



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAKURU**  
**CRIMINAL APPEAL 102 OF 2011**

**DANIEL KAGORI NJUGUNA .....1ST APPELLANT**

**ANN GATHOGA ..... 2<sup>ND</sup> APPELLANT**

**BETH WAMBUI KARURI ..... 3<sup>RD</sup> APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

**(An Appeal from original conviction and sentence in Naivasha SPM.CR.C. No.360 of 2009 by Hon. P.M. Mulwa, Principal Magistrate dated 1<sup>5th</sup> August, 2011)**

**JUDGMENT**

Daniel Kagori Njuguna, Ann Gathoga and Beth Wambui Karuri (the appellants) were convicted on a charge of stealing by servant contrary to **Section 281** of the **Penal Code** and each was sentenced to pay a fine of Kshs.150,000/= in default each would serve 12 months imprisonment. The appellants were Revenue Clerks at the Municipal Council of Naivasha – with 1<sup>st</sup> appellant being the Chief Revenue Clerk. They had denied the charges before the trial court in which they were alleged to have stolen Kshs.3100/= from the Municipal Council of Naivasha, which got into their possession by virtue of their employment.

According to **MARK WAINAINA KARANJA** (the Council’s auditor) after carrying out his audit work relating to an MR receipt book SN 58551-58600 his findings were that the money collected were receipted for and proceeds remitted, nothing was amiss. He left the receipt book with the Council Treasurer who later called him and gave him one receipt said to have been issued to a business woman Irene Nyambura, and that the money on that receipt No.58595 did not tally with what was in the duplicate. The sum in that receipt was Kshs.3100/- and it is the prosecution’s case that the sum was not remitted to the Council as the duplicate showed the sum as Kshs.150/= paid by Anthony Wachira on account of **“Hawking around town.”** This witness confirmed he was not trained as an auditor or an accountant.

According to PW1 the officer responsible for issuance of the Council’s accountable documents was **DANIEL KURIA** (not the appellant).

**IRENE NYAMBURA MAINA (PW2)** is the business lady who told the trial court that she paid a total of Kshs.3100/= for a business licence to the 2<sup>nd</sup> and 3<sup>rd</sup> appellants – there was some delay in issuing the

licence and when it was eventually issued, it showed a sum of Kshs.2500/=. The licence had some discrepancies and was accompanied by a Receipt No.58595 dated 1/7/2008 showing a sum of Kshs.3100/=. This led to PW2 raising queries and the Council officers eventually called her to explain how she had obtained the licence. It was then that **PW4 (JACKSON NJUGUNA KINUTHIA)** was shown the business permit in respect of PW2 and he realised that the original one did not match the one in the booklet as the original read 2500/= while the one in the booklet read 2150/=.

The original receipt showed the permit as **No.4249** whilst the copy read **4475** – this raised suspicion. The name of the licencing officer was given as **Anne** yet in the corresponding duplicate receipt S/No.4249 dated 27/6/06 was a business licence issued to **MERCY NJERI** to carry on Tailoring Business at a fee of Kshs.2150/- and even the licencing officer's name was different. The Council's enforcement officer **JOHN KIHARA KIUHU (PW5)** took up the matter and after noting the discrepancies in the original receipts and licences on one hand, and the duplicates on the other hand, he concluded that there was a possibility of parallel receipts and licences being used to embezzle the Council's money. The counterfoil in the records pointed to the 2<sup>nd</sup> and 3<sup>rd</sup> appellants as the possible culprits. Basically, the problem was that money was collected but not remitted to the Council and the record documents were being manipulated by the appellants.

According to this witness, **DANIEL KURIA** had been issued with the receipt book bearing the impugned receipt and the 3<sup>rd</sup> appellant was shown as the one who issued the original receipt to PW2.

**PENINA NALIKA (PW6)** told the trial court that she gave **DANIEL KURIA (PW7)** the accountable documents including the receipt book which contained the questioned receipt. He signed a record to acknowledge receipt and was to use the receipt book for revenue collection. According to this witness the amounts in the original receipt and copy differed. **PW7 DANIEL KURIA** confirmed that he was issued with the receipt book containing receipt No.58595 and he is the one who receipted one Anthony Wachira for Kshs.150/= for Hawking business. He discovered the receipt for Kshs.3100/= issued to Irene Nyambura for a business permit. He denied suggestions that he was the one running a parallel receipt book or receiving Kshs.3100/- from the 3<sup>rd</sup> Appellant or plucking a receipt from the receipt book and giving it to the 3<sup>rd</sup> Appellant. When the discrepancies were noted, the MR receipt book SN 58501-58600 was retrieved from Daniel Kuria. The 1<sup>st</sup> appellant's role in all this is that he was supposed to verify the information on the receipts yet he failed to do so. After investigations the appellants were charged.

The document examiner PW10 told the trial court that the signatures appearing in the questioned receipt and Exhibit 4 (licence) were made by the 1<sup>st</sup> appellant – these were the same documents the 2<sup>nd</sup> appellant had submitted to the 1<sup>st</sup> appellant for examination. This is not a contested issue but on its own, it would not prove theft – the prosecution needed to demonstrate that the verification made by 1<sup>st</sup> appellant were done to intentionally deny the Council revenue of Kshs.3100/=.

The 1<sup>st</sup> appellant confirmed in his sworn defence that he was responsible for verification of documents. He described to the trial court the procedure followed in the verification process. He received a bundle of documents from the 2<sup>nd</sup> appellant, among them being the receipt showing the disputed figure, according to him the entries corresponded and were in order.

Later on he was questioned about the discrepancies between the original receipt and duplicate. He denied being involved in any impropriety saying he was targeted because, in his position as Secretary of the workers union he had been agitating for worker's rights and the Council did not approve of his activities. This eventually materialised in a threatened strike and eventually six branch officials including the 1<sup>st</sup> appellant were arrested and charged. He sees this charge as an act of victimisation by his employer.

The 2<sup>nd</sup> applicant also confirmed that her duties included checking application forms and accompanying receipts, and she would then submit the documents for signing by the Revenue Officer. It is her evidence that on 01/07/2008, the 3<sup>rd</sup> Appellant presented to her a form which had a receipt attached to it and requested her to prepare a licence. She thereafter presented the documents to the 1<sup>st</sup> appellant for

verification and signature. She had noticed discrepancies in the documents but did nothing as she was busy.

The 3<sup>rd</sup> Appellant, a Revenue Collector confirmed that she knew the business lady (Irene Nyambura) and in fact she is the one who assessed her fee at Kshs.3100/=. She left the sum of Kshs.3100/= plus the application forms with Kuria who had an unexhausted MR book. She used Kuria's MR receipt book to receipt Irene (PW2) for the sum received, then took the receipt and application form to the 2<sup>nd</sup> appellant. Eventually she took the receipt and all the relevant documents to PW2. She denied interfering with the documents.

The trial magistrate considered all the evidence and had no doubt regarding the discrepancies on the accountable documents and the other documents. He also found that PW2 had properly applied for the business permit, paid Kshs.3100/= and was issued with the receipt No.58595. His observation was that in ordinary circumstances, that receipt should have been plucked from the Miscellaneous Income Fee book, but that did not happen because the Serial Number in the corresponding duplicate had different entries in terms of who it was issued for, the purpose it was issued for and the sum received. His conclusion was that the receipt was plucked from a different Fee Book and the only logical conclusion was that a parallel fee book was active and was being used to collect money from traders. His conclusion on the matter was that:

**“A miscellaneous Income Fee Book could not be used without a single business permit fee book which basically is the Business Licence or permit. Therefore if a parallel MR Fee Book was in use, it meant that there ought to be a parallel Single Business Permit Fee Book to ensure that the money receipted in the former is completely “accounted for” in the latter.”**

The trial magistrate also observed that 2<sup>nd</sup> appellant was aware of the discrepancies but did nothing and the 3<sup>rd</sup> appellant was aware because she acted on the receipt and licence and presented them to 1<sup>st</sup> appellant for verification and signature. It is not clear how this inference was drawn. The 1<sup>st</sup> appellant was deemed to bear the biggest burden, as his duty required him to scrutinize and verify the documents, yet he over looked everything and the only conclusion that could be drawn was that he was aware of what was happening. The trial magistrate's view was that there was a well-co-ordinated cartel meant to deny the Municipal Council of its revenue and it involved the three appellants and in the process they stole 3100/= by use of a receipt and permit not authorised for use by the council.

These findings are challenged on grounds that:

- (1) The particulars of the charge did not support the charge nor did the evidence prove the offence.
- (2) No reasons were given for rejecting the defences tendered by the three appellants.
- (3) Submissions made by the defence counsel were not considered.
- (4) The sentence meted was harsh and excessive.

In arguing the appeal, Mr. Mbuvi submitted on behalf of the appellants that the defect in the charge was in the wording of the particulars which failed to mention that the appellants were jointly charged, and this made it very difficult for the appellants to understand the charge whether each was being accused of stealing the Kshs.3100/= or whether it was a joint offence. It is argued that this rendered the charge fatally defective. It was further contended that the trial magistrate failed to consider the evidence of PW1 who had carried out an audit and not found any anomalies, and instead chose to rely on evidence of untrained witness to convict the appellants.

The appellants submitted that whenever an employee is accused of stealing independent auditing must be presented to court, yet in this instance auditing was done by an employee of the complainant. This court was asked to be guided by the decision in **ANDREW OJWANG WODERA V R** Criminal Appeal

No.21 of 2005, which is said to be on all fours with the present case. In that case it was held that an audit carried by an employee of the complainant could not be deemed to be an independent audit. This was important especially in the light of evidence presented to the effect that appellants had worked for the complainant for 20 years, daily collecting funds, yet they had never been accused of mishandling the funds. The appellants counsel argue that they were convicted on suspicion and the discrepancies in the documents cannot be used to convict them on a charge of stealing, especially in the light of PW6's evidence. Counsel's contention is that the 1<sup>st</sup> appellant was being victimised because of his role in agitating for the workers' rights, and 1<sup>st</sup> and 2<sup>nd</sup> appellant never dealt with cash.

The State concedes the appeal, and Mr. Omari the State Counsel submits that the absence of an independent audit was fatal especially because an initial audit carried out by the Council's employee detected no fault (who was not a qualified auditor) and all the more reason why an independent audit was necessary. In his view the proper person to testify, was the Town Treasurer who would have given details regarding internal systems in revenue collections and procedures which the council has in place, so the trial court proceeded without the benefit of understanding the internal procedures of the council and in fact it is the 1<sup>st</sup> appellant who shed light on the internal procedures of the council.

Secondly, there were crucial documents i.e. the control sheets against which comparison was made with the receipt book which were in the hands of the Revenue Clerks, so as to detect errors, yet they were not produced, despite the court granting adjournments twice so as to get them. This was conceded was having been prejudicial to the appellants.

The lack of properly qualified personnel is seen as the reason for all the loopholes at the council, and the State Counsel submits that it would have been very difficult for someone of the 1<sup>st</sup> Appellant's calibre to detect any discrepancies if the auditor could not, and it was only after this case arose that a Revenue officer and an Assistant Revenue officers were appointed – infact according to the State, these subsequent appointees should have been called to testify in court so as to shed light on whether what happened was unusual or was enough for one to infer that it constituted theft. It is submitted that there is doubt as to whether appellants had the intention to steal or whether they were just victims of a local authority which did not have a proper system in place for revenue collection and audit, so the conviction was unsafe.

I have no doubt that there were discrepancies in the receipt issued to PW2 whose details differed with what was its purported duplicate. There is also no doubt that the receipt for Kshs.3100/= was issued by the 2<sup>nd</sup> appellant after she had present it to the 1<sup>st</sup> appellant for verification; and the 3<sup>rd</sup> appellant has admitted that she is the one who received the money from PW2. However it seems that the council was keen to protect Daniel Kuria, believing that he had the genuine book and that the proper receipt was the one issued to Antony Wachira, despite the said individual not testifying.

This was particularly significant in the light of **Naliaka's (PW6)** evidence that there was no indication that the receipt booklets were to be used for a particular purpose and that some of the documents had printing errors of the nature raised in this case. When Naliaka's evidence is considered in the light of PW1's testimony, that when he carried out an audit, initially he did not detect any defect until the treasurer pointed it out, then certainly there was need for an independent auditor other than PW1 who was an employee and may have felt obliged to make a finding supporting his senior's assertion. Again since it was a confirmed position that the 1<sup>st</sup> appellant had been a union leader, acting like some thorn in the flesh of the council – then the possibility of victimisation due to his agitating for workers' rights and threatening to paralyse the council's operations should not have been ignored. As a matter of fact the trial magistrate did not give any reason for rejecting the defences offered by the appellants. One is left wondering why, if the 1<sup>st</sup> audit carried out produced no query, then what happened to enable PW1 suddenly find the glaring defect, possibly victimisation? I concur with both counsel that in the absence of an independent auditor greatly prejudiced the appellants.

Each council worker, i.e. both prosecution witnesses and appellants had their own versions of how the money received from the business woman was handled – an independent auditor and the Treasurer who prompted the entire investigation ought to have clarified to the trial court what was the ideal procedure,

the permitted practice, and the prohibited or irregular practice – none was availed and there was no justification in preferring the explanation given by prosecution witnesses, against the one given by the appellants.

Then there were the control sheets referred to in the evidence of PW1 as having been used to compare with the entries in the receipts at each collection, yet these were not produced – and despite this the trial magistrate accepted the version presented by the prosecution witnesses – certainly this was prejudicial to the appellants, without having sight of the control sheets, it is not clear how the trial magistrate simply accepted the worked of the witnesses to support the allegations.

Granted there were discrepancies in the documents and the hand writing expert even attributed some of the writings in those documents to the appellants, yet this did not constitute an act of stealing as defined under section 268 of the Penal Code – in fact the evidence learned more towards fraud. The conviction on a charge of stealing was unsafe.

The upshot is that the appeal is properly conceded; the conviction was unsafe and is quashed. The sentence is set aside. The appellants shall be set at liberty forthwith unless otherwise lawfully held.

**Delivered and dated this 20<sup>th</sup> day of September 2012, at Nakuru.**

**H.A. OMONDI  
JUDGE**