REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CRIMINAL APPEAL 102 OF 2007

(From original sentence and conviction in Criminal Case No. 393 of 2007 of the Senior Principal Magistrate's Court at Malindi)

MICHAEL KAZUNGU ……..……APPELLANT

VERSUS

REPUBLIC ……..……..……PROSECUTOR

JUDGMENT

The appellant Michael Kazungu was convicted on a charge of stealing by servant contrary to section 281 Penal Code and sentenced to four (4) years imprisonment.

Prosecution case was based on particulars to the effect that on 5-2-07, the appellant and one Katana Ngumbao Charo, jointly being servants to Imranali Chandabhai, stole from him Ksh 96,201/- which came into their possession by virtue of their employment. complainant deals in soda distribution.

The evidence of complainant (PW1) was that on 5-2-07 he was called by his night manager and informed that the people who had gone to sell soda at Matsangoni had a problem – the cashier Katana did not return that evening with the proceeds.

Michael was the driver and incidentally the car had been returned. Attempts to trace Katana the next day failed, then his brother Kazungu brought him and he was taken to the police station. Michael was eventually arrested. PW1 presented to the court receipts for the sales of the day, totaling to Ksh. 96,201/- .

On cross-examination he said:

"*He (Michael) was told not to handle any money that day Katana was to sign for the goods received*"

On cross-examination he told the court that Michael said Katana was the one who went with the money.

Joseph Bahati (PW2) who worked for PW1 as a loader had accompanied the driver and salesman on that day. He confirmed that they made sales until 4.30pm when the motor vehicle was driven to Dhow Inn, Mnarani, then to Mnarani and back. Michael was talking on phone and he heard them tell someone to meet them at Mkwanjuni Hotel. Katana told him to wait at the reception. After sometime, Katana

returned to him and asked whether he had seen someone leave and Katana said the person had conned him of Ksh. 70,000/- . Katana and Michel then quarreled and they drove to Diamond Hotel where they again inquired about the man. Michael and Katana discussed, and Katana then returned with a bucket and bag and dropped off the motor vehicle along the way while PW2 and Michael went to the office. They informed the manager, Sammy that Katana had fled.

On cross-examination he said while at the hotel:

"*Katana and Michael left me. Katana appeared from the rooms and Michael from the vehicle. It is then that I realized there was a problem. I can't say if it was a conspiracy between the two."*

PW3 Pc Kaingu on cross-examination confirmed that even after report of the incident, appellant returned to work.

In his sworn defence appellant told the trial court that his duties on that day was only to drive – Katana was the salesman and they finished work by 3.00pm. He did not know how much money Katana had collected and he was simply to drive where Katana directed. So they went to Mnarani where Katana was to collect his crates, he parked outside Dhows Inn, Katana alighted and talked on the phone. Appellant suggested that they should go back early – to which Katana responded that he was organizing something and then directed that they go to Mkwanjuni and appellant noticed that a saloon car was following them. A lady and a man alighted from the motor vehicle and Katana spoke to them. From the side mirror, appellant saw the motor vehicle boot open and a bucket was removed.

Joseph (the loader) went to sit with him and he fell asleep. When he woke up, Joseph had gone to the counter and then saw a man who had emerged from the motor vehicle come out and board the same motor vehicle and leave. Katana appeared from the restaurant area and asked about the man who had just left. Katana told appellant that he was trying to make money and had given out Ksh 70,000/- which had gone and sought advise from appellant. Appellant said they should go and report, but on the way, Katan, alighted saying he could not report and so appellant returned the motor vehicle to the yard and reported the matter to the night manager. He denied being given the money by Katana.

In his judgment the learned trial magistrate found that in their evidence, each accused was blaming the other, first accused claimed he had gone with appellant to someone who was to double the money for them whereas appellant said his co-accused did it on his own. He noted that during the sales, the money was being kept by Katana and stated that since each blamed the other, then he would have to consider the evidence of the loader (Katana) and he held that:

"*it is clear from the evidence that Katana and Michael were working together in the scheme to double the money, leading to the loss"*

His reasoning was that according to the loader, the two kept discussing as the motor vehicle was being driven to and from Mnarani and Mkwajuni. It was his considered view that if appellant knew that Katana was up to some fishy business then he should have driven the vehicle back to the yard and not allowed Katana to alight along the way. He held that appellant was an accomplice who aided Katana by making calls to the stranger.

The appellant challenged the findings of the trial magistrate on grounds that:

(1) The charge was framed contrary to section 137(f) and was thus defective.

(2) The trial magistrate failed to observe keenly that he (appellant) was not accountable for the money.

(3) The trial was conducted partly without full coram

(4) The case was not proved beyond reasonable doubt

(5) The defence statement was not considered alongside the prosecution evidence

(6) The trial magistrate failed to follow the provision of section 169(2) Criminal Procedure Code in his judgment

Mr. Ogoti for the State, conceded to the appeal on grounds that the evidence of PW1 clearly stated tht appellant was told not to handle any money and it was his co-accused to sign for the goods.

Further even at the scene, it is Katana who rushed out looking for the "mystery" man saying he had been conned of Ksh. 70,000/- and that what came out clearly from the evidence was that the first accused (Katana) was in charge of the goods and the money and appellant was simply the driver.

Mr. Ogoti urged this court to take note that whereas in his defence Katana claimed he had given appellant Ksh. 87,000/- yet he had told the loader that the other person had left with money. Mr. Ogoti submitted that the trial magistrate erred in not seeing the evidence placed before him so as to arrive at a proper conclusion as to who was responsible for the money, and who gave it out.

Appellant had filed lengthy written submission saying the charge sheet did not disclose the time the offence was committed and that this offended the provisions of section 137(f) of the Criminal Procedure Code. I think that is a defect which is curable under section 382 of the Criminal Procedure Code and would not be a reason to warrant the court interfering with the judgment of the court.

The main aspect which he submits on and which is of significance is precisely what Mr. Ogoti has addressed this court on – who was in charge and in control of the money – the prosecution case was very clear that it was appellant's co-accused and that appellant's role was limited to keeping the motor vehicle mobile. The trial magistrate opted to give weight to the evidence of PW2 (the loader) saying it showed that appellant and Katana had conspired in the matter – yet PW2 was very clear that while standing at the hotel's reception, he saw Katana come out and ask him whether he had seen someone pass by and upon confirmation, Katana remarked to him that the said person had conned him of Ksh. 70,000/- (Not conned THEM, if appellant was to be considered as being involved). And how can it be conspiracy when PW2 on being cross-examination by second accused told the trial court.

"*Michael was talking on the phone…I do not know what they talked about ….Katana appeared from the rooms and Michael from the vehicle."*

This statement does not disclose conspiracy and in fact confirms what appellant said in his defence that he was left in the motor vehicle and his co-accused went with his "miracle workers" into the hotel.

Indeed even the conduct of his co-accused is confirmed both by PW2 and appellant – it was Katana who was anxiously looking for the man whom he said had conned him of Ksh. 70,000/-.

As for allowing Katana to alight on the way, no evidence was tendered before the trial court to suggest that there were strict instructions that the driver must never allow the salesman to alight on the way and in any case was it his duty to control the salesman's conduct – he may as well have decided "since he gave out the money, may be he knows how he will trace the person, and explain to the boss, as for me, I am driving this motor vehicle back to the yard and letting the manager know simply that Katana has not returned with us."

It was unfair for the trial magistrate to hold appellant responsible for Katana's movement, he was not a prefect.

Despite what appellant states in his submissions, the learned trial magistrate did give reason for his judgment, only that those reasons could not be logically supported by the evidence on record. As a result then, my finding is that the conviction was unsafe and I quash it.

The sentence is thus set aside and appellant shall be set at liberty forthwith unless otherwise lawfully

held.

Delivered and dated this 27th day of July 2009 at Malindi.

H. A. Omondi

JUDGE

Mr. Ogoti for State

Court clerk – Sango

Appellant present