



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT MALINDI**

**CRIMINAL APPEAL NO. 107 OF 2010**

*(From original sentence and conviction in Criminal Case No. 663 of 2009 the Principal Magistrate's Court at Kilifi before J. M. Gandani - PM)*

**JOHNSON ZUMO OBONGO .....APPELLANT**

**=VERSUS=**

**REPUBLIC.....RESPONDENT**

**JUDGEMENT**

The appellant John Zumo Obongo was convicted on a charge of stealing by servant contrary to section 281 of the Penal Code and sentenced to serve 4 years imprisonment.

The charge stated that on 16<sup>th</sup> August 2009, at Mtwapa township within Kilifi District, being a servant of Charity Maina, stole kshs. 173,000/- the property of the said Charity Maina.

Charity (PW1) operates an M-PESA shop in Mtwapa. The appellant was her employee. On 16<sup>th</sup> August 2009, PW1 sent him to collect scratch cards from one Mariam's shop and also gave ksh. 500/- for tea and Kshs. 173,000/- for Mpesa deposit. Mweni called PW1 at around 9.00am or 10.00am saying appellant was at her shop and PW1 told her to give him the scratch cards. PW1 then called Aisha at the MPesa deposit shop informing her that appellant was going to deposit money at her shop. Aisha confirmed that the shop was open. Pw1 then rang appellant who said he was just near Aisha's shop and would be there in 20 minutes. By 11.30am, Aisha informed pW1 that appellant had not reached her shop and that she would be closing at noon.

At 11.45am PW1 called appellant, but he had switched off his phone. PW1 kept calling appellant until 1.30pm – at 2.00pm, still pW1 called appellant – the phone rang but no one picked it. At 4.00pm the accused returned to the shop looking sad and gloomy. When PW1 asked him what was wrong, appellant shook his head then told her he had been conned. He claimed that he found himself in a single room without the money. Later he changed his story, saying he had been strangled, then his eyes blinded by a piece of cloth and that he found himself at Tuskys. PW1 called her husband and appellant's brother who asked appellant take them where he had been conned. Later the brother called saying he knew the young men who had conned the appellant and he would ensure the money is returned. However the money was never recovered.

On cross-examination PW1 stated that appellant and his brother offered to refund the money in

installments but thereafter, both appellant and his brother refused to pick PW1's calls.

When PW1 reported the matter to her husband Fredrick Maina Kibebe (PW2), he too tried to reach appellant on phone but failed. When appellant appeared and he questioned him, appellant said that while walking in town, he found people playing games using cassettes and music and he gave out the money. Since appellant's brother was known to PW2, he got him and together they requested appellant to take them to the place where he had been conned. Appellant took them to Uhuru Park, but upon getting there, appellant changed his version to now say that he was conned by friend who had proposed to multiply the money and that they had taken him to Kiembeni in a room where the money was washed, then one of the boys called a police officer who arrested them, but he was later released.

Pc Joseph Ngatia (PW3) received the report from PW1, arrested the appellant who on being questioned, told him that he had been conned by people who said they could multiply the money.

PW4 Pc Samuel Kaviti who interrogated appellant told the trial court that appellant gave him two versions of what had happened – first he said he met some people he knew, who told him they could multiply the money. So they took him to Kiembeni and disappeared with the money. He also said he went gambling with the money and later found himself at Tuskys without the money.

In his unsworn defence, appellant confirmed that he used to work for PW1, and that indeed she gave him Kshs. 173,000/- to deposit in her M-pesa account.

He learnt the Mpesa operator would be arriving late so he went to A-one Supermarket to hang around and wait for the Mpesa facility to open. He met a friend at the supermarket who asked him where he was taking the money – appellant was surprised and asked how he knew appellant had money. His friend said he had seen the money through supernatural powers and that he could multiply the same. Appellant got interested as he needed money. The friend took him to Kiembeni in Bamburi where they met another man whom appellant was instructed to give the money. The man left, saying he would be back after five minutes, only to return with two men who claimed to be police officers and told appellant that he was under arrest. Appellant and his friend were put in a vehicle, then on the way, they were thrown out of the motor vehicle. Appellant got confused, then went to explain to his boss what had happened. PW2 demanded that appellant takes him where the incident had happened, and appellant took him to A-one supermarket but PW2 said appellant was lying and wanted his money back. So appellant informed his brother who also knew the conmen but they failed to trace them. Appellant's brother negotiated with the Mainas to repay the sum but they rejected this.

The trial magistrate examined the flow of events from the time appellant was given the money – observing that for the better part of the morning PW1 kept calling appellant who initially said he was near the deposit unit, then thereafter switched off his phone, only to reappear later in the evening claiming that he was conned. The trial magistrate held that the series of events showed that appellant had a premeditated intention to steal the money, that his conduct was suspicious from the moment he reached Mombasa town.

The trial magistrate considered his defence which she termed as not truthful especially the claim that even appellant's brother knew the conmen and had offered to ensure the money was returned.

The trial magistrate rejected this saying if that was the case, then appellant's brother should have given the police the information as to who the conmen were and, where to find them.

The trial magistrate found that appellant's undoing was the different versions he gave to the Maina's as to how he lost the money.

The lower court's findings were challenged on the following grounds;

(a) The case against appellant as not proved.

- (b) Ingredients of the offence were not established
- (c) The trial magistrate shifted the burden of proof onto the defence.
- (d) Appellant's defense was improperly rejected
- (e) There were material contradictions and inconsistencies in the evidence of the key prosecution witnesses, some based on hearsay and unconfirmed sources.
- (f) The sentence was harsh and excessive, taking into account the appellant's age.

At the hearing of the appeal, Mr. Magia appeared on behalf of appellant while the State was represented by Mr. Kemo.

Mr. Magia submitted that the conviction was wrong as there was no proof that appellant intended to steal and that appellant consistently told his employer and even police that he had been conned, yet police never went after the conmen. It was his contention that appellant reported the matter to police who did nothing. It was argued that appellant was simply gullible and believed the people would multiply the money and that is why he was even ready to pay back the same. He further submitted that the four year sentence as harsh, taking into account that appellant was a first offender and the trial court ought to have considered a non custodial sentence especially because the complainant could still recover the money in a civil case.

The appeal was opposed, and Mr. Kemo submitted that the ingredients of the offence had been proved because:

- (a) Appellant did not deny being an employee of the complainant
- (b) That he was given money by the complainant to go and deposit, as part of his employment errands and that money was converted by appellant, to his own use.

He urged the court to consider the events from the moment the appellant was given the money to the time he resurfaced and stated that his conduct left no doubt that appellant converted the money to his own use, the basis of saying so, is that appellant was given the money at 7.00am, by 11.00am, he had not deposited the money, by 2.00pm, he had now switched off his phone, when he returned at 4.00pm saying he had been conned – but giving two versions of how he had been conned. Mr. Kemo submitted that the explanation as to how the money got lost is very fishy and that prosecution proved the appellant had the necessary *mens rea*.

As regards the police, Mr. Kemo points out that appellant simply told police he had been conned and it is not for the police to go after the alleged conmen.

There is no dispute that appellant was an employee of the complainant and was given Kshs. 173,000/- as part of his employment errands, to go and deposit in PW1's M-pesa account and he never did so nor did he return the money to complainant. The issue that required determination was whether appellant converted the money to his own use. The evidence is largely circumstantial in trying to determine what appellant did with the money. His defence was that he had been conned of the money – although according to prosecution witnesses he gave two different versions. The reason why I believe he gave different versions is from his own defence – although he claimed to have been taken to Kiembeni, then Bamburi where he lost the money – when asked by PW2 to show him where the incident had taken place, he didn't say he took them to Kiembeni or Bamburi – in his own defence he said he took PW2 To A-One supermarket – that first shows the dishonesty – If he was genuinely conned then why was he eager to protect the identity of the people since he knew those people, then how is it that he never mentioned any

names? Were police supposed to believe his story of conmen known to him, with no description, no name, and comb the entire Bamburi looking for persons with the label CONMEN 173000/- on their faces and backs? That is preposterous – certainly not. I am satisfied with the trial magistrate’s reasoning, that appellant’s conduct, from the moment he left PW1’s shop to the time he resurfaced did not demonstrate bona fides.

Quite apart from that, he confirmed he actually wanted to convert PW1’s money by having it multiply, take what would be born, when the money never belonged to him in the first instance – if that is not conversion, then what other term can be used?

The trial magistrate properly analysed the evidence and arrived at an appropriate conclusion. I find no reason whatsoever to interfere with her finding, the conclusion was safe and it is upheld.

The offence carries a maximum sentence of seven years - Appellant was sentenced to four years imprisonment. Considering that he was a first offender and the amount involved, then my view is that the four year sentence is rather harsh and I would interfere with the sentence by substituting it with a twelve (12) months imprisonment which shall take effect from the date of conviction.

Delivered and dated this 17<sup>th</sup> day of **March 2011** at Malindi.

**H. A. OMONDI**  
**JUDGE**