REPUBLIC OF KENYA

High Court at Kitale

Criminal Appeal 36 of 2008

PAUL OYUGA ORIARO.....APPELLANT.

VERSUS

REPUBLIC.....RESPONDENT.

(Being an original conviction and sentence of W.A. Juma – CM in Criminal Case No. 576 of 2005 delivered on 14th July, 2008 at Kitale.)

J U D G M E N T.

The first appellant, **Paul Oyuga Oriaro,** and the second appellant, **Justus Mukhwana Sebbi,** appeared before the Chief Magistrate at Kitale charged with stealing by servant contrary to section 281 of the penal code.

In count one, it was alleged that on diverse dates between 15th December, 2003 and 30th July, 2004 at Barclays Bank, Kitale, being a servant to Barclays Bank Ltd, the first appellant stole cash Ksh. 67,490/= which came into his possession by virtue of his employment.

In count two, it was alleged that on diverse dates between 14th June, 2004 and 20th September, 2004 at Barclays Bank Kitale, being a servant to Barclays Bank ltd, the second appellant stole cash Ksh. 6,120/= which came into his possession by virtue of his employment.

The two appellants pleaded not guilty to the charges but after trial were both convicted and sentenced to serve two (2) years community servicer.

Being dissatisfied with the conviction and sentence, the appellants filed separate appeals which were consolidated and heard together.

The grounds of appeal are contained in the respective petitions of appeal filed herein by the appellants.

At the hearing of the appeal, learned counsel, **Mr. Makali,** represented the first appellant while learned counsel, **Mr. M. Wafula**, represented the second appellant. The learned prosecution counsel, **Mr. Chelashaw,** represented the state/respondent.

In his submission, the first appellant indicated that the sentence has already been served. On conviction, he stated that the charge against him was not proved beyond reasonable doubt by the six witnesses who were availed by the prosecution. He said that the exact amount of the money allegedly stolen was not proved since it was alleged by PW1 that a sum of ksh. 67,490/= was stolen yet PW4 mentioned a sum of

Ksh. 94,910/=. Further, the charge indicated that the material transactions were carried out between 15th December, 2003 and 30th July, 2004 yet the code used to facilitate the transaction was availed to him (first appellant) on 17th September, 2004.

The first appellant said that it was alleged that he was transferring the amount to his child yet PW1 said that all transactions carried out by himself (first appellant) were examined and confirmed on a daily basis. He contended that if there were any anomaly the transactions would not have been approved.

Further, the funds in the suspect account were frozen and later released to him by the Bank thereby implying that there was no theft but mere suspicion.

The first appellant went on to say that the profit and loss accounts were not produced by the prosecution and instead they relied on journals which were produced contrary to section 177 of the Evidence Act. He contended that it was dangerous for the trial court to put up a theory which was not borne by any evidence or even justify it, when it stated that a clever way was used by the accused. The first appellant also contended that the taking and the intention to permanently deprive the bank of the money was not established and that there was nothing to prove that he unlawfully took money belonging to the bank.

It was further contended by the first appellant that PW6 did not investigate the case but merely relied on the words of a bank's officer and that the document marked PMFI 58 was found not to have been signed.

The first appellant maintained that the prosecution case was not proved beyond reasonable doubt. He relied on three decisions of the Court of Appeal **(i.e. Nyanamba vs. Republic 1983 KLR 599**, **Njenga vs. Republic (2006) 1 KLR 17** and **Masere vs. Republic (1989)KLR 483)** and urged this court to allow his appeal.

The second appellant more or less agreed with the first appellant's submissions and contended that he was given the user authorization form No. 12 which confirmed everything that appeared in journals. Further, P.Ex 46 which was used by the prosecution to prove that he (second appellant) was authorized to make entries on the journals had no probative value since the offence was allegedly committed between 14th June, 2004 and 20th September, 2004 yet the documents was executed on 5th November, 2005. Further, Pex. 46 indicated a number 8 and not number 12.

The second appellant stated that there was no evidence to show that he was user No. 12 yet P.Ex. 47 to 53 were linked to the said user No. 12. he contended that the charge against him was tailor made to victimize junior officers at the Bank. He urged this court to allow his appeal. In opposing the appeals, the state/respondent contended that the case against the two appellants was proved beyond reasonable doubt and that documents relating to the commissions account showed that the transactions were fraudulent.

The respondent stated that money was irregularly transferred to the children of the first appellant and if there were any contradictions in the figures, the fact that theft occurred could not be vitiated.

The respondent contended that money was not accosted for and that the release of money to the first appellant did not disprove his guilt.

Further, although the transactions were checked on a daily basis, the money was transferred to a wrong account. Further, the non-production of all the documents did not water down the case against the appellants.

The respondent urged this court to dismiss the appeals and contended that the judgment if the trial court was based on the evidence on record and that the complainant was permanently deprived of its money. The respondent also contended that documents were produced by officers of the bank in accordance with section 77 of the Evidence Act and that the court of Appeal decisions relied upon by the first appellant were irrelevant in this case.

Having considered the aforegoing rival submissions, the role of this court is to re-consider the evidence

adduced at the trial court and draw its own conclusions bearing in mind that the trial court had the advantage of seeing and hearing all the witnesses.

In that regard, this court has considered the evidence by both the prosecution and the defence contained in the certified copies of the proceedings and judgment of the trial court and in its opinion, the obligation to prove the case against both appellants lay with the prosecution and the prosecution alone. There was no obligation placed upon the appellant to prove their innocence.

From the evidence, the fact that the two appellants were employed by the complainant bank was not disputed. The dispute was whether being such employees they fraudulently and unlawfully took away money belonging to their employer.

The learned trial magistrate heavily relied on the evidence of **Wilson Ngare (PW1**) and **Turanta Msome (PW4)** to convict the two appellants. Ngare (PW1) was the complainant's Risk Advisor while Msome (PW4) was its security and investigating manager. Indeed, the evidence of these two witnesses was crucial in establishing whether the ingredients of theft were fully established against the two appellants by the prosecution.

As correctly noted by the learned trial magistrate, **David Ngotho (PW2)**, an employee of the bank based in Nairobi within the information technology department, was a mere whistle blower. His evidence was not relevant in establishing any fraudulent transactions on the fact of the two appellant.

He merely detected discrepancies involving the banks commission account and cash account.

Silas Saya (PW3), a bank employee in Kitale was not helpful in establishing any fraudulent transaction.

The role of **P.C. Ezekiel Ekakor (PW5)** of Kitale police station was to arrest the two appellants while the investigating officer **IP David Kitur (PW6)** of CID Kitale, based his investigations on what he was informed by Msome (PW4). He preferred charges against the two appellants on the basis of what he was informed by the bank officials and in particular Msome (PW4). As it were, he did not act as a partial and independent investigator.

Be that as it may, the definition of theft is contained in section 268 (1) of the Penal Code. This, “a person who fraudulently and without claim of right takes anything capable of being stolen, or fraudulents converts to the use of any person, other than the general or special owner thereof, any property is said to steal that thing or property.”

And, a person who takes anything capable of being stolen or who converts any property is deemed to do so fraudulently if he does so with an intent to permanently deprive the general or special owner of the thing of it. (See, section 268 (2) (a) Penal Code)

According to Ngare (PW1), the first appellant used an access No. 16 and in the process diverted commissions to accounts other than the profit and loss account. It was alleged that in that manner, he directed a total of Ksh. 94,910/= via accounts belonging to his children. The second appellant was allegedly given an access No. 12 which he used to divert a total sum of Ksh. 6,120/=. The learned trial magistrate found that the evidence of Ngare (PW1) only served to show that the relevant accounts did not balance. Indeed, this was the case and in the opinion of this court that evidence did not establish theft on the part of the two appellants but mere suspicion which however strong would not be a basis for conviction with regard to the evidence by Msome (PW4), the learned trial magistrate appreciated that he traced commission deposits to the first appellant's children accounts but there was no reflection of loss in the bank statement.

The learned trial magistrate also appreciated that Msome (PW4) was not aware that the first appellant's children accounts were closed but after investigations were carried out respecting the suspicious transactions, the accounts were re-opened and monies refunded. He (PW4) did not know why the Bank refunded amounts of money inclusive of interest.

The learned trial magistrate further appreciated that Msome (PW4) indicated that despite certain discrepancies in the suspicious transactions, no loss to the bank was detected.

Despite the foregoing pertinent appreciations, the learned trial magistrate proceeded to convict the appellants on the basis of the evidence by Ngare (PW1) and Msome (PW4). This was rather surprising as there was no credible and sufficient evidence establishing the ingredients of theft against both appellants. The learned trial magistrate went further to acknowledge that the prosecution did not avail some material documents to prove theft but misdirected herself by inventing a theory that the theft occurred in a clever way because at the end of the day the cashiers' till balanced.

What was obvious was that the alleged theft was not proved whether or not it was done in a clever way.

The prosecution simply failed to discharge its burden of proof such that no amount of theories or conjectures could have cured the fatal shortcoming in its entire evidence against the two appellant.

In the end result, this court must hold that the appellants' conviction by the learned trial magistrate was against the weight of the evidence and therefore improper and unsafe. The appeals are allowed to the extent that the conviction of the two appellants by the learned trial magistrate is hereby quashed. There will be no orders as to the sentence since it has already been served.

Ordered as prayed.

[Delivered and signed this 21st day of February, 2013.]

J.R. KARANJA.

JUDGE.