

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
Criminal Appeal Case 116 of 2007

JOACHIM ABOK ADINGOAPPELLANT

VERSUS

REPUBLICREPUBLIC

J U D G M E N T

Joachim Abok, the appellant herein, is before the Chief Magistrate's Court facing a charge of ten counts of stealing by servant contrary to section 281 of the penal. On 24th day of July 2007, the case proceeded for hearing. The first witness to testify was Joseph Maithya Mululu (P.W.1). He was the Internal Auditor of Habo Group of Companies, the complainant herein. At the end of P.w.1's evidence in chief, Mr. Odhiambo learned advocate for the appellant, applied for P.W.1 to be stood down until the following documents namely:

- i) *Computer print out for the Chief Cashier for the year 2006*
- ii) *Emergency Cash Register*
- iii) *Bank Statements for the months of September, 2006, October and November, 2006*
- iv) *Cash book for Petty Cash Voucher for daily payments*
- v) *Cash Book for Cheques received and paid Petty Cash Account*
- vi) *Copies of any other exhibit or documents the prosecution will rely on the case before Resident Magistrate's Court*

are availed in court. The application was heard and dismissed. Subsequently, the appellant applied for adjournment to enable him appeal against the dismissal order. The application for adjournment was also rejected and the case proceeded to hearing. Being dissatisfied with the aforesaid decision, the appellant preferred this appeal.

On appeal, the appellant has put forward six (6) grounds. In sum, the appellant has stated that he was not given a fair trial. Mr. Monda, learned Senior State Counsel conceded the appeal on that ground. He however beseeched this court to order for a retrial.

I have considered the arguments of both the learned Senior State Counsel and Mr. Odhiambo, appellant's learned counsel. I have also critically examined the proceedings of 24th July 2007. It is obvious from the record proceedings that the appellant was denied certain documentary evidence which he needed to use to cross-examine the prosecution's witness (P.W.1). Those documents were not within the possession of the appellant but were in the possession of the complainant. I agree with the appellant's submission that there can never be a fair trial if the aforesaid documents are withheld by the complainant. I am satisfied that the learned Senior State Counsel rightly conceded to this appeal.

The appeal is allowed. Consequently the proceedings taken before Mr. M.O. Obiero, learned Resident Magistrate are hereby set aside. The case is to be retried afresh before another magistrate of competent jurisdiction other than Mr. M.O. Obiero on priority basis.

Dated and delivered at Mombasa this 21st day of May 2009.

J.K. SERGON

J U D G E

In open court in the presence of Mrs. Umara h/b Monda for Republic

N/A Appellant.