



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO 83 OF 2013

**Appeal from the original conviction and sentence in the Principal Magistrate’s Court at Mwingi
Criminal Case No. 317 of 2013 (I.W. Gichobi, RM)**

KOIGU MUIGAI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

Background

Koigu Muigai, whom I will refer to in this judgement as the appellant, was convicted on his own plea of guilty in five counts and sentenced to a total of 11 years and 18 months. Before he was arraigned in the lower court, he was an employee of the Anglican Church of Kenya (ACK) Diocese of Kitui, Mwingi Parish. He had worked for about six months at the time he was arrested and charged with these offences. He faced the following charges:

- i. Stealing by servant contrary to section 281 of the Penal Code in that on 17th June 2013 at the ACK Mwingi Parish in Mwingi District of Kitui County being a servant to the said ACK as a verger stole cash Kshs 23,640, one projector make Sony, one camera make Sony, one Orange (Mobile Provider) Modem, one DVD make Sony and one bunch of church keys all valued at Kshs 101,140 the property of the said Church which came into his possession by virtue of his employment.
- ii. Stealing by servant contrary to section 281 of the Penal Code in that on 3rd June 2013 at the ACK Mwingi Parish in Mwingi District of Kitui County being a servant of the said ACK as a church verger stole one cheque leaf number [particulars withheld] valued at Kshs 10 of bank account number [particulars withheld] the property of the said Church which came into his possession by virtue of his employment.
- iii. Forgery contrary to section 349 of the Penal Code in that on 28th June 2013 at the Cooperative Bank Garissa District of Garissa County, with intent to defraud, forged a certain cheque leaf number [particulars withheld] of bank account number [particulars withheld]purporting it to be a genuine cheque leaf of Mwingi St. Paul’s ACK Neema Academy.
- iv. Uttering a false document contrary to section 353 of the Penal Code in that on 18th June 2013 at the Cooperative Bank Branch in Garissa District of Garissa County, knowingly and fraudulently uttered to Michael Kimani a forged cheque number 000283 of Kshs 187,740 purporting it to be a genuine cheque issued by the Mwingi St. Paul’s ACK Neema Academy.
- v. Attempting to steal contrary to section 389 of the Penal Code in that on 18th June 2013 at the Cooperative Bank in Garissa District of Garissa County attempted to steal Kshs 187,740 from bank account number [particulars withheld] belonging to Mwingi St. Paul’s ACK Neema

Academy.

The facts of this case

The appellant was employed by the ACK Mwingi Parish on 1st January 2013. His duties included cleaning and office messenger. In the month of January 2013, the pastor of the Church lost a cheque leaf No. [particulars withheld] for Bank Account No. [particulars withheld]. He reported the loss to the Cooperative Bank Mwingi Branch and at the Mwingi Police Station. On 17th June 2013 the appellant stole a Sony Projector, Sony Camera, Modem for Orange Mobile Provider, Sony DVD with its remote control gadget, a bunch of keys belonging to the church and cash Kshs 23,640 all belonging to the Church and absconded from his duties.

On 18th June 2013 the appellant was arrested in Garissa Town at the Garissa Cooperative Bank Branch where he had gone to present the stolen cheque leaf in which he had inserted his names and Kshs 187,740. He intended to withdraw this amount. He presented the cheque leave to one Michael Kimani a cashier at the Cooperative Bank Garissa. But unbeknown to him, the bank was aware that the cheque leaf had been stolen. Michael Kimani alerted the DCIO Garissa whose officers went to the bank and arrested the appellant. Mwingi ACK Parish was informed together with the OCS Mwingi Police Station.

The appellant led police to his hotel room in Ramada Hotel Garissa where the stolen items specified above and cash Kshs 20,300 were recovered. The appellant was escorted to Mwingi Police Station where these charges were preferred against him. In the meantime his employer terminated his employment.

The appellant was presented in court on 24th June 2013 to take the plea. The five charges were read to him and he pleaded guilty to all of them. The prosecutor presented the facts and produced the exhibits that had been recovered. The appellant admitted the facts and told the court that the facts were correct. He was convicted on his own plea of guilty in all the five counts and sentenced to serve five (5) years imprisonment in count one and two (2) years' imprisonment in counts two, three and four respectively. In count five he was sentenced to serve eighteen (18) months imprisonment. He has now come to this court on appeal.

Petition of appeal

In what appears like mitigating factors rather than grounds of appeal, the appellant has stated as follows:

- i. **That the trial magistrate failed to consider that the appellant was a first offender.**
- ii. **That the appellant is remorseful.**
- iii. **That the trial magistrate did not consider the appellant's mitigation and defence.**
- iv. **That the appellant urges the court to reduce the sentence and/or give the appellant an option of a fine.**

Appellant's submissions

In his brief oral submissions the appellant told the court that the lower court failed to consider his defence; that he had been employed in church and that the pastor lost a cheque leaf which he found and failed to tell the pastor; that the cheque was open and he went to deposit it but he was arrested; that at the time of his arrest he had the church keys but he had not stolen the keys since he used to keep them.

Respondent's submissions

The learned state counsel opposed the appeal and briefly submitted that the appellant can only challenge the legality of the sentence since he was convicted on his own plea of guilty; that the appellant cannot claim that the lower court failed to consider his defence when he was convicted on his own plea of guilty; that the lower court considered the appellant's mitigation; that the sentences are legal and the trial court was right in ordering that the sentences should run consecutively. Learned counsel urged the court to

dismiss the appeal.

Determination

On allegations that the trial court did not consider the appellant's mitigation, defence and that he was a first offender, this is not true. The trial magistrate stated as follows:

“The court considers the fact that the accused is a first offender. Also his mitigation (*sic*). However, he must face the consequences of his actions.”

The court then proceeded to sentence the appellant. I wish to state here that the proceedings before the lower court were not full hearing. The appellant pleaded guilty after the charges were read out to him. The prosecutor presented the facts after which the appellant admitted. There was therefore no defence advanced by the appellant. These grounds of appeal have not merit.

Sections 348 of the Criminal Procedure Code provides as follows:

“No appeal shall be allowed in the case of an accused person who has pleaded guilty and has been convicted on that plea by a subordinate court, except as to the extent or legality of the sentence.”

I have carefully read the sections of the law creating the offences for which the appellant was tried and convicted. The maximum sentence for stealing by servant is seven years; that of forgery and uttering a false document is three years and attempting to steal under section 389 Penal Code attracts half of the sentence for the stealing. The sentences are legal. Sentencing is left to the discretion of the court and I find no reason to interfere with the sentences as imposed save to consider whether they ought to run concurrently or consecutively. In **Elias Abdi Osman v. Republic [2006] eKLR**, the court stated that:

“It has been repeatedly said that where a person commits more than one offence at the same time and in the same transaction, concurrent sentences of imprisonment should be imposed..... In the instance case, the complainants were assaulted by the appellant at the same time and at the same *locus in quo*. Accordingly the learned magistrate in sentencing the appellant on each count ought to have ordered that the sentences imposed do run concurrently.”

I take the same view as in the above cited case that the appellant committed these offences which are related. It was incredible how the appellant imagined he could get away with this. I consider that all the items were recovered save for Kshs 3,340 that he had perhaps spent. He did not manage to withdraw the amount of money he had inserted in the stolen cheque leaf. This court will give the appellant some reprieve and order that the sentences in all the five counts shall run concurrently from 24th August 2013 when he was sentenced by the lower court. It is hoped that by the time he finishes his term of imprisonment he will have learned hard lessons. I make orders accordingly.

Dated, signed and delivered this 7th April 2014.

S.N.MUTUKU

JUDGE