



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

Criminal Appeal 42 of 2009

DAVID KIBER CHUMBAAPPELLANT

VERSUS

REPUBLICRESPONDENT

(Appeal from Original Conviction and Sentence of SRM's Court Maseno

in Criminal Case No.1330 of 2005

Coram:

J. W.Mwera J.

Miss Oundo for State

Mwamu for the appellant present

Court Clerk Raymond

interpreter English/Kiswahili/Luo

J U D G E M E N T

The appellant herein was charged in the lower court with seven (7) counts of stealing by servant contrary to section 281 Penal Code and simple theft contrary to section 275 Penal Code.

Mr. Mwamu appearing for him here told the court that his client was after trial convicted of counts 1 and 7 only and these read:

Count 1: That on diverse dates between 11th September 2004 and 5th April 2005 at Kenya Commercial Bank (KCB) Luanda Satellite Branch, Vihiga the appellant being in charge of the said branch stole Kshs.516,000/= the property of Kenya Commercial Bank which came into his possession by virtue of his employment contrary to section 281 Penal Code.

Count 7: Again brought under section 281 Penal Code it was alleged that between 23rd September 2004 and 31 March 2005 at the said Luanda Kenya Commercial Bank branch the appellant stole shs.4,557,996/= which came into possession by virtue of his employment.

On conviction of the 2 counts the learned trial magistrate handed down a 3 – year term imprisonment for

each counts, to run concurrently. That provoked this appeal.

A petition with twelve (12) grounds was filed but at the time of hearing, counsel condensed these into four (4) lots: grounds 1,2,3 together; grounds 5,6,7,8 together; grounds 4,9,9A,B,C together and grounds 10,11,12 together.

Ground 1 was basically on evidence. Mr. Mwamu contended that Robert Gumo (PW1) testified that the appellant stole shs.2.5 million. He could not establish some entries which came from the appellant's Luanda branch to Kisumu regional office for tallying and that when all entries were reversed a sum of shs. 7 million was found to have been lost at Luanda. And the two charges/counts 1,7) spoke of theft of shs.516,000/= and shs.4,557,996/= respectively. And yet in the judgment the learned trial magistrate found the appellant guilty of stealing shs.4,879,181/=. Counsel then wondered what figure of the allegedly stolen money the appellant faced in order to answer the charges. Mr. Mwamu saw these varying figures as prejudicial to the appellant. He contended that he should not have been convicted on Count 7.

Coming to what he called other issues or ground, counsel said that as per Lydia Makokha (PW2) vouchers were not balancing as at 13th April 2005. That time the appellant was away on a seminar when the examination was being carried out. That Lawrence Ambundo (PW4) then testified that the appellant was charged because he failed to post vouchers to Kisumu and some primary vouchers and documents were missing. That this created a doubt as to how the total sum lost was arrived at or how the appellant was responsible for it.

And that another witness Abel Ekodir (PW9) testified that there was no loss at Luanda and all it needed was a reconciliation of the books and that the appellant should have been granted this opportunity. It was added that the same PW4 then said that error correction register was handled by several members of staff at Luanda and not the appellant exclusively. So it was in error to find that the appellant was concealing irregular activities when all that the prosecution should have based its case on and it did not, was to have an audit report for the period alleged so that specific figures sums were set forth. Such a report would certainly state as to what sum got lost at what time and who was responsible.

That indeed this handicap hampered I/P Kibet's (PW11) efforts to come up with any certain sum(s) during his investigations because he was even given some fictitious vouchers. He had uncertain figures to deal with.

Mr. Mwamu then moved onto what he termed vital witnesses not being called to testify. One such was Athens Kimutai who used to record vouchers from Luanda. He did not come to tell the court how/if he received the vouchers and how much money was involved. It should thus be presumed that Kimutai, had he testified would have given evidence prejudicial to the prosecution (see Juma Ngodia versus Republic (1982-88) 1KAR 454.

That because other staff members could make entries in the questioned register(s) and not the appellant alone, a doubt was created and thus the appellant ought to have been acquitted.

And lastly that the total sentence of 3 years was harsh in that the money allegedly lost was recovered from what would have been the appellant's terminal dues and also that his services were terminated.

Miss Oundo the learned Senior State Counsel, opposed the appeal by positing that even if there may appear varying sums in the charge sheet and evidence, that did not water down the prosecution case so section 382 Criminal Procedure Code should cure that. The appellant was not prejudiced. That the prosecution called those witnesses it felt could and did prove its case and so excluding Kimutai did not matter. The defence could as well have called him to testify on its behalf. That the appellant was in charge of the Kenya Commercial Bank Luanda branch with duties to supervise entries by clerks and verify the same before submitting them to the Kisumu office. During the period in question entries did not tally and when entries made manually were later computerised it was found that shs.7 million was missing, in the period between September 2004 and April 2005. Then he went on training. The appellant

was found to have credited other customers accounts including his own. Vouchers used did not have details of customers and on several occasions the appellant had failed to reconcile his accounts. When directed to forward his accounts to Kisumu, he ignored that. Vouchers for error correction were not entered in the register and forwarded to Kisumu and many were not available. Further, that the document examiner (Emmanuel Kenga, PW8) found that the appellant signed the vouchers. That the learned trial magistrate had sufficient evidence to convict and hand down the 3 year-jail term which was not harsh.

Turning to the evidence before the lower court so this first appellate court can draw its own conclusions, Robert Kipserem Tumo (PW1) (or Tum), a clerk working at Kenya Commercial Bank (Kisumu) branch recalled that about April 2005 his operations manager Mr. Mbudo (or Ambundo) directed the witness to balance the Luanda branch account that was not balancing. That arose from payments having been made and yet the same were not debited to due accounts. That on 18th December 2004 shs.3,800/= was paid into account number 230-487-958 belonging to the appellant, David Chumba. The sum was not debited to that account as per summary sheet before court. The money did not go through the account. The same took place on 12th October 2004 with shs.10,000/= to the appellant's said account.

The witness who worked with the appellant for 4 years and knew his signature well added that the appellant authorised payment of shs.20,000/= from account number 230-375-014. And then on 01.03.05 some shs.60,000/= was paid from account number 130-449-443. And on 5/3/2005 shs.10,000/= was paid into account number 230-847-958 (of the appellant.) The witness produced several other transactions, paying in or out of certain accounts as supported by respective activity sheets and daily summaries, all bearing the appellant's signature/authority. After examining about twenty transactions involving customers accounts and some on the appellants' account, PW1 found that all payments were not posted through the respective accounts and those accounts were not debited. And withdrawal sheets that should have been sent to Kisumu from Luanda, were not submitted. The manual transactions at Luanda had to come to Kisumu for computer posting. There occurred a large debit in the account and that is how it was realized. That there had been withdrawals. The witness carried out the exercise using debit notes, daily activity sheets and summary sheets signed by the appellant involving several transactions and accounts. A sum of some shs.7 million was found lost at the time the appellant was in charge at Luanda. He was only required to authorize entries made in the daily activity sheets and summary sheets. He never made these entries himself but he had to see and confirm physically whether withdrawal vouchers were there.

Lydia Makokha (PW2), a bank clerk at Luanda Kenya Commercial branch had duties to prepare and pass vouchers, open accounts and keep registers.

On 13th April 2005 she received vouchers from Kenya Commercial Bank Kisumu Office, which were not balancing and she was to find out why. PW2 went over the relevant register and found that they had not been recorded. These were before court (MFI.32, later produced). To her, a transaction took place but the credit and debit bits did not balance. The sum involved was shs.299,160/=. It was similar case with another transaction of shs.299,160/=. Both these had David Chumba's (appellant) signature. PW2 sought his directions. The appellant directed that these vouchers be sent to one Kimutai at the Kenya Commercial Bank Kisumu office to post as they were. PW2 did not do that but held onto the vouchers awaiting the appellant's explanation. When he ultimately came to explain, the witness did not give him the vouchers. The appellant went on training. When a new person replaced him, PW2 told him that she was having the questioned vouchers. Then the bank's security personnel arrived and she was questioned. Later she made copies of those vouchers. She denied that she raised the vouchers. Then the appellant was better placed to explain these vouchers.

On his part Naftally Otiende (PW3), cashier at Luanda said that he prepared activity and daily summary sheets (MFI P1-22) which the appellant authorised and he paid. On 18th December 2004 the appellant represented a cheque for shs.3,800/= personally and payment was made on (his) account number 230-847-958. Other customers were similarly paid. Then the appellant verified and signed the sheets which were then transmitted to Kisumu by the appellant or any other officer. He had to authorize such payments after they had been made. Activity sheets were made based on withdrawal vouchers or cheques.

Lawrence Mbudo (PW4), a retired Manager Operations with Kenya Commercial Bank (Kisumu) received information from Lydia (PW2). She had received vouchers passed through Account number 9732390924. That surprised the witness. To him this was an inter-branch account which was not supposed to be debited manually unless there was sufficient evidence. PW4 sent one Catherine to establish whether other vouchers were related to this account. Catherine's exercise showed that shs.4.2 million had been involved. That appeared as an anomaly with the teller account reading shs.5.3 million. The teller account in which a cashier makes postings must reflect a balance with the physical cash in the till. So PW4 directed Robert Tum (PW1, Tumo?) to investigate the anomaly vouchers used MFI.P(21) with transactions erroneously reversed, now corrected, which did not make sense. In the case PW4 was handling, the vouchers did not have details of the customer, his account or branch. The witness knew the appellant's signature and handwriting which appeared on the questioned vouchers. Money had been paid to the appellant himself, Ebukanga Girls Secondary School and other customer's whose accounts the witness stated to the learned trial magistrate, with varying sums involved. For instance the appellant paid in his own account number 230-847-958 shs.16,000/= between 11th December 2004 and 5th April 2005 plus shs.3800/= and 10,000/= (MFI(a), P2). All involved what the witness called an inter-branch account. The appellant denied having raised vouchers in connection with that account.

The witness took part in the entire investigation, visiting Luanda, the appellant's branch and perusing the records: activity and daily summary sheets, registers, etc. It was the appellant's duty to check and verify what cashiers like Naftally Otiende (PW3) entered. Singling out a transaction involving account number 130-449-443 the lower court was told that its holder received cash from the bank but a credit entry was not made. This was to be done by one Allens Kimutai at the Kisumu Kenya Commercial Bank office. That because no credits were generated to the teller accounts for the debts and the appellant failed to forward documents required to Kisumu, he was charged. The witness could not tell why the primary vouchers and documents went missing. On this point Mr. Mwamu stressed that the appellant was not charged for theft but for failure to forward to Kisumu some documents.

Catherine Gichuku (PW5) a clerk in charge of accounts at Kenya Commercial Bank (Kisumu), had duties including verifying transactions to ensure that they were correctly posted to the general ledger.

On 13/4/05 Lydia (P2) called this witness to query about some tagged entries that did not balance. They carried her initials but she had not raised them. The entries were debiting an inter branch account which did not emanate from Luanda. When Lydia sent their copies to PW5, she concluded that they emanated from Luanda and were meant to correct errors. Lydia did not know which errors and the matter was reported to the operations manager (PW4). The vouchers were extracted (MFI.P34). The Luanda register (MFI.P35) did not contain errors to be corrected.

Lydia had made several corrections on (MFI.P38) and also the appellant made entries there on 25th July 2003.

Joseck Muka (PW6) told the learned trial magistrate that he used to work at Luanda before moving to Siaya.

On 26th April 2005 investigations came there inquiring into a suspected fraud. The Kisumu office had previously inquired whether some questioned vouchers from Luanda had been paid by him or not. They (MFIP37) bore PW6's stamp. That stamp had been assigned to him but it was withdrawn (the received stamp)

although he had no evidence of that, while he retained the paid stamp. The witness denied that he did raise or stamp the questioned vouchers.

Rose Akoth Otieno (PW7), a businesswoman in Kisumu, traded in the name of Romano Agencies. She had an account at Kenya Commercial Bank Kisumu branch. She got a letter in May 2005 to the effect that her account did not have money, yet she had withdrawn some from it. She was required to return that money. She was told that the money had been withdrawn through Luanda Kenya Commercial Bank branch. She visited her branch and denied making such a withdrawal. She was not shown the

signed withdrawal vouchers. She knew the appellant when he used to serve her at the Kenya Commercial Bank branch.

Emmanuel Kenya (PW8) an Assistant Commissioner of Police, a Document Examiner duly trained and experienced in examining disputed documents, handwritings and signatures, received exhibits from I/P Mwita of Kenya Commercial Bank (banking fraud unit) on 19th June 2006:

Exh. B1-B6 – known writings and signature of David Chumba (the appellant herein) C1-22, D1-D73 questioned documents

The witness examined and compared the questioned writings with the known ones after applying the applicable observations and characteristics. PW8 found on all the exhibits, that they were made by the same hand. He presented his report (Exh.P.39). Any alterations there were acknowledged, explained the same having been signed against.

Alice Ekidor (PW9), whose duties involved investigating fraudulent cases, was stationed at the Kenya Commercial Bank (Headquarters) Nairobi. On 21st April 2005, PW4 (Lawrence) called the witness so that he could look into some teller account at Luanda Kenya Commercial Bank that could not balance – with a difference of about shs. 6 million. That Chumba, the appellant had not done the balancing and Lawrence had come across some fictitious vouchers. These vouchers were collected and PW9 teamed up with I/P Bett to investigate. On interviewing the appellant, he denied that there was loss at his branch and he required time to reconcile the account. Time was given to him but he was suspended before he reconciled the account and made a report. Other staff did the exercise and reported that some accounts held at the Kisumu office had benefited from some of the transactions e.g. Gulf Fabricators, Romeo Agencies, Cherop Weru Etc. Cashier sheets were not accompanied by the mentioned customers(?) to withdraw the funds.

Activity Reports were alluded to, to show that the appellant's account (above) had payments of shs,380, shs.10,000/= without the relevant corresponding documents e.g. vouchers or cheques. The appellant denied raising vouchers (MFI.P3&). They were not entered in the Luanda register either (MFI.P38). Several members of staff made entries in the error correction register at Luanda. Documents to support transactions marked on MFI.P1() and P36(b) could not be traced.

I/P Patrick Mwita (PW10) worked with the Banking Fraud Unit at Kenya Commercial Bank, Nairobi. He took over the file on the Luanda saga from I/P Bett. The witness went over the payments in question and in his testimony spoke of having interviewed two accused persons at Luanda. He did not name them but one must have been a woman:

“I brought her to Kisumu.....”

He caused the two to be jointly charged with theft of shs.276500/=. PW4 forwarded the signatures on payment vouchers and cashier summary sheets to the document examiner and later received a report that the signatures on the vouchers plus activity sheets were made by “accused one.” The witness told the learned trial magistrate that the cashier summary sheets MFI.P1(a) to MFI P36(b), specimen signature's of “accused one” which were marked as C1, specimen handwritings E1 to E18 and known handwriting and signature of accused one marked A1 to A45. All these were what was contained in the document examiners report (Exh. P39). PW11 then produced Exh P1(a) to P36(b). At this point if the court may observe the person referred to as “accused one” by this witness, is the appellant. His co-accused. Dorris Muthoni Weru is accused 2 in count 2 – stealing contrary to section 275 Penal Code.

Then the appellant alluded to Exh P37 where “accused one” was supposed to sign. This is the appellant. However, so far it is not clear at what point Exh P37 was produced. But PW10 said that “accused one”, the appellant quite likely signed Exh.P1 to 36(b).

I/P Mathew Bett (PW11) then working at Mombasa, recalled on 23rd April 2005 when he was performing banking fraud duties at Kenya Commercial Bank. He received a complaint against David

Kibet Chumba in charge of Luanda Kenya Commercial Bank branch. It was alleged that he falsified entries in some vouchers occasioning a loss of about shs.4 million. PW11 moved to Luanda, interviewed Chumba (the appellant) and took a statement from him. He was able to obtain some documents while others were missing. The appellant denied knowledge of any fictitious vouchers. So his handwriting specimens were taken, entered in the exhibit memo and forwarded to the document examiner for verification. The witness also interviewed some customers whose accounts were involved. On his transfer to Mombasa, PW1 handed the file to I/P Mwita (PW10). The witness told the court that the appellant's wife had been charged as "accused two." (see count 2) in the charge sheet). She was acquitted at the point of "no case to answer" while the appellant was put in his defence.

In a short unsworn statement the learned trial magistrate heard that he was transferred to Luanda branch as the in-charge there. His duties included authorizing entries raised by clerks and cashiers. He did this at the end of the day using cashiers activity sheets and cash summaries together with actual cash balances. He would then forward these documents to the main branch at Kisumu. As regards the matters before court, he went on a training and on his return was informed that cash was lost. He had no knowledge of that.

The lower court then went on to convict the appellant on counts 1 and 7 – stealing by servant contrary to section 281 Penal Code.

In this court's review of the whole evidence in the lower court, it is not in doubt and both the prosecution and the defence were agreed that the appellant's duties were to verify the entries in the sheets completed by cashiers/clerks, called activity sheets or summary sheets where a day's transactions had been effected. His signature was appended to these documents to signify that they reflected a true state of transactions carried out by the cashiers and clerks. It was added that he had to ensure that the balances in the account tallied with the transactions. Then the schedule/register of all these had to be transmitted to Kisumu branch by the appellant. He did not make the entries he authorized. Other staff did. But as the overall in charge he had to verify the accuracy of the completed sheets, registers and forward them to Kisumu for posting. It is not in doubt that he did append his signatures to the questioned papers. The document examiner found so. So to this court, it was very negligent of the appellant as final authority, on entries of transactions emanating from Luanda, to authorise what definitely ended up with faulty or erroneous details some of which may have occasioned loss to the bank. Verifying and authorizing the entries by his signature, of transactions done by his staff, was not a matter of course. The appellant was expected to personally satisfy himself that the entries were correct before signing. Seemingly he did not ensure that and even some documents meant to be sent to Kisumu were found missing. All this took place before he went on training and so it cannot be said that he had no knowledge of the questioned transactions. They bore his signature. It therefore appeared to this court that the appellant performed his duties in such a careless manner that did even verge on recklessness. This could only be attributed to a person who was never qualified for trained in or interested in the job he held. Or on the other hand he may have had something to do with the anomalies and sought to hide behind the reason that he never made the entries. What remained at the end of the prosecution case was that no evidence led, linked or directly showed that the money allegedly stolen got into the hands of the appellant so as to be able to steal it. If he did so by some manipulation then the vagueness of how he did it did not help here. His was to authorize the entries made in the books by others – not to handle cash. So he could not be said to have stolen what did not pass through him at all. Not even what could be alleged to have caused/facilitated by the appellant to be stolen. On that account this court would be inclined to allow this appeal.

There was however evidence that some money was paid into or out of the appellant's own account number 230-487-958 (see the evidence of Robert Tum PW1, and Lawrence Mbudo, PW4)

- (i) On 18th December 2004 - shs. 3,800/- paid in
- (ii) On 27th November 2004 - shs.10,000/- paid out
- (iii) On 5th March 2005 - shs 10,000/- paid out

(iv) On 4th April 2005 - shs.20,000/- paid out

The total come to shillings 43,800/=. Surely he appellant cannot claim that he did not know of these sums going into and out of his own account. If he did not, it verges on the unbelievable and if he did he condoned it. He did not desire to explain this in his defence. In the light of this, this court finds the appellant guilty of stealing that money contrary to section 275 Penal Code as per count 3.

The sentence was said to be harsh and excessive as regards counts 1 and 7 on which the appeal has been allowed. Conviction there is quashed and sentences set aside. But having been convicted on count 3 the sentence imposed is 2 years imprisonment. The conduct and activities of the appellant in the whole case left a lot hardly to be considered in his favour.

Save for the variation of conviction and sentence, this appeal is dismissed.

Judgment accordingly

Delivered on 18th May 2009

J. W. MWERA

J U D G E

JWMmk.