REPUBLIC OF KENYA

High Court at Machakos

Criminal Appeal 253 of 2010

DANIEL MULINGE NTHENGE ………….................................……..……..APPELLANT

VERSUS

REPUBLIC ……………………………...………………..RESPONDENT

(Being an Appeal from the original sentence and conviction in Kangundo Principal Magistrate's Court Criminal Case no 140/2007. By Hon. C. Obulutsa,P.M. on 6/9/2010

JUDGMENT

The appellant was charged, tried and convicted by the Kangundo Resident Magistrate's Court in Criminal Case No. 140 of 2007 on the 6th day of September, 2010. He had been charged with forging 8 cash deposit slips in respect of account No. 265 – 268-077, Kenya Commercial Bank Ltd, Tala Branch between 20th November 2006 and 16th February, 2007 contrary section 349 of the Pena Code. He also faced 2nd count of stealing Kshs. 904, 484/= from his employer **Joseph Munyasia Matolo** between 20th February, 2006 and 19th March, 2007 at Tala contrary to section 28 of the Penal Code. The appellant denied both counts and was soon thereafter tried and convicted as already stated. Upon conviction he was sentenced to serve 2 years on the 1st count and 5 years in respect of the 2nd count. Both sentences were ordered to run concurrently. Appalled by the conviction and sentence, the appellant lodged the instant appeal on grounds that;-

"1. ***That the learned trial magistrate erred in the interpretation of sections 64 and 68 of the Evidence Act by admitting copies of documents as exhibits without proper basis in law to the prejudice of the accused.***

2. ***That the learned trial magistrate erred in law and fact in concluding that the deposit slip indicated to have been banked by John was actually banked by the accused against the weight of the evidence adduced.***

3. That the learned trial magistrate erred in law and fact in relying on the document examiners report which was prepared after examination of duplicate copies of documents and which report the examiner admitted did not analyze each and every letter and that carbon copy may differ slightly with the original.

4. That the learned trial magistrate erred in fact and law in concluding that Joseph Munyasia Matolo and Matolo distributors Limited were one and the same thing contrary to the provisions of the company law.

5. That the learned trial magistrate erred in fact and law in concluding that the accused was a servant of Joseph Munyasia Matolo while the evidence produced and summarized in the judgment herein established that the accused was employed by a Limited Liability Company.

6. That the learned trial magistrate erred in law and fact by unilaterary (sic) and on his own motion amending the charge sheet particulars to read a total of Kshs. 560,184/= was not banked while the particulars of the charge gave the total as Kshs. 904,484/=.

7. That the learned trial magistrate erred in law and fact in disregarding the evidence tendered by the accused and his witnesses and consequently arrived at the wrong conclusion.

8. That the trial magistrate erred in fact and law in convicting the accused against the force of the available evidence and on a charge not supported by evidence.

9. That the learned trial magistrate fundamentally erred in law in selectively analyzing the evidence tendered thus arriving at the wrong conclusion.

10. That the learned trial magistrate erred in law in proceeding with a trial that was a nullity ab initio.

11. That the learned trial magistrate erred in law in dismissing and failing to appreciate and give due regard to testimony of the witness who the trial magistrate had no opportunity to observe when they testified.

12. That the trial magistrate erred in law and fact by imposing an excessive sentence."

When the appeal came before me for hearing on 11th June, 2012 **Mr. Mukofu,** learned State Counsel and **Mr. Mwenda** learned Counsel of the appellant agreed to canvass the appeal by way of written submissions. I have carefully read and considered them.

The appellant was charged with the offence of forgery and stealing by servant. The charge of forgery stated that he forged 8 deposit slips. This charge was amended on the 19th day of June, 2007 and substituted therefore with that of stealing by servant. In effect the charge sheet now contained 2 charges of theft by servant. During the trial only certified copies of the banking slips were tendered in evidence contrary to the provisions of section 64 of the Evidence Act. The original deposit slips were not tendered in court as exhibits and despite objection on behalf of the appellant, the court still admitted them in evidence contrary to the provisions of the law. The investigating officer confirmed seeing the original documents in the Bank and the bank manager(PW8) alleged that the original documents exists and nobody gave a reason why those documents were not availed to the court as the law requires.

In the case of **Jane Wambui vs Stephen Mutembi & another [2006] eKLR** the court had the following to say;

"under section 67 of the Evidence Act, Cap 80, documents must be proved by primary evidence except in cases set out in section 68 of the Act where secondary evidence may be given of the existence, condition, or content of a document. The definition of primary evidence is to be found in section 65 of the same Act. Generally speaking, primary evidence means document itself produced for the inspection of the court"

Initially when the appellant objected to the marking of the certified copies, the prosecution undertook that the originals would be produced by the branch manager. The objection was renewed when the said manager turned up without the original documents. The trial magistrate erred in confusing marking the exhibit for identification and production of the same. The provisions of section 68 of the Evidence Act provide for instances when copies of documents can be admitted in evidence. None of the conditions in that section were met to enable the court to proceed as it did. The complainant did not wish to have original documents produced and the court obliged by admitting copies even when prosecution witnesses

admitted the documents were available. This was a gross misdirection on the party of the learned magistrate,

The branch manager testified that the money lost was customer's money hence the bank had no business providing the original deposit slips. On the contrary the money lost could have been handled by the appellant, any of the other employees of the company who took the money to the bank, the complainant himself as he used to bank and or even the bank staff. It was testified that the banking slips used to be filled out at the office of the complaint and whoever went banking will carry the money and the banking slip and insert his name on the slip.

The bank cashiers who testified confirmed this practice and they stated that at all times they gave priority to this particulars account. It would have been easy to pin down who took the 8 banking slips in contention to the bank as the teller who handled some of the banking confirmed that the name on the face of the document denoted the person sent to bank the money. None of the forged documents have the name of the appellant on their face though.

The complainant testified that only the appellant used to bank the money. This he maintained even during cross-examination. However, the testimony of other witnesses confirms that several employees, the complainant and even his brother in law used to bank money. Why did the complainant lie to the court if at all the money was stolen by the appellant?

The document examiner testified and confirmed having examined the certified copies of the documents in issue. He submitted his report in court and during cross examination, he confirmed that there was a difference in thickness and colour *vis-avis* the density of the colour blue in the alleged certified copy and the carbon copy of the deposit slips. The difference in colour and density of the lines or curves is an indicator that the person writing is not the same and the pen is different. As a matter of fact the examiner admitted that he did not specifically analyze the alleged additional lines in the carbon copy against the original document. He generally analyzed the known writing and the general writings on the questioned document. The issue before the court was not the general hand writing but specifically the added lines on the 8 slips vis-à-vis the known hand writing of the appellant. That was not done. The testimony of PW2 was therefore of no much assistance to the court nonetheless the court relied on it to convict the appellant.

It was testified that the documents were filled in the office and taken to the bank. If the originals in the bank were not seen and had been altered, then there was no way of knowing unless the same was produced for examination. The only conclusion to be drawn is that there can be no authentic report on the matter unless the real original documents are availed and scrutinized, examined and report prepared. PW9 who was the investigating officer did agree with counsel for the appellant that some of the added lines were thinker than the others. Why did the document examiner ignore to analyze them and make a finding as to whether they were made by same hand? Why did the prosecution withholding this original document from the court?

PW8 the local branch manager confirmed that the original documents were still available in the bank. That the complainant went to complain about missing money and that no investigations where done by the bank other than giving the certified copies of the original banking slips. The witness confirmed that the documents bear all the usual bank markings, cashier numbers and signatures. It beats logic why the bank never investigated whether the theft was internal, external and or a conspiracy.

In the absence of the original documents which admittedly were held by the bank, the copies were inadmissible and the court had no basis to convict the appellant on that basis.

The second count was that being the servant of **Mr. Joseph Munyasia Matolo,** he stole Kshs. 904,494/= which came to him by virtue of his employment. Several witnesses testified and the appellant on being put on his defence also testified and called witnesses. The complainant testified that being the managing director for a private limited company, they employed the appellant as a manager. He tendered in his evidence the letter of employment. The said letter clearly showed that the appellant was employed by the company called Matolo Distributors Ltd. P.O Box 650 Tala. The appellant was expected to keep cash

journal and stock book. All these books belonged and recorded the daily business of Matolo Distributors Ltd, the company. There is no evidence that he was a private employee of the complainant in whatever capacity and the letter of appointment does not require the appellant to serve the complainant in any personal capacity. The evidence tendered in support of the charge does not show or depict the appellant as having been serving the complainant at all.

All the witnesses who testified confirmed that the appellant was working for the company and not the complainant. The company is in law a separate entity from its promoters, directors and shareholders. It is capable of suing and being sued, it can file complaints in its name and pursue any prosecution in its name. A loss to the company is not synonymous with a loss to individual directors.

In any event there was no evidence before the court to show that appellant had access to the complainant's personal or private accounts or cash for him to steal from. All the ledgers produced, cash books and other records were all admitted to belong to the company. How then did the complainant loose what he never owned. How could money belonging to an known legal entity be claimed on behalf of that entity by the complainant who was only one of the directors. The complainant never owned what he claimed was stolen from him. The charge on that account ought to have failed. There is no doubt at all that the trial magistrate failed to appreciate the provisions of the Companies Act when he came to the conclusion that the company and PW1 were one and the same.

Moreover in the cause of the trial it, became evident that the complaint was diverting company money to his personal account. The diversion may have been to conceal the amount the business was making hence avoid taxation. In reply to a question put to him by counsel for the appellant the complainant was emphatic that he was free to deal with the money of the company in whatever way he deemed fit. That cannot possibly be correct.

Further, during cross-examination, the complainant admitted that he had an employee by name **Mutisya Nzoka** but denied knowing his Christian name. Complainant admitted that this was his accounts clerk and if the money got lost then it must have been between the **Mutisya Nzoka** and the appellant. It later transpired that this was the same man called **John** whose name appeared in all the disputed banking slips. The complainant insisted that all the money lost was banked by the appellant but on cross-examination, admitted that they used to have several people take the money to the bank due to security concerns. That testimony was corroborated by the appellant, the bank tellers who testified and confirmed that the money would be brought by different people.

The court therefore had no basis of concluding that only the appellant banked the money the subject of this charge as others had been to the bank.

The charge sheet before the court stated in count 1 that Kshs. 1,101,449/= was stolen by the appellant between 20th November, 2006 and 10th March, 2007 and count II Kshs. 904,484/= was lost over similar period in similar circumstances.

The court when analyzing the evidence arrived at a different amount as having been stolen and put this amount at Kshs. 560,184/=. There is no evidence to support this amount and there is no distinction to show which amount was stolen in count 1 and which sum belonged to count II yet the court convicted the appellant on both counts.

The prosecution case again was full of contradictions, fabrications and other simulations to persuade the court to convict the appellant. These contradictions raise doubts as to the veracity of the prosecution's case. The cardinal principle in criminal law is that all doubts must be resolved in favour of the accused persons.

PW5 who is the complainant's brother claimed that the appellant in a meeting at Matungulu house admitted having stolen the money. The meeting was attended by complainant, appellant, Patrick (PW7) and himself. He also confirmed that **Mutisya Nzoka** agreed to pay that money. However, when PW7 took the stand he denied having attended the meeting. He stated that he found the meeting going on in

complainant's office which was not in Matungulu House and did not enter the meeting room. The two witnesses being related to the complainant and at one time or the other having been mixing their money with that of complainant had something to hide hence the contradictions.

PW6 testified that he is a secretary of a co-operative society where the appellant's wife works and that he provided salary details that match with the testimony of DW2. The prosecution on realizing that the evidence will damage their claim on Kshs. 125,000/= recovered during the search they avoided producing the payroll that was with the said witness together with other statements of the witness income. The court notes though that the testimony of the witness is incomplete as no cross-examination was recorded by the court while the witness was actually cross-examined.

It also transpired that **John Mutisya Nzoka** had been charged with theft of the same money and was convicted by the court in Criminal Case No. 142 of 2007 which the court was referred the court to and which one of the slips before this court was the subject. The fact was also confirmed by PW8.

The defence applied for summons to compel the attendance of the bank cashiers/tellers one of them the famous teller number 4 whose stamp had been used to stamp the banking slips. DW3 happened to be the teller and he confirmed that he had written a statement with the police but was not called to testify. This clearly showed a pattern where the prosecution was suppressing any evidence not in its favour. In **Bukenya vs Uganda [1971] E.A. 549** it was held;-

"The prosecution is duty bound to make available all witnesses necessary to establish the truth, even if their evidence may be inconsistent with its case."

PW9 was the investigating officer who gave us contradictory evidence as well. He contradicted himself as to the time he was called was an issue, who instructed him to investigate, reasons why appellant was held for longer than stipulated under the law, search process when money was recovered, how it was recovered and from where. The witness admitted there were discrepancies between the original document and carbon copies he took for examination. All this shows a case that had been predetermined and the investigations were only geared towards finding evidence.

The defence called 4 witnesses. The appellant testimony confirmed that banking was done by several people though he sometimes would fill the banking slip in the office and send them. There were several books of accounts in existence and they used to be adjusted by the accounts people to conceal actual sales in order to reduce taxation. As a matter of facts **John** who was the stock controller was the one who used to do accounts posting and therefore instructions to adjust books will be given to him.

The appellant also testified that the complainant used to direct him to give money to the bank officials who included the bank manager and the two cashiers who testified when called by the defence. They as expected denied handling most of the transactions even though they admitted serving the appellant in the cause of business. The appellant did state that one of them was even forced to pay Kshs. 80,000/= towards loss.

Richard Mbunya testified that he was teller number 4 and that he recorded statement with the police. He was evasive as to the role he played in the loss of the money but admitted writing a statement with the police. One wonders why he was not called to testify in this trial while he had been called as a witness in the trial in the case of **John Mutisya Nzoka**.

It is instructive that the key witnesses were all related to the complaint and despite staying together sharing business premises, safe and banking services they could not give a strait forward answers. Their contradictions should point to the fact that this trial was only but an attempt to frame the appellant to deflect personal problems with the authorities among others.

In the upshot, the appellant has demonstrated that the key areas were ignored when document examiner examined the documents generally and not specifically as he was dealing with few offending lines and not the whole document, he has also demonstrated that the prosecution selectively brought to court

witnesses and exhibits that were considered useful to the prosecution and concealed or suppressed anything that was favourable to the appellant and finally that the appellant was an employee of a limited liability company and as such cannot have been a servant of the complainant as alleged.

This appeal must be allowed on the basis of the foregoing. It is so allowed, conviction quashed and sentence imposed set aside. The appellant should be set at liberty forthwith.

DATED, SIGNED and delivered at **MACHAKOS** this **15TH** day of **OCTOBER 2012.**

ASIKE MAKHANDIA
JUDGE