REPUBLIC 0F KENYA
IN THE HIGH COURT OF KENYA
AT MERU
CRIMINAL APPL.NO.248 OF 2008
ISSACK TULICHA GUYO ……..…..APPELLANT

VERSUS

REPUBLIC……RESPONDENT

(Appeal from the judgement and sentence by Hon Charles Obulusta Senior Resident Magistrate Moyale SRM Court Criminal case No.365 of 2008)
CRIMINAL PRACTICE AND PROCEDURE
Constitutional law
· *Amendments of petition of appeal and abandonment of grounds whether earlier allowed .S350 of criminal procedure code (cap 75 laws of Kenya)*

· *Accused person allowed facilities to prepare his defence (S77) (d) of the constitution.*

· *Criminal law-stealing by a servant contrary to section 281 of the penal code ,(cap 63 laws of Kenya (Definition of a servant)*

JUDGEMENT

The appellant was charged and convicted of the offence of stealing by servant contrary to section 281 of the penal code ,(cap 63 laws of Kenya) and was sentenced to serve five (5)years .He has appealed to this court ,on seven grounds one which he abandoned and his counsel said he did not wish to argue
The appeal was urged by Mr. Mutunga learned counsel for the applicant Mr Muteti senior state counsel urged opposition to the appeal on behalf of the republic .The appellant ‘s counsel urged grounds 6,7,3,2,4 and 1 of the petition of appeal. He abandoned ground 5 of the appeal. I will consider grounds 7, 1,3 and 5 which was abandoned by counsel for the applicant I will also consider grounds 2 and 7 together. Ground 7 will be considered separately.
Ground 7
This ground claims that the learned magistrate erred in law when he denied the right of legal representation. Counsel for the appellant contended that this was a violation of the appellant’s right under section 77(2) (d) of the Constitution. That section guarantees every person charged with a criminal offence a right to defend himself before court in person or by a legal representative of his own choice. The right to defend oneself is guaranteed in two respects – **firstly,** to defend oneself in person, that means, the right to an by the accused person to not merely to question his accusers, that is to say witnesses by the prosecution but also the right to testify in his own defence.
Secondly the provision allows the accused to be guided by counsel of his own choice.
Considering the provisions of Section 77 (2) (relating to a fair hearing) in **JUMA and OTHER vs. A.G (2003) E.A. 452, Mbogoli and Kuloba JJ.** Held that these provisions of the constitution can have life and practical meaning only if accused persons are provided with copies of statements made to the Police by persons who will, or may be called, to testify as witnesses for the prosecution as well as copies of exhibits which are to be offered in evidence for the prosecution.
In this case the appellant’s complaint is not that he was not availed with such statements or copies of

exhibits to be produced by the prosecution witnesses. The appellant's complaint is that he was denied the right to engage a counsel of his choice in his defence. The evidence in support of this contention is found at p. 26 of the lower court's proceedings. The record shows that the Appellant was charged on 23/10/2008. The complainant **had a requested for a Mr. Nyandeka to come for hearing at the end of November.** The Appellant said:-

"I have no objection; I will also look for an advocate".

The plea of not guilty was entered, and the matter was fixed for hearing on 26.11.2008 and mention on 31.10.2008 the only issue which arose was the appellant application for bail-bond pending the hearing This application for bond was declined and the matter was confirmed for hearing on 26.11.2010 .On that date, the court declined the appellant's application for an adjournment on the ground of illness. The court followed the case of **OLEMA &ALISTEN VS REPUBLIC** (1991)K.LR539 that when the accused an adjournment on the ground of illness the court will exercise of its direction consider the appearance of the accused and his behavior in court ,and adjournment was not automatic .The court noted that the applicant had on being called out stood upright and had a clear voice .The witness were from out side ,far away from Moyale town ,and it would be difficult to bring them back if they did not testify on that date 26.11.2008.

When the charge was submitted and read to the appellant he decided to keep silent and the court entered a plea of not guilty and the prosecution proceeded to call its first witness .The appellant cross-examined this witness and thereafter the hearing was adjourned to enable the appellant seek and obtain medical attention.

The hearing resumed at 3.15 on 26.11.2008 after the appellant has been attended to at the hospital and stated that he was ready to proceed with hearing. Indeed the appellant was ready with the hearing .He cross-examined all the four subsequent prosecution witness and also further cross examined the first witness(P.W1).The appellant did not even say ,I wish to engage or seek legal counsel. What the appellant said when the charge was read to him on 23.10.2008 is

"I have no objection; I will also look for an advocate"

He neither reiterate nor referred to that desire on 31.10.2008 when the matter was mentioned, nor did he mention that wish on 26.11.2008 at the commencement of the prosecution's case nor again at the close of the prosecution case when the court ruled that he had a case to answer, and chose to give an unsworn statement in his defence.

It seems to me therefore that where an accused person voluntarily takes part in the conduct of his own defence at the trial and does not seek an adjournment at the commencement of the prosecution's case or renew his application to engage counsel and actively takes part in the trial proceedings by cross examining prosecution witnesses, and later gives evidence on his defence, albeit by way of an unsworn statement he cannot turn around an appeal and be allowed to allege or claim that his right to counsel was breached by the trail court. The only exception to this proposition is in respect of trials in capital cases murder, and treason, under sections 203 and 40 of this Penal Code (Cap 63 Laws of Kenya).

Ground 7 of the Petition of Appeal therefore fails and I so find and hold.

GROUNDS 3 AND 5

Grounds 3 and 5 are irreconcilable as Mr. Muteti learned Senior State Counsel submitted. In ground 3 the appellant denies he was an employee of the complainant. In grounds 5 however, the appellant admits he was an employee on commission.

Having examined the evidence of PW.1, P.W.2 and P.W3 and the appellant own admission that he was an employee of the complainant, the evidence of those witnesses corroborate each other that the appellant was an employee of the complainant. P.W.1 in his evidence in – chief said –

"The accused is known to me. He is my employee since 2001 when his father approached me to employ him. He started as a tea picker. In December, I made him a sales man as I trusted him from home".

P.W.2's evidence is in like vein, ***"the accused is from our community in Moyale. He was a salesman and was on contract. It was signed in my presence".***

P.W.3's evidence is also clear that he was the driver of the motor vehicle to Maua, to make sales, and upon returning to Meru Town the appellant excused himself, got out of the vehicle, switched of his mobile phone, and disappeared. P.W.4's evidence was to same effect.

The Appellant in his own unsworn statement betrays his denial that he was not an employee of the complainant. This is his unsworn statement.

"I am called Isack Talicha Guyo born in 1978. I am working with RAGOS. I come from Moyale the

complainant is from my community. I knew him. I have worked for his company for 7 years".

For the appellant to contend that he was not an employee of RAGOS, the complainant's company for which he says he worked for 7 years and therefore a servant of that company, is to perpetuate a falsehood. Grounds 3 and 5 therefore fail together notwithstanding the purported abandonment of ground 5 of the Petition of appeal.

GROUNDS 4 AND 6

The appellant contends that there was no proof that he received the money (ground 4), and that the prosecution evidence in respect of invoices MFI – 6a MFI – 6(b) MFI 6d and those were mere invoices and not were evidence of receipt of money.

It goes without saying that invoices are not receipts. An invoice is a request for payment against delivery of goods. A receipt is either an acknowledgement of receipt and acceptance of the goods delivered or of payments therefore upon receipt of the money called the purchase price.

It was the evidence of P.W.3 (Peter Githuka) the driver, that he accompanied the appellant to Maua on 9.10.2008, and made sales and delivered the cargo to one Mohamed, and another person. The appellant was the one who deposited the money – **"I did not know how much"** he went to the Kenya Commercial Bank Ltd Meru Branch and returned after 3 minutes. – P.W.4's evidence is to the same effect.

The reconciliation was carried out by P.W.2 and found the money missing. The appellant offered no explanation. He had first disappeared until arrested by Police and charged. He invoices were relevant for the period in question as the documents issued in relation to the particular goods and for which the applicant was paid. It is absurd for the appellant to argued that there were no receipts to evidence payment by the customers to whom the goods were delivered. Under section III of the Evidence Act (Cap80, Las of Kenya) the fact of the money was a fact peculiarly within the Appellant's knowledge for which he had a duty to explain and failed to do so.

In the circumstances the contention that the trial court took into account irrelevant consideration or that there was no proof that the appellant received any money is not tenable. Grounds 4 and 6 must equally fail so I find and hold.

Having come to the conclusion that none of the six (6) grounds are sustainable I do not propose to discuss the question raised by learned State Counsel whether or not the Petition of apples is defective by failing to pray that the Appeal be allowed, the conviction be quashed and sentence set aside and the appellant be set free.

The appeal has no substance and fails in its entirely and the judgement sentence of the lower court is affirmed and I direct the cancellation of the bond granted herein and that the appellant commence service of the balance of his sentence as of the time he was granted bond by this court.

These shall be orders accordingly.

SIGNED at NAKURU this 10th day of MARCH 2010

M.J ANYARA EMUKULE
JUDGE

DELIVERED and DATED at MERU this…….day of……..…..2010

MARY KASANGO
JUDGE