



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Criminal Appeal 95 of 2011

ANTHONY NDERITU GEORGE.....APPELLANT

VERSUS

REPUBLICRESPONDENT

(From original conviction and sentence in criminal case Number 1431 of 2008 in the Chief Magistrate's Court at Nairobi – Mr. G. C. Mutembei (CM) on 07/04/2011)

JUDGMENT

1. **Anthony Nderitu George**, was tried and convicted of stealing by servant contrary to **Section 281** of the **Penal Code**. The brief facts are that, on or about 5th September 2008 at Eco Bank, Fedha Towers Branch, in Nairobi, being a cashier in the said bank, he stole kshs.500,000/= the property of Eco Bank, which had gone into his possession by virtue of his employment.
2. Upon conviction the appellant was sentenced to serve 12 months imprisonment.
3. The appellant being dissatisfied with the conviction and sentence, filed a petition of appeal in which he advanced the following grounds.
 - 1) ***The charge against the appellant was not proved beyond reasonable doubt.***
 - 2) ***Due weight was not given to the evidence and submission of the defence and the circumstances surrounding the incident, were ignored.***
 - 3) ***The burden of proof was shifted to the appellant.***
4. The learned state counsel Mr. Mulati, responding on behalf of the respondent, conceded the appeal on grounds that the evidence of **PW3** indicated that the appellant had stated that he overpaid the money to someone who would repay it, while another witness stated that he overpaid a customer by mistake.
5. It is not in dispute that the appellant was an employee of Eco Bank and that he was a cashier. It is also not in dispute that on 5th September 2008, the appellant opened the day with a sum of

Kshs.778,801.98. After the days transactions, he was supposed to have in his drawer a sum of Kshs.723,661.98 but instead, he only had Kshs.223,665.50. A sum of Kshs.500,000/= was missing and the appellant could not account for it. The matter was then reported to the police and the appellant was arrested and charged.

6. On 5th September, he reflected back and remembered that he had paid one Michael Chege Thuo Kshs.500,000/= without processing the payment through the computer system since his superior who was to authorize the payment, was out of the office. He said that before paying he had the cheque counter signed by a senior officer. The cheque was to be kept up to the end of the day when it was supposed to be posted into the system. Since he could not trace the cheque, he concluded that he must have handed the cheque back to Chege together with the money. He later looked for Chege who promised to go to the bank. He however did not.

7. Mr. Udoto the learned counsel for the appellant submitted that all the prosecution witnesses used words such as “**missing**” “**lost**” “**unaccounted for**” and “**short fall**” to refer to the missing cash. None of them including the Investigating Officer concluded that the appellant stole the said cash. The Investigating Officer specifically stated that she arrested the appellant because he did not surrender the cash.

8. From the commencement of the investigation the appellant maintained that he overpaid a client and all the witnesses referred to that fact in their various testimonies. It was indeed shifting the burden of proof onto the defence for the learned trial magistrate to state that the appellant failed to call evidence to prove such overpayment.

9. In a criminal trial the burden of proof rests with the prosecution and the appellant was under no obligation to prove his innocence or indeed to explain himself. The trial court must always take caution not to use language that appears to place that burden of proof on an accused person.

10. It was up to the prosecution to show that no such transaction was reflected in the appellant’s daily transaction sheet, and to rule out the possibility of inadvertent overpayment as was being advanced by the appellant. There was also no effort to scrutinize the appellant’s activities on the relevant date on the bank’s CCTV to make a determination in one way or the other as to whether he stole the missing cash.

11. The upshot is that whereas the prosecution proved that the appellant was the servant of the complainant, a serious doubt exists as to whether the appellant stole the missing cash himself as stated by the prosecution, or he was a victim of an unfortunate lapse on his part. The appellant was charged with stealing by servant contrary to **Section 281** of the **Penal Code**. It was not enough for the prosecution to show that some cash was missing or that he had a deficit in his balances, it was necessary for them to prove the act of stealing.

For the foregoing reasons, I find that the appeal is meritorious and allow it.

The conviction is hereby quashed, the sentence is set aside and the appellant is set at liberty unless otherwise lawfully held.

SIGNED DATED and **DELIVERED** in open court this 29th day of **November 2012**.

L. A. ACHODE
JUDGE