



REPUBLIC OF KENYA

High Court at Nairobi (Milimani Commercial Courts)

Criminal Appeal 718 of 2010

ISAIAH PAUL OTINGAAPPELLANT

VERSUS

REPUBLICRESPONDENT

(From original conviction and sentence in Criminal Case Number 1090 of 2007 in the Chief Magistrate's court at Nairobi – K. Bidali (SRM) on 17th December, 2010)

JUDGMENT

The appellant was charged with the offence of stealing by servant contrary to Section 281 of the Penal Code. It was alleged in the particulars of the charge that on 14th April, 2009 at Kenya Commercial Bank, Moi Avenue branch Nairobi, being a servant to Security group CIT Limited as a security guard, he stole from the said company Kshs. 18, 923,395/= which came into his possession by virtue of his employment. After a full trial he was convicted and sentenced to 4 years imprisonment. This is an appeal arising from the said conviction and sentence.

In his petition of appeal he raised several grounds among them that, the evidence on record is contradictory and inconsistent and that the charge was not proved beyond reasonable doubt. It was his case that the learned trial magistrate erred in fact and law by failing to consider that the appellant received a consignment and had no opportunity to tally it before banking. Further, the court failed to set out the issues and reasons for reaching the findings that it did, that the appellant's submission were not appreciated and no reasons were given for disregarding them. Both the learned counsel for the appellant and the respondent filed submissions in arguing this appeal.

According to the evidence on record, money was collected by field officers and tallied by Uchumi Supermarket cashiers. These field officers would then take the money to the company vaults. Here, P.W. 3, one Albert Wandera, received the money and compiled the bags. The appellant then would receive the money but there is a contradiction in that, whereas P.W. 2 said the appellant escorted the money to the bank, P.W. 2 said the appellant never escorted the money. This position was shared by P.W. 6. Whatever the case, there is no evidence that the appellant knew or had reason to know how much money he was carrying. This is because he received sealed bags from P.W. 3. There is also evidence that the bank is installed with CCTV cameras but the images of these cameras were deleted after one

month. There is no evidence that the bank, the police or the complainant company made any efforts to secure these images.

According to P.W. 1, P.W. 6 and P.W. 7 the appellant could not carry this money single handedly. There is evidence that the CCTV cameras at the bank captured the appellant moving money from one teller to another. He was also captured moved money from the bulk teller to the banking hall. The movement of the appellant from one teller to another was not unusual. P.W 8 had directed that the money be distributed to various cashiers. The CCTV cameras never captured the appellant leaving the bank with any money. It is ironical that all other activities were captured but not this particular one. The logical conclusion is that all the money remained in the bank.

This reinforces the evidence of P.W. 1 that there is no way the appellant could have carried the money alone from the bank. The banking slips were not available since the bank systems were down. The appellant collected 24 banking slips and advised to return later to collect the rest. The learned counsel for the Republic concedes this appeal and with respect I agree.

The fact that the CCTV cameras never captured the appellant leaving the bank with the money alleged to have been stolen casts reasonable doubt and therefore the conviction was most unsafe.

Accordingly, this appeal is allowed, conviction quashed and sentence set aside. The appellant is out on bail pending the determination of this appeal. The terms of his release are now vacated.

Orders accordingly.

Dated and delivered at Nairobi this 13th Day of March, 2013.

A. MBOGHOLI MSAGHA
JUDGE