



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MACHAKOS

HCCR.APPEAL NO.80 OF 2009

JASRON SANDE SAFANIA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. Jasron Sande Safania (“the Appellant”) was charged with stealing contrary to Section 275 of the Penal Code. The particulars of the offence were that on diverse dates between the 17th and the 21st December, 2005 at Foam Mattresses Ltd. Factory at Athi River Branch in the Machakos District of Eastern Province jointly with others not before the court, he stole a cheque leaf valued at KShs.21/- serial No.100313 for KShs.224, 384 the property of Foam Mattresses company. The appellant also faced a second count of making a document without authority contrary to section 357 (a) of the penal code. The particulars thereof were that on diverse dates between the 17th and the 21st December, 2005 at an unknown place in Nairobi within Nairobi area, the appellant jointly with others not before the court with intent to deceive or defraud without lawful authority or excuse made a certain document namely a cheque number 100312 for KShs.224,384/- by entering the names “Jasron Sande Safania” purporting to have been entered by the Foam Mattress Ltd. a fact the Appellant knew to be false.

2. The Appellant was tried in the Acting Senior Resident Magistrate’s Court at Machakos and convicted on both counts and sentenced to serve three (3) and four (4) years imprisonment respectively the sentence to run concurrent. The Appellant being dissatisfied with both the conviction and sentence of the learned trial magistrate appealed to this court on several grounds including that the learned trial Magistrate misdirected herself and erred in law in convicting the Appellant on count I when the evidence did not point to the Appellant; and further that the learned trial Magistrate erred in convicting the Appellant on count II against the weight of the evidence.

3. In his submission, Collins Omondi Esq., Advocate for the Appellant, contended that the evidence by the prosecution did not support the conviction and sentence. He pointed out that at the time the cheque leaf disappeared, the Appellant was neither working for nor was he employed by the complainant company and that although its Manager, a Mr. Premji, was mentioned by Evens Mwanje Kareka [P.W.2] in his evidence Mr. Premji was never called to testify at to how the cheque disappeared. Learned Counsel also said that in the evidence of Dev Makand Patel [P.W.1], Evens Mwanje Kareka [P.W.2], Iqbal Jusain Keshraw [P.W. 3] and police Sgt. Raphael Makumbi [P.W.5] respectively, conflicting information was given as to the amount stolen and the doubt raised thereby favoured the Appellant. Replying on the

decisions, the Court of Appeal in **Aggrey –vs- Republic [1983] KLR 649** and **Muchene –vs- Republic [2002] 2 KLR 367**, Learned Counsel urged that the appeal be allowed.

4. Arguing in opposition to the appeal, Mrs. Christine Gakobo, Learned State Counsel, contended that the conviction was on sound and credible evidence. She pointed out that the Appellant admitted to depositing the cheque but on behalf of his brother whom he never called to testify. As the Appellant was the payee named in the cheque and he admitted withdrawing the money from the Bank, the circumstantial evidence was such that the only inference that could be drawn was the Appellant committed the two offences as charged.

5. I have considered the thirteen grounds of appeal in conjunction with the evidence and the submissions respectively made by both Learned Counsel. The unchallenged evidence tendered by Dev Makaand Patel [P.W.1] Evens Mwanje Kareka [P.W.2] and Iqbal Jusain Keshraw [P.W.3] was that the cheque was stolen from the premises of the complainant, Foam Mattresses Ltd. and transferred to the Appellant's account maintained at Habib Bank, Koinange Street. The drawer of the cheque was on Joseph Wanjohi Macharia, a customer of Foam Mattresses Ltd., who had addressed the cheque. Mr. Macharia was P.W.4 and confirmed that fact. Police Sgt. Raphael Makumbi [P.W.5] testified as to how he investigated the case, traced the encashment of the cheque and arrested the Appellant who said he had been given the cheque by his brother to deposit into his account on his brother's behalf.

6. The Appellant reiterated in his defence that he deposited the cheque on behalf of his brother and that he, the Appellant subsequently withdrew the money which he gave to his brother. The Appellant did not call his brother to testify in his defence. Indeed, P.W.5 said that he was unable to trace the Appellant's brother and the trial court made the inference in the circumstances that no such brother existed and that any allegation to that effect was purely meant to hoodwink the court. What is not in doubt is that the Appellant handled the cheque that was stolen; that he had his names inserted as the payee thereof; that he deposited it in his bank account and within two (2) months withdrew the whole amount in four instalments.

7. On this evidence the Learned trial Magistrate convicted the Appellant and sentenced him to serve three (3) and four (4) years imprisonment respectively for stealing the cheque and for making a document without authority as aforesaid. Being of the opinion for the foregoing reasons that the Learned trial Magistrate correctly convicted and sentenced the Appellant, I uphold such conviction and sentence. In the result, I dismiss the appeal.

Orders accordingly.

Dated and delivered at Machakos this **9th** day of **May**, 2011.

P. Kihara Kariuki
Judge