



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MURANG'A**

**CRIMINAL APPEAL NO. 18 OF 2012**

**JOHN NJOROGE.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Being an appeal against conviction and sentence I a judgment delivered in Thika Chief Magistrates Court Criminal Case No. 2773 of 2010 (Hon. M.W. Mutuku) on 14<sup>th</sup> December, 2012)*

**JUDGMENT**

The appellant was charged with two counts of stealing by agent contrary to **section 283** of the **Penal Code (cap 63)**; in the first count, the appellant is said to have stolen **Kshs. 1,000, 000/=** which he is alleged to have received for and on behalf of Jane Njoki Njuguna on 19<sup>th</sup> day of March, 2010 at Equity Bank, Thika Branch in Thika Township of Thika district within central province. According to the particulars of the second count, the appellant is alleged to have stolen the sum of **Kshs. 1,200,000/=** which he received for and on behalf of Jane Njoki Njuguna on 4<sup>th</sup> and 5<sup>th</sup> day of June, 2010 at Equity Bank, Thika Branch in Thika Township of Thika district within central province

At the conclusion of his trial, the appellant was convicted of both counts and sentenced to two years imprisonment on each of those counts with the sentences running consecutively. He has now appealed to this Court against the convictions and sentences on seventeen grounds the gist of which is that the case against the him was not proved beyond reasonable doubt and that the appellant's trial and subsequent conviction was orchestrated to bring pressure to bear upon him to settle a civil dispute. The appellant has also faulted the learned magistrate for ordering that the sentences should run consecutively rather than concurrently.

The trial court took evidence from four prosecution witnesses and the appellant who gave a sworn statement; of all these witnesses, it is the evidence by the complainant and the appellant himself that is crucial to the prosecution and subsequent conviction of the appellant.

The record shows that the appellant and the complainant were relatively long time business associates; according to the complainant, **Jane Njoki Njuguna (PW1)**, she and her husband, **Njuguna Kimathi (PW2)**, had been doing business with the appellant for almost eight years as at the time the appellant was charged.

The complainant and her husband were based at Thika where they traded in cereals while the appellant was based in Busia, in western Kenya; the nature of their business relationship was such that the complainant would deposit money in the appellant's bank account for purchase of cereals in Busia. The appellant would in turn buy the cereals and have them transported to Thika either using the complainant's

vehicles or by any other vehicle.

The appellant admitted in his defence that he had known the complainant for more fifteen years and for close to ten of those years, he had been buying beans at her order and transporting it to Thika where she undertook her business. The complainant would deposit money in the appellant's account to buy the beans although occasionally he would use his own money to top for any shortfall to meet the order; whenever this happened the complainant would reimburse him. The appellant testified the money he is alleged to have stolen was meant to buy sugar from the black market in Uganda and that though he paid for the sugar, it was never delivered by the seller in Uganda. It was the appellant's case that this debt would be offset by what the complainant owed him as a result of earlier business transactions.

It is apparent from the evidence of the complainant and the appellant that they were business associates; it is also not in dispute that the complainant used to deposit money in the appellant's bank account for business purposes. The basis of the charges against the appellant was that although money had been deposited in his bank account, the appellant had failed to deliver the goods as was the custom. The appellant did not dispute this fact but explained that, though he had made the payments, the goods which the complainant wanted on this particular occasion could not be delivered for reasons beyond his control. In any event, so he stated, since the complainant owed him much more than what he had received from her, her claim could easily be set-off by what she owed him; in his view, this was a purely civil dispute between business associates which could not invite any criminal liability.

When the appeal came up for hearing, the state conceded and urged that the conviction was not safe; the state counsel, Mr Solomon Njeru, submitted that the facts did not disclose the offences with which the appellant was charged. In the counsel's view, there was no asportation, and without proof of this element, there was no evidence that the appellant took the money he is alleged to have stolen; simply put, the offence of theft was not established.

**Section 283** under which the appellant was charged provides as follows:-

**283. Stealing by agents, etc.**

*If the thing stolen is any of the things following, that is to say—*

*(a) property which has been received by the offender with a power of attorney for the disposition thereof;*

*(b) property which has been entrusted to the offender either alone or jointly with any other person for him to retain in safe custody or to apply, pay or deliver for any purpose or to any person the same or any part thereof or any proceeds thereof;*

*(c) property which has been received by the offender either alone or jointly with any other person for or on account of any other person;*

*(d) the whole or part of the proceeds of any valuable security which has been received by the offender with a direction that the proceeds thereof should be applied to any purpose or paid to any person specified in the direction;*

*(e) the whole or part of the proceeds arising from any disposition of any property which has been received by the offender by virtue of a power of attorney for such disposition, such power of attorney having been received by the offender with a direction that such proceeds should be applied to any purpose or paid to any person specified in the direction, the offender is liable to imprisonment for seven years.*

It is not clear under which part of **section 283** of the **Penal Code** the appellant was charged as the charge against him simply reads "*stealing by servant contrary to section 283*" of the **Penal Code**. In her judgment, the learned magistrate did not do any better; she stated that "*this court convicts the accused on*

both counts under section 215 of the CPC". The offence for which the appellant was charged and convicted is not stated. This appears to be contrary to **section 169** of the **Criminal Procedure Code** which requires the court to specify, in its judgment, the offence that has been committed and the particular section of the Penal Code or other law under which, the accused person is convicted. This provision of the law is in the following terms:-

### **169. Contents of judgment**

*(1) Every such judgment shall, except as otherwise expressly provided by this Code, be written by or under the direction of the presiding officer of the court in the*

*language of the court, and shall contain the point or points for determination, the decision thereon and the reasons for the decision, and shall be dated and signed*

*by the presiding officer in open court at the time of pronouncing it.*

*(2) In the case of a conviction, the judgment shall specify the offence of which, and the section of the Penal Code or other law under which, the accused person is convicted, and the punishment to which he is sentenced.*

*(3) In the case of an acquittal, the judgment shall state the offence of which the accused person is acquitted, and shall direct that he be set at liberty.(underlining mine)*

The appellant could not possibly have been charged under every provision in section 283 of the Penal Code and to the extent that the charge sheet indicates that he was so charged, the charge was obviously defective and this defect was, in my view, not only of form but was also of substance. It is a defect which, in the language of **section 382** of the **Criminal Procedure Code**, occasioned a miscarriage of justice for the reason that it is not clear which of the offences under **section 283** of the Penal Code the appellant was charged with and convicted of.

The defect would not have been fatal to the prosecution case if either the prosecution or the court had taken the initiative to have it corrected under **section 214** of the **Criminal Procedure Code**; that section provides as follows:-

### **214. Variance between charge and evidence, and amendment of charge**

*(1) Where, at any stage of a trial before the close of the case for the prosecution, it appears to the court that the charge is defective, either in substance or in form, the court may make such order for the alteration of the charge, either by way of amendment of the charge or by the substitution or addition of a new charge, as the court thinks necessary to meet the circumstances of the case:*

There are provisos to this section which are not relevant to the issue at hand. The point to note is that where the charge is defective either in form or substance it must be corrected and whenever such correction is necessary, particularly where it is likely to cause a miscarriage of justice, it must be done before the closure of the prosecution case. A conviction based on a charge whose defect ought to have been corrected but for one reason or another was not corrected is not safe.

Counsel for the appellant also submitted that the appellant ought not to have been prosecuted when it was clear that the dispute between the parties was a civil dispute which should not have been subjected to a criminal process; I agree with counsel that criminal justice process should not be employed as a tool to settle what is purely a civil dispute. There is evidence on record that the prosecution of the appellant was an example of such a case where the appellant was prosecuted for purposes other than upholding the criminal justice. The investigating officer corporal **Fredrick Mbiugu (PW4)** testified that he charged the appellant because he did not repay the money that had been deposited in his account by the complainant; it would appear that he presided over a meeting in which the appellant promised to pay the money and he

only charged him when he broke his promise. To quote him, the witness said in re-examination:-

***“The accused promised to pay the money in the first count then failed to do so. We already had facts before the arrest. If payments were done we could not have charged the accused.”***

In the case of **Cruisair Ltd versus CMC Aviation Ltd (Ltd), (1978)KLR 131** which was quoted in **Nairobi High Court Miscellaneous application No. 839 and 1088 of 1999 Vincent Kibiego Saina versus the Attorney General** the Court of Appeal emphatically stated with regard to winding up proceedings, that;

***“...a winding up court is not to be used for debt collection purposes, or to exert pressure to force payment of a debt which is bona fide disputed and contested. A fortiori, to institute or sustain or prop criminal proceedings, like bring winding up proceedings, to exert pressure for the payment of a debt or sum which is disputed in good faith, that which is disputed on substantial and not insubstantial grounds, and the criminal proceedings cannot decide the disputed debt or sum, constitutes an abuse of the process of the court, is oppressive, mala fides...”***

I am satisfied that on the evidence of the material before court, the dispute between the complainant and the appellant was not only a civil disputed but also that the criminal process was employed to bring pressure to bear upon the appellant to settle it. In the words of the Court of Appeal in **Cruisair Ltd versus CMC Aviation Ltd (Ltd), (1978)(ibid)**, the criminal proceedings could not decide the disputed debt or sum, and constituted an abuse of the process of the court besides being oppressive and *mala fides*.

The other question that deserves attention in this appeal is the learned magistrate’s order that sentences meted out against the appellant should run consecutively rather than concurrently. This question of sentences running concurrently rather than consecutively was considered in case of **Odero Versus Republic (1984) KLR 621** where the High Court (Brar, Mbaya JJ, as they then were) sitting in Nairobi where it was held that if a series of acts are so connected together by proximity of time, community of criminal intent, continuity of action and purpose or by the relation of cause and effect as to constitute one transaction, then the offences constituted by these series of acts are committed in the course of the same transaction. Accordingly, the court concluded that, in cases where a person has been charged with and convicted of two or more counts involving the same transaction, the practice is to direct that the sentences should run concurrently. The appellant’s appeal against sentence was allowed to the extent that the learned magistrate directed the sentences to run consecutively.

I would take cue from the decision in **Odero’s case** and find that the appellant’s appeal would have succeeded on sentence; this is because, assuming that the appellant was properly charged and convicted, the series of acts that would form the offences for which he was charged and convicted were connected together by proximity of time, continuity of action and purpose as to constitute one transaction; the offences constituted by these series of acts were committed in the course of the same transaction. If the appellant was duly convicted I would have set aside the sentences but having noted that the conviction was not safe in any event this question is now moot.

For the foregoing reasons, I hold that the appellants appeal is merited and is hereby allowed; the convictions are quashed and the sentences set aside. The appellant is set at liberty unless lawfully held.

**Dated, signed and delivered at the High Court in Murang’a this 10<sup>th</sup> day of December, 2014**

Ngaah Jairus

**JUDGE**