



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
CRIMINAL APPEAL NO. 152 OF 2014

RAPHAEL MUTISO MBITHIAPPELLANT

VERSUS

REPUBLICRESPONDENT

*(Being an appeal from the original conviction and sentence in Makindu Principal Magistrate's Court,
Criminal Case No. 1228 of 2013 by Hon. E.M. Muiru Resident Magistrate on 8th August, 2014)*

J U D G M E N T

The appellant herein **Raphael Mutiso Mbithi** was charged with theft by servant contrary to **Section 281** of the **Penal Code**. The particulars of the offence were that on the 26th day of August, 2013 at National Oil Petrol Station at Mtito Andei, Kibwezi District of Makueni County being an employee of National Oil Petrol Station Mtito Andei as a pump attendant stole from the said National Oil Petrol Station Kshs. 508,791/= which came to his possession by virtue of his employment.

The appellant pleaded not guilty to the charge and the case proceeded to full hearing. The prosecution called three (3) witnesses in support of their case and after the close of the prosecution's case, the appellant was put on his defence.

The prosecution called three (3) witnesses in support of the charge. The complainant testified as PW1 (*Abdi Mohammed Simoil*). He told the court that he is a businessman and he runs a petrol station and a Hotel at Mtito Andei. The petrol station is called National Oil.

It was his further evidence that on the 25th August, 2013, the appellant who had been employed at the said petrol station as a pump attendant was on duty with one **Mathew Mutoi Nyekai** (*who testified as PW3*). On that day the appellant was the cashier and he was the one receiving the money after the sales were made.

On the material night two clients bought bulk fuel amounting to around Kshs. 620,000/= and this he was able to establish by reading the meter which he used to do every morning and evening. The difference in the meter reading would enable him to know how much fuel was sold.

At around 3a.m the appellant woke the supervisor up **Ahmed Mohammed** (PW2) and gave him Kshs. 120,000/= and he disappeared with the rest of the money. The appellant told his colleague PW3 that he was going to an Mpesa agent to withdraw money but he never went back.

On 26th August, 2013 he was told the appellant was nowhere to be found and he took the meter readings of the pumps and it is at this point that he realized a large sum of money was missing which he put at Kshs. 508,791/=. He gave the court the meter reading for the various pumps and products.

The total sales made for the three products on the material night was Kshs. 695,290.33. In addition there were also lubricants amounting to Kshs. 1240/= and LPG amounting to 6,311/=. The same night some customers bought 400 litres of fuel amounting to Kshs. 41,600 as per the trial court but the trial magistrate did not indicate whether it was diesel or petrol which does not add up because 400 litres of petrol at Ksh. 112 and the same number of litres for diesel at Ksh. 104.20 would have added to Ksh. 44,800 and 41,680 respectively.

After deducting the value of the products that were bought on credit on that night from the total sales the balance due was Kshs. 661,241.33 and that was the cash expected in the morning.

The appellant had given the supervisor (PW2) a total sum of Ksh. 120,000 before he left and hence a balance of Kshs. 541,241.33 minus the sales that were made by PW3 thereafter of Kshs. 32,450/= making the total of the stolen amount Kshs. 508,791. That is the amount the appellant is said to have stolen.

In his evidence, PW2 (*Ahmed Mohammed*) told the court that he was the supervisor at National Oil Mtito Andei. He told the court that on 26th August, 2013 he was at the petrol station since he lives within the same compound. At about 5-5.30a.m he was woken up by appellant who gave him Kshs. 120,000/= and 30 minutes thereafter the watchman woke him up requesting him to give him keys to switch on the generator since the lights had gone off. PW2 enquired from the watchman and also from PW3 where the appellant was and he was told that he had gone to a nearby Mpesa shop. PW2 woke up again at 5 am to go to the mosque and once again enquired as to the whereabouts of the appellant and he was told he had not come back yet. On coming back from the mosque he found the appellant had not showed up and PW2 informed his boss what had happened by this time PW1 had already reported to work and was at the counter collecting money.

PW1 told PW2 to reconcile the accounts and upon doing so he noticed that a sum of Ksh. 508,791 was missing after which he (PW2) recorded his statement at Mtito Andei police station. The appellant never returned to work. On cross-examination PW3 maintained that he was given a sum of Kshs. 120,000/= and not Kshs. 600,000/= as alleged by the appellant.

On his part PW3 (*Mathew Mutoi Nyekai*) who was a pump attendant at National Oil Petrol Station at Mtito Andei told the court that on 26th August, 2013 he was on duty at the said station and with him was the appellant who was also on duty then. He told the court that they were both on night shift and sold fuel till 3.30a.m and the appellant was the cashier. It was his further evidence that at 3.30a.m the appellant disappeared and he was left alone at work. His supervisor (PW2) woke up twice in the early morning to enquire where the appellant was. The supervisor told PW3 to call the appellant who upon receiving the call said he was nearby.

The appellant did not come back at all and at 6a.m in the morning the other colleagues of PW2 reported to work and he told them how the appellant disappeared from work and had not returned. He had even switched off his phone. He (PW3) was present when the accounts were reconciled and a shortage of Kshs. 508,791 was detected. PW3 had worked with Mutiso for 2 years and they were employed almost at the same time.

At the close of the prosecution's case, the appellant was put on his defence and he gave unsworn testimony without calling any witnesses. In his defence, he told the court how the manager Ahmed of National Oil Petrol Station had approached him and told him he had a deal he wanted to get into with him. The deal was to turn the reading of the meters so that they could make money out of it but he declined. The appellant said he was working as a cashier at the said petrol station. He said after he declined, the manager was always against him accusing him of malicious shorts which led him to writing a resignation letter on the 23rd August, 2013 though he worked until 26th August, 2013 but on this day his shift had been changed to night time. He worked until 11pm when the manager PW2 asked him to leave,

but according to him he left behind all the money that he had and PW2 confirmed the amount when it was given to him. It was his evidence that it was Ksh. 784,000/= and he was released to go. The appellant told the court that he gave the money in the presence of the watchman and another person who was in the manager's house and that the money was given to PW2 in his house. The appellant shortly after, left for Namanga the same night where he got a job letter as a butcher man at a butchery called Vision where he worked until he was arrested sometime in the month of September, 2013.

The learned magistrate convicted the appellant and sentenced him to serve three (3) years imprisonment. The appellant being dissatisfied with the sentence and conviction has appealed to this court and listed three (3) grounds of appeal as hereunder:-

- a. *That the learned magistrate erred in law and in fact by failing to consider the defence that the appellant was fabricated on the alleged offence.*
- b. *The learned magistrate erred in law and in fact and misdirected himself by holding that the case for the prosecution was proved beyond reasonable doubt whereas on the basis of record the burden of proof was not discharged.*
- c. *The sentence imposed is too harsh and extensively excessive.*

When the appeal came up for hearing the appellant made oral submissions to support his appeal which submissions did very little if anything to help his appeal because he just pleaded for forgiveness from the court saying that he had reformed.

On his part, the state counsel opposed the appeal and submitted that the court should not interfere with the sentence because it is lawful and within the law. He further submitted that the allegation by the appellant that he has reformed is not a ground for the court to interfere with the sentence. He told the court that the sentence meted out by the trial court is reasonable. He urged the court to uphold the conviction and the sentence.

The court has carefully considered the evidence on record and the submissions made by the appellant and the learned state counsel in support of and against the appeal respectively.

In the first ground of appeal, I find that the lower court considered the defence put forth by the appellant and therefore that ground fails.

On the second ground of appeal, I find that the prosecution proved the case beyond a reasonable doubt and discharged the burden of proof. The appellant faced the charge on theft by servant contrary to **Section 281** of the **Penal Code**. All that the prosecution needed to prove was that the appellant was an employee of the complainant and that he stole the money in the course of employment.

The evidence of PW1, PW2 and PW3 is very clear that the appellant was an employee of the complainant and that on the 26th August, 2013 he was on duty. In his defence, he also admitted that he was on duty as a cashier at his employees service station namely National Oil at Mtito Andei as where he worked until 11pm. He did not deny being an employee of the complainant. The complainant PW2 in his evidence referred to the NSSF membership card for the appellant which was marked as MFI-2 and the job identity card which was marked as MFI-3 but the two documents were not produced as exhibits but that notwithstanding I find that there is sufficient evidence on record to prove that the appellant was an employee of the complainant.

The other ingredient that the prosecution was required to prove was that the appellant being an employee of the complainant stole money in the course of his employment. On the material night the appellant was working as a cashier and he received the money for the sales that were made that night and early morning before he disappeared.

In fact he admitted that he received the money but he gave all of it to the manager PW2 before him (*the*

appellant) left after he was told to leave by the manager. He puts the figure at Kshs. 784,000/= while the manager said he only received Kshs. 120,000/= from the appellant. The complainant (PW1) gave a detailed account of the products that were sold on the night of 26th August, 2013 and the expected total sales. Though there were some discrepancies in figures, what came out from the evidence was that money was stolen. The discrepancy in the figures was not material and does not cause prejudice to the appellant.

The appellant alleged that he gave all the money to the manager (PW2) before he left. PW3 denies that allegation and testified that he was given Kshs.120,000/= only. When he cross-examined PW2, he said he gave him Kshs. 600,000/= but the figure changed to Ksh. 784,000/= when he gave evidence in his defence.

The conduct of the appellant of disappearing from work was not consistent with his alleged innocence, he left his place of work wee hours of early morning and switched off his phone, and he never came back to explain his whereabouts. I find the evidence of PW2, PW2 and PW3 credible on what transpired on the night of the 26th August, 2013. I do not believe the appellant's evidence when he says that he had written a resignation letter on the 23rd August, 2013 on the basis of which he was told to leave employment by PW2 on the 26th August, 2013 at night and in any event PW2 was not the employer of the appellant and he could not have accepted his resignation.

The court therefore finds that the prosecution proved its case beyond reasonable doubt and ground two (2) of the appeal hereby fails.

On ground three of appeal, the appellant is charged under **Section 281** of the **Penal Code** and the maximum sentence provided is seven (7) years imprisonment. The sentence of three (3) years imposed by the trial court is reasonable and not excessive.

Consequently, I have no reason to disturb the findings of the learned trial magistrate. I hereby dismiss the appeal and affirm the conviction and sentence imposed by the lower court.

Dated and Delivered at Machakos this 23rd day of July, 2015

LUCY NJUGUNA

JUDGE