while the investigating officer admitted in court that he was not conversant with

accounts and mode and thus could not conduct any thorough investigations since he did not have the necessary expertise to carry out investigations.

- iv. That the learned trial magistrate erred in law and fact finding that the prosecution had proved their case by relying on expert evidence while the court did not establish the manner or method which was used by the alleged expert witnesses to form their opinion in order to guide itself appropriately before relying on their evidence.
 - v. That the learned trial magistrate erred in law by writing a judgment which contravened Section 169 of the Criminal procedure Code when the trial magistrate failed to analyze the evidence of the 1st accused person followed by a decision based on the analysis of the evidence.
 - vi. That the learned trial magistrate erred in law and fact in convicting the appellant based on defective charges by virtue of their being omnibus.
 - vii. That the learned trial magistrate erred in law and fact in convicting the 1st accused person on all counts and thereby ignoring his defence while it raised serious and reasonable doubts as to whether the 1st accused person was rightly charged and whether the prosecution had proved its case to the required standard.
- Viii) That the Appellant appeals against the sentence as it is excessive and oppressive.
6. At the hearing hereof the appellant was represented by Ms Fatuma and the Prosecuting Counsel for the State was Mr. Njue. Both Counsels made oral presentations. Hereunder is a summary of their respective submissions;

APPELLANTS SUBMISSIONS

7. The appellant had eight grounds of appeal; that the trial magistrate erred in finding that the prosecution had proved its case beyond reasonable doubt in all the six counts; whereas there was no evidence to support such findings.
8. That the appellant was charged on Count I because the entry could not be found in the Bank Statement; that the appellant banked the money and was issued with a banking slip; the Board of Survey at Folio 46 made an entry and confirmed that this entry was correct; this verification could not have been done without the banking slip being seen; that the prosecution failed to call any official from the Board of Survey and from the Bank to testify; the appellant was therefore wrongly convicted on this Count.
9. On Count III; this entry was verified by the Accountant I who was the appellants supervisor; this supervisor was also the appellants co-accused and was subsequently acquitted; that the evidence of the supervisor was that the banking slip was produced; that on the 19/01/2006 the supervisor having verified the existence of the banking slip both he and the auditor signed Folio 53 (DExb.2); again this auditor was not called as a witness; the appellant was therefore wrongly convicted on this Count as there was evidence of the money having been banked.
10. Counts II and IV related to monies in cheque form; these are the monies referred to in Counts I and II and it was shown that this money was banked and slips issued; that it was also not possible for the appellant to steal money in cheque form; further no bank officials were called by prosecution to testify.
11. That Count VI was defective as it stated that the appellant stole the sum total of Kshs.306,047/- on diverse dates between June and 8th March, 2006; **Loise Wangu (PW3), PW4 and PW5** all these witnesses stated in evidence that they paid these monies to the appellant on dates in the year 2004 which was outside the period subject to the charges which was 2006; therefore the appellant was wrongly convicted on this defective charge.
12. On Count VII the appellant is said to have stolen the sum of Kshs.134,454/95 on the 13/03/2006; the amount was presumed stolen because it was not available as cash; that **PW7** could not state who was to blame for loss as the appellant was not in office.
13. There were lots of inconsistencies and contradictions in the prosecutions' case as no investigations were conducted by the Investigating officer (**PW8**); he relied entirely on the audit report as a basis to charge the appellant; the audit report was prepared despite there being missing receipts and no proper handing over; it was also prepared after the appellant was arrested;

- during this period appellant was not in office; **PW8** stated that the appellant was arrested on the 3/03/2006 and charged on the 13/03/2006.
14. The trial magistrate stated in her judgment that she relied on evidence of an expert; the expert is purportedly the District Accountant; yet he did not state that he was testifying as an expert and did not claim to be one; an expert ought to have been called.
15. In totality Counsel urged the court to allow the appeal as the conviction was unsafe as it was arrived at with no evidence to support it.

RESPONDENTS SUBMISSIONS

16. The appeal was opposed by Prosecuting Counsel for the State who divided his responses into several sub-titles; the first being that **the charges were not defective**; that there were some deficiencies in respect of specific dates relating to when the offences were committed; this arose due to the fact that during investigations no-one could tell when the amount in question was either falsely entered into the record or stolen; that these deficiencies did not make the charges defective; that these defects were also curable under Section 385 of the Criminal Procedure Code.
17. That sufficient evidence was tendered against the appellant and **the charges were proved beyond reasonable doubt**; the evidence of **PW3**, **PW4**, and **PW5** explained how appellant came into possession of monies; that the Audit Report covers a period from 9/06/2004 to 8/03/2006; he urged the court to consider the evidence of **PW7** and the Audit Report which demonstrated that the period of collection of funds as being relevant to the charge; and throughout the case it was not disputed that the appellant was an officer of the Government of Kenya attached to the District Treasurer and that his duties were to collect revenue from the Ministry Of Environment.
18. **PW1** testified that the appellant was forwarding weekly and monthly returns late; this prompted him to transfer the appellant to a different docket; handing over was to be done; whilst attempting to balance the books **PW2** discovered a loss prompting investigations by **PW8**; Counsel conceded **PW8** was not an expert but is said to have consulted **PW1**.
19. That any limitations encountered by the prosecution were caused by the appellant as he was the custodian of the documents and he had the power to hide the evidence that could have been used against him; and that he had no duty to incriminate himself and or aid in the investigations; therefore a presumption of fact was created against the appellant and in turn he was duty bound to dispel this presumption as provided by Section 111 of the Evidence Act; this the appellant failed to do.
20. As for the prosecution **failing to call an official from the Bank**; it was submitted that there was no necessity in calling such a witness; reference was made to Section 14(3) of the Evidence Act that the prosecution was not bound to call a particular number of witnesses to prove a particular point unless demanded by the law; and the court was urged not to draw a negative inference due to such failure;
21. On the issue of **the date of arrest**; the Investigating Officer (**PW8**) stated that the arrest was effected on 3/03/2006 but this evidence does not stand alone; the court was urged to consider dates on the charge sheet which show that the appellant was arrested on the 20/02/2007 and arraigned in court on the 22/02/2007; therefore the appellant was still in office when the offence in Count VII was committed.
22. The **Audit Report was the basis upon which the appellant was charged**; it was the evidence of **PW7** that the audit was done in the months May – June, 2006 and the charges were preferred in 2007.
23. Counsel urged the court to re-evaluate the evidence on record and that the conviction and sentence be upheld.

REJOINDER

24. In a brief rejoinder Counsel for the appellant stated that the burden of proof lies with the prosecution throughout the case and never shifts to the appellant; the prosecution at page 6 of the judgment attempted to shift this burden to the appellant; the evidence of **PW1** and **PW8** was that

the arrest was effected in March, 2006; that the evidence on record also shows that the Audit Report was prepared in June, 2006; as for the date of arrest the court should be guided by the evidence on record and not the charge sheet;

ISSUES FOR DETERMINATION

25. After hearing the parties hereunder are the issues framed for determination;

- a. Whether the prosecution proved falsification;
- b. Whether the issue of intent to defraud or steal was proved;
- c. Whether there were inconsistencies and contradictions in the prosecutions' case;
- d. Whether the prosecution proved its case beyond reasonable doubt on all the six (6) counts.

ANALYSIS

26. This being the first appellate court, it is duty bound to reconsider and evaluate the evidence on record and arrive at its own independent conclusion bearing in mind that I neither heard nor saw the witnesses testify. Refer to the case of **Njoroge v Republic, 1989 KLR 316**.

Whether the prosecution proved falsification to the desired threshold on Counts I and III:

27. The reason the appellant was charged with falsification arose from entries made which were unsupported by bank-slips and that these entries were also not reflected in bank statements: that the sum of Kshs.62,000.02 was indicated in folio 44 of the cash book as having been banked on 17/06/2005; that this amount had no supporting bank slips and was not reflected in the statements for that period; that a reverse entry dated 3/01/2006 was inserted in the Register in the sum of Kshs.454,904/10; that this amount was indicated in folio 54 as having been banked but it was not supported by any paying in slip nor was it reflected in the bank statements for that month.
28. The evidence of **Josphat Tathaga Githaiga (PW1)** was that he was the District Accountant from 2003 to 2006; that he noted that the appellant was not performing his daily, weekly and monthly returns and reconciliations properly; in that the appellant was always late in making the returns and reconciliations; he therefore warned him and thereafter made a re-shuffle and moved the appellant from the cash office;
29. His evidence was that the reshuffling was done in the month of March, 2006; that the appellant was replaced by a Francis Kangangi; that partial handing over was done and was supervised by **PW1's** deputy **Monica Gakeri (PW2)** but the process of handing over was never completed; that **PW2** when inspecting the books she discovered that some monies were missing. **PW1** then invited external auditors to verify and a report was prepared; his evidence was that it was the appellant had made these entries in the cash book and the register.
30. In her judgment the trial magistrate made a finding that it was the appellant who falsified the records and adds that there was no need to call for a mandatory report from the document examiner.
31. This court opines that falsification of a document entails modifying a document for the purposes of deceiving another; that the person falsifying must have acted with criminal intent; that the issues of handwriting, intent and falsification are sequential; therefore the onus was upon the prosecution to first prove the maker of the handwriting, then prove intent and theft then the act of falsification stands proven as a matter of course.
32. From the evidence on record the only reason that linked the appellant to the entries was the fact that he was the Accounts Assistant attached to the office of the District Treasurer, Kirinyaga and that he was in charge of collecting revenue for the Ministry of Environment and Natural Resources;
33. This court concurs with the submissions of Counsel for the appellant that the burden of proof always lies with the prosecution throughout the case and that at no time should it shift to the appellant.
34. There was no direct evidence of falsification and all the evidence of the prosecution witnesses is based on assumptions; this court notes from the evidence of **PW1** that the entries were made by

- the appellant; PW2 does not allude to the maker of the entries she discovered but states that there was no proper handing over; the evidence of **PW7** was that it was not possible to tell exactly when the records were falsified; **PW8** stated that he carried out no investigations of his own but concluded that the signatures were that of the appellant and proceeded to charge him;
35. By his own admission the Investigating Officer (**PW8**) stated that he carried out no investigation whatsoever; it is apparent from the evidence on record that no specimen handwriting of the appellant was taken by the investigator for comparison with the handwritings in the entries.
36. My considered view is that if the entries are alleged to have been falsified there was therefore need to dispel all doubts as to the maker of the entries;
37. After careful perusal of the record I have not sighted any admission by the appellant that he falsified or modified the entries; my considered view is that **PW1** and **PW8** were not experts and lacked training in matters of handwriting and their evidence can at best be described as hearsay and cannot be relied upon as a basis for conviction; therefore without the comparison and/or an opinion from a document examiner the trial court had no basis of arriving at such an evidential conclusion on the handwriting and the maker of the entries and erred in filling gaps where the prosecution had provided no evidence.
38. This court is satisfied that the trial magistrate erred in law and in fact in making a finding that there was no need for a mandatory report from a document examiner; this omission raised doubts in the prosecutions' case on the issue of the maker of the handwriting and the appellant therefore entitled to that benefit of doubt.
39. The ground of appeal that sufficient evidence was lacking to prove these Counts is found to have merit and is hereby allowed.

Whether the prosecution proved intent on Counts II and IV;

40. The main issue here relates to whether the prosecution proved that the appellant's **intention to defraud and or theft** of the sum of Kshs.62,620/20 and Kshs.454,904/10 from the concerned Ministry.
41. The evidence of **PW2** was that from 2001-2007 she worked at the Kirinyaga District Treasury; that in March, 2006 she inspected the Ministry of Environment and Natural Resources books and found that the sum of Kshs.62,000.02 as indicated in folio 44 of the cash book as having been banked on 17/06/2005; that this sum was not reflected in the statements for that period; she also discovered a reverse entry dated 3/01/2006 inserted in the Register in the sum of Kshs.454,904/10; this amount was indicated in folio 54 as having been banked but it was not supported by any paying in slip nor was it reflected in the bank statements for the month of January.
42. **PW6** testified to being an auditor; that he inspected the accounts for Kirinyaga District Office; he testified on **MFI 1(e)** that there were entries in folio 44 indicating that an amount of Kshs.62,620.20 had been banked which amounts were not reflected in the bank statements; he added that this amount had been misappropriated; he further stated that he had looked at entries of bank deposits totaling to Kshs.454,904.10; that no banking slips were availed; and that the amount was not reflected in the bank statement; that he was of the opinion that these monies had also been misappropriated.
43. This witness under cross-examination stated that under government procedure payments are made in cash; but when payments are made in cheque form it would not be possible for any-one to bank these cheques in their personal accounts;
44. He also alluded to the fact that each and every entry must be verified by an accountant; that no one had verified the entry on folio 44; he reiterated that folio 52 was an entry indicating that the sum of Kshs.454,904.10 was banked but the same was not; that he was not able to confirm whether a bank reconciliation was ever done; that he had no mandate to investigate the bank to clarify why some amounts had been banked and other amounts had not.
45. **PW7** evidence was that he was an auditor; that he was called in March, 2006 to carry out an audit for Kirinyaga District; he reiterated that the amount of Kshs.454,904.10 in folio 52 (marked as **MFI 1**) was indicated as having been banked yet there was no receipt or banking slip; that there was also a purported banking of Kshs.62,620.20; he tendered the report marked as **'Pexb.21'**.

46. The Investigating Officer was **PW8**; testified to having been called by the Treasury Office and that he was also shown the cash book entries and the folios; based on the signatures appearing thereon he arrested the appellant and the co-accused and charged them accordingly; upon being cross-examined he confessed to being totally unfamiliar with the accounting process, that he did not understand the entries and had relied entirely on the audit report as a basis to arrest and charge the appellant;
47. It is apparent from **PW8**'s own testimony that he did not carry out any further investigations of his own accord; he never interrogated anyone to establish the fact that there might have been a second or other bank account(s) in existence belonging to and in the name of the Ministry to rule out the possibility that the missing monies might have been banked in such an account, so as to tie up any loose ends.
48. The appellant and his co-accused in their defence provided evidence that raised doubts to the prosecutions' case when they both provided banking slips to verify that the monies were banked and stated that these entries were verified by a witness who was not called to testify by the prosecution; this court reiterates the submissions of counsel for the appellant that it is trite law that the burden of proof never shifts to an accused person (read appellant)
49. **PW6** under cross-examination stated that when payments are made in cheque form it would not be possible for any-one to bank these cheques in their personal accounts; No thorough investigation was conducted by the Investigating Officer to rule out the existence of other bank accounts the evidence of **PW6** and **PW8** did not do justice to the prosecution's case.
50. It would appear from the evidence of **PW6** that these monies in the form of cheques may have been banked in a bank account(s); and that the Ministry may not have been defrauded or deprived of this money as alleged.
51. Yet the trial magistrates finding in her judgment was that;

“The 1st accused falsified and stole.”

“.....This was outright falsification and theft. The court takes judicial notice that Ministry (sic) have specific accounts for revenue collected and it was therefore not necessary to avail any other account.”

52. The loose ends in the prosecutions' evidence demonstrates that the prosecution failed to prove a crucial ingredient of the offence which is ***intention to steal or defraud***; based on the evidence adduced the prosecution also failed to prove that the appellant ***stole and permanently deprived*** the Ministry of the sums of Kshs.62,620.20 and Kshs.454, 904.10 as enumerated in Counts II and IV.

53. Based on the evidence adduced this court is satisfied that the trial court erred in making a finding that:

“.....The 1st accused falsified and stole.”

“.....it was therefore not necessary to avail any other account.”

54. This court is satisfied that the prosecution failed to prove the maker of the handwriting, it also failed to prove intent to steal or to defraud; it therefore follows that the act of falsification also fails.

55. This ground of appeal that the trial court erred in finding that the prosecution proved its case beyond reasonable doubt on these two Counts is found to have merit and is hereby allowed.

Whether the prosecution failed to call crucial witnesses on Counts VI and VII;

56. These Counts relate to stealing of the sums of Kshs. 306,047/- and Kshs.134,454/95 the property of the Government of Kenya; these amounts of money are said to have come into possession of the appellant by virtue of his employment; the first amount comprised of unposted receipts of collections for the period ranging from 29th June, 2004 to 8th March,2006 and the latter was a cash shortage.

57. The sum of Kshs.306,047/- relate to monies collected from **PW3**, **PW4** and **PW5**; all these witnesses stated in evidence that they paid these monies to the appellant on dates in the year 2004; which this court has noted was outside the period subject to that which was stated in the charge; which period reads as “*diverse dates between June-May 2006*”; their evidence can therefore be said to be inconsistent and in contradiction to the particulars spelt out in Count VI.
58. Indeed as Prosecuting Counsel submitted that the prosecution has the discretion in the number of witnesses it so chooses to call; but taking into consideration the evidence of the appellant and his co-accused that the Board of Survey gave them a clean bill of health for the year 2004; this court is of the view that by not calling or making available an official from this Board of Survey an adverse inference can be drawn that Boards evidence would have been adverse to the prosecutions’ case.
59. The sum of Kshs.134,454/95 relates to a cash shortfall; that these monies went missing from the cash box; the evidence of **PW1** was that he was not present when the cash box was opened; and could not state what was in the cash box; that he had been duly informed by the accountant that the cash box was opened in the appellants presence; but still could not attest to what was found in the cash box; that the handing over was partial and incomplete; **PW2** also confirmed in her testimony that there was no handing over as there were anomalies.
60. The evidence of **PW6** was that when inspecting the cash book folio 56 the balance that was supposed to have been in the cash-box was in the sum of Kshs.168,064/95; the sum of Kshs. 33,610 was held as imprest leaving a balance of Kshs. 134,454/95 which sum was missing from the cash box; he concluded that the missing money had been misappropriated; he added that a handing over report and an inventory are two crucial and important documents and that neither were prepared.
61. **PW7**’s evidence was that the cash since the money was not there it was assumed that it had been stolen.
62. The genesis of this Count is missing monies in the cash box; the prosecutions’ evidence was that there was no Handing Over Report nor was an Inventory prepared on any items that might have been in the cash box.
63. The record shows that none of the prosecution witnesses was able to give an account or an explanation on the status of the cash box and nor did they confirm the absence of cash in the cash box or the presence of cash in the box and/or the amount; without a Handing Over Report and more particularly an Inventory the evidence of the prosecution witnesses was based on a presumption that monies had been misappropriated by the appellant.
64. This presumption is not absolute and is in itself rebutted by the prosecutions own failure to produce evidence; The Audit Report ought to have contained evidence in the form of the Handing Over Report and the Inventory of the cash box to enable the court reach a conclusion that from the surrounding circumstances the appellant was the only one who took these monies.
65. This ground of appeal that there was insufficient evidence to support any of the Counts preferred against the appellant is found to have merit and is hereby allowed.
66. After re-evaluating the evidence herein this court is unable to draw the same conclusions as the trial magistrate as there was insufficient evidence to support all the counts of falsification and theft and this court is satisfied that the prosecution failed to prove its case to the desired threshold.

FINDINGS and DETERMINATION

67. For the reasons already stated above this court finds that there was insufficient evidence to support a conviction on all the counts of falsification and theft and that the prosecution failed to prove its case to the desired threshold
68. The appeal on conviction and sentence is found to be meritorious in its entirety and is hereby allowed.
69. The convictions on Counts I, II, III, IV, VI and VII are hereby quashed. The respective sentences imposed on the aforementioned counts are hereby set aside.
70. Accordingly all the fines paid be duly refunded to the appellant.

Orders accordingly.

Dated, Signed and Delivered at Nyeri this 18th day of February, 2016.

A. MSHILA

JUDGE