REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Criminal Appeal 725 of 2006

(From original decision by F.M. Kombo (Mr.) RM)

NAWAZ NAZIR SUMRA……APPELLANT

V E R S US

REPUBLIC .....……..……RESPONDENT

J U D G M E N T

Nawaz Nazir Sumra ***(the appellant***) was convicted on a charge of stealing by servant contrary to section 281 of the Penal Code and sentenced to pay a fine of Kshs.15,000/= or suffer six months imprisonment in default. He has appealed against the conviction. The particulars being that on 25th October, 2004 at Diamond Plaza, Highridge in Nairobi within Nairobi area, being a servant to Matrix Technologies Ltd, stole from Matrix Technologies Ltd, cash Kshs.375,960/= 2944 assorted Safaricom scratch cards, 22 Safaricom sim cards, 2 Nokia 3310 mobile phones, one Sendo Mobile phone and 51 sodas, all valued at Kshs.1228927/- which came into his possession by virtue of his employment.

Appellant denied the charge and the matter proceeded to hearing. P.W.1 Peter Ngibuini Kuguru is the Managing Director of Matrix Technologies Ltd, which deals in Safaricom Products. The Company had a branch at Highridge, Parklands Area which had two staff members. Esther Kahuho who was the shop keeper and the appellant whose duties were to distribute cards to customers, open the shop in the morning, maintain stock, bank the money sold and reconcile sales with stock. In a nutshell he was the one in charge of the branch.

On 25.10/04, P.W.1 received a phone call from Emily Kahuho (P.W.3) that appellant had been robbed in Highride and had been found tied at the shop with his legs, hands and mouth bound using cellotape. When P.W.1 spoke to appellant, the later said all he could recall was seeing a G3 rifle on his shoulder, then he lapsed into unconsciousness. P.W.1 then drove to the shop and noticed there was no breackage but there was some heavy book tape and pieces of string which appellant claimed had been used to tie him up. P.W.1 wondered how money had ended up in appellant's hands yet P.W.3 was supposed to have locked it on Saturday – (***the incident occurred on Monday***) and P.W.3 said Appellant had given her permission to report to work at 11.00 am. P.W.1 decided to report to police and appellant pleaded that he would repay the money through his brother.

Stock taking was then done and showed the shop had lost Kshs.375,960/- in cash. The appellant and Emily were then arrested. Hezekiah Chege Gikonyo (P.W.2) is the Management Accountant for Matrix Technologies Ltd. and was sent by P.W.1 to do the stock taking and report to him and his findings were contained in the report Exhibit 9 showing that the shop lost cash Kshs.375,960/= but on cross-

examination he explained that part of the amount comprised Safaricom Scratch cards.

P.W.3 ***(Emily Wangui Kahuho***) who states that on 25/10/04 in the evening, they counted Kshs.375,960/= cash and before leaving, appellant requested her for the keys – that was on Saturday. Appellant's explanation to P.W.2 was that he wanted to sell cards to his brother on Monday morning – so P.W.2 obliged. The next day in the morning, appellant called P.W.2 to say the scratch cards (which were kept in a safe) had been stolen: P.W.2 got to the shop and found it strewn with papers and the safe door was open. She saw appellant squatting under a drawer near the safe with cellotaped hands, mouth and legs. P.W.2 called the guard and appellant told them that he had been robbed of cash and scratch cards at gun point. Police then came and went with P.W.2 to search her house but no significant recovery was made. Susan Asige (P.W.4) the Credit Controller of Matrix Technologies Co. Ltd. says that upon learning about the incident she blocked the Safaricom scratch cards which had been issued in the last consignment – she contacted Safaricom's customer care office and gave them the serial numbers and a credit note was issued in the company's account. Peter Otero Munga (P.W.5) was the guard on duty at Diamond Plaza where the shop in question was situated and he is the one to whom P.W.2 reported her sightings of appellant in the shop. He was on duty on 25/10/04 and worked from 6.00 pm to 10.00 am at the exit gate with a colleague one Harun Monde. He confirms finding appellant lying under the counter bound with cellotape and unable to breath properly. They rescued him and removed the tape. P.W.5 saw money both in coins and notes scattered on the floor. He maintained that no one went through his gate when he was on duty – he says there are two gates on the perimeter wall. Appellant told him he had sold scratch cards to two strangers and upon demanding for payment, they pointed a gun at him.

P.W.6 Police Constable Gabriel Rotich is the investigating officer who visited the scene and found police officers from Parklands Police Station and D.C.I.O already there. He went to search appellant's house to see whether he could recover the money which had been stolen plus the assorted scratch cards and the mobile phones – he found nothing significant. Appellant in his unsworn defence refers to 20/10/04 as the day he opened the shop at 9.30 am as directed by P.W.1 – at the time, his co-worker Emily had not arrived and when he rang to ask her why she was late, she said she was in a thick jam. He then took stock sheets and while examining the same, two men entered the shop and asked for scratch cards – one was tall and dark, the other was short and brownish. He sold to them scratch cards and wrote a receipt for them and they gave him Kshs.9800/-. Appellant took the money and turned round to the safe where the scratch cards were usually kept and suddenly he was thrown down by the short brown man who was pointing a gun at him and he was ordered to keep quiet or get killed. The two men bound him up using cellotape and pushed him under the counter. The safe was open by then and Appellant doesn't know what the two men did but eventually he was freed by the security guards. Four days later, P.W.1 went to see appellant at the Police Station and told him that he would drop the charges if appellant paid back his money – appellant denied taking the money and P.W.1 told police to take him to court. He says on 23/10/05, P.W.3 told him to take the keys for the shop because she would be late on 25/10/05 as she wanted to deposit money at Equity Bank.

The learned trial magistrate in his judgment noted that the issue to determine was "***whether the accused stage managed the theft. No one saw the accused commit the actual theft, and evidence is therefore entirely circumstantial. I have to state at the instance that accused has not adduced evidence in the sense of the word, but made an unsworn statement which has no probative value."***

The learned trial magistrate further stated-

"***The accused expertly denied that he had agreed to repay P.W.1 lost money. The evidence of P.W.1 is clear on this. I accept the evidence of P.W.1 on (sic) the truth and reject the allegation by the accused that he denied that he had stolen the money. I consider the evidence of P.W.1 to be stronger, being sworn evidence, as against sworn defence by the accused. This being the case, the question to ask is why the accused would agree to repay the money that he had not stolen. I note that this aspect was not attacked by the accused during cross-examination."***

The learned trial magistrate rejected the explanation appellant had given to the police as to why he could not untie himself saying it was not plausible. The other reason why the trial magistrate did not find

appellant's defence tenable was that no one heard the alleged theft at a shopping mall open to the public and the learned trial magistrate found it incredible for an incident which occurred in the morning, saying-

"***If the theft was quiet as the accused would wish this court to believe, what scattered the money and papers? If there was a struggle, how come no one heard?."***

The learned trial magistrate's conclusion was that the evidence on record irresistibly pointed to the appellant's.

In the petition of appeal, this judgement is challenged on four grounds-

(1) ***That the learned trial magistrate erred by holding that the prosecution had proved the case beyond reasonable doubt.***

(2) That the learned trial magistrate misdirected himself by not appreciating the contradictory prosecution evidence.

(3) That the learned trial magistrate erred in law by convicting the Appellant.

(4) That the trial magistrate erred by not appreciating the Appellant's defence.

Mr. Billing, counsel for appellant submitted that there was no proof that appellant stole the cash Kshs.375,960/= or the total amount of over Kshs.1 million as shown in the charge sheet. Mr. Billing pointed out that the learned trial magistrate relied on evidence of P.W.1 (Mr. Kuguru) and wonders whether this was a confession or an admission, saying the same is not admissible in law – reference was made to the decided case of ***Republic -Vs- D. Manyara Njuki and 14 others Criminal Case 22 of 2003*** where High Court dealt with section 25 A of the Evidence Act as amended. The appeal is opposed and Mrs Kagiri on behalf of the State submits on this limb that the learned trial magistrate took into account appellant's offer to refund P.W.1 the money and that this was never challenged in cross-examination and that for the appellant to have rejected the same at the defence stage was deemed as an afterthought. Why did the learned trial magistrate decide that P.W.1 was telling the truth and that appellant was lying? Why did he decide that appellant must have offered to repay the money to P.W.1. From the proceedings it appears that the learned trial magistrate decided that evidence is what is said on oath and that what is not sworn to cannot be believed. That seems to be his yard stick as he said-

"***accused expertly denied that he had agreed to repay…..."*** So what should the appellant have done – make the denial in some sugar coated phrase? Again as is already shown in the re-evaluation of the lower court's record the learned trial magistrate said –

"***I consider the evidence of P.W.1 to be stronger being sworn evidence, as against unsworn defence by the accused."***

On cross-examination P.W.1 stated-

"***It is not true that I put pressure on the accused to pay the debt."*** What prompted this offer to repay? Its not clear but P.W.1 claimed that appellant made the offer on that very morning of the incident and repeated the same at the police station. Was anything significantly related to the theft recovered from appellant? No.

Did anyone else hear Appellant making the offer? Apparently no one else made reference to the purported offer by Appellant to P.W.1. So what tangible reason did the learned trial magistrate have in choosing to believe that P.W.1 was telling the truth and Appellant was lying other than that one gave evidence on oath? None. I would agree that if at all the Appellant even made such confession and if that was the rationale for believing P.W.1, then that evidence would be inadmissible to the extent that it does not meet the required procedure of taking confessions as recognized under the Evidence Act. What about the complaint that the learned trial magistrate erred in relying on evidence of P.W.6 based on the fact that

he was not the initial investigating officer? P.W.6 in his evidence stated that he was the investigating officer, and that the matter was initially being investigated by Chief Inspectior Kamuti ***(who did not testify***). Is the failure to call CIP Kamuti as a witness fatal? Mrs Kagiri's response to this is that prosecution endeavoured to call one investigating officer who took over from CIP Kamuti and gave relevant evidence to the case as concerns the investigations, and that the appellant had not demonstrated what prejudice he suffered by not having CIP Kamuti testify. I concur with the State Counsel that indeed the appellant has not demonstrated any prejudice suffered, P.W.6 was an investigating officer and he testified regarding all the investigation and the only item he could not explain about were the whereabouts of the cellotape which Appellant had on his body. The non production of the cellotape is not fatal since even Appellant confirmed that when rescued, he had his limbs and mouth bound with cellotape. Why did the trial magistrate believe the evidence of P.W.3 regarding why the key left her custody and ended up with appellant instead of the version offered by Appellant.? P.W.3's evidence cannot be said to corroborate that of P.W.1 because most of what P.W.1 testified to is what was reported to him by P.W.3, including the explanation as to why it was Appellant who had the key and why she was away from the shop. Should she be seen as an accomplice as suggested by Appellant's counsel and therefore her evidence be treated as such?

Mrs Kagiri's response to this was that P.W.3 was a prosecution witness at all times and it would amount to speculation to consider her an accomplice. I think that would be a rather myopic way of looking at it - it is confirmed by P.W.3 that she had been arrested as the appellants co-accused and charged then later the charge was withdrawn under unexplained circumstances and she became a prosecution witness – that is not speculation – it's a fact – which would lead to the question – what was the deal involving her release? Was it in return for testifying against the appellant?

The learned trial magistrate conceded in his judgment that no one witnessed the so called "***robbers***" but that the circumstances could only lead to one explanation and no other hypothesis – that appellant was the one who stole the money. The defence counsel took up issue with this saying the evidence of P.W. 5 and P.W.6 confirm that Diamond Plaza is a shopping mall with many entrances – three were identified and persons coming in and out were not checked and that there had been previous incidents of thefts and robberies prior to this one not involving this shop.

The learned State Counsel's response to this is that appellant was the only one in charge of the shop at all times during the alleged robbery and must have been aware of what was going on as he indeed feigned ignorance of the fact that he is the one who had given P.W.3 permission to report late on the material date. Again Appellant in his defence contradicted this, saying it is P.W.3 who had given him the key to the shop on the basis that she would report late to work on 25/10/05 as she needed to make some deposits at the bank. Why the learned trial magistrate decided that P.W.3 was the one telling the truth and not Appellant on this is also not clear. What was clear was that on 25/10/05, P.W.3 did not report on duty at the normal time and had indeed left the keys to the shop with the appellant. As to whether P.W.3's absence was by design of appellant or by her own design was not established. Did the trial magistrate shift the burden of proof onto the Appellant. Mr. Billing submits that he did because in the judgment the trial magistrate stated that it was for the accused to explain why he had offered to repay the money ***(yet prosecution had not proved that he had done so)*** and that he did not give a plausible explanation to police for failing to untie his taped limbs. The learned state counsel's response was that the learned trial magistrate analysed the defence and found it unbelievable with many gaps and that the least defence should have done was to cast doubts on the prosecution case.

For circumstantial evidence to be relied on it must inculpably point to the guilt of the appellant ***(accused***) to the exclusion of anyone else. Is this applicable in the present case? What is there to absolve P.W.3 from being the one who stage managed the robbery and then somehow made it appear as though she had just stumbled upon the scene? The learned trial magistrate appears to have completely closed his mind to this possibility. This coupled with the fact that there were more than one – entrance to the building, so that even if the guard Munga (P.W.5) did not see anyone pass through his gate, then what about the other two gates – given too that P.W.5 stated that they do not stop customers from the premises, or do they search persons entering the premises. So isn't there a probability that someone else could have come into the premises and walked out without P.W. 5 having seen? That is a real probability. The

learned trial magistrate also seemed to need an explanation as to how no one heard any commotion and how it was that the monies were scattered on the floor of the shop – was this explanation supposed to come from the appellant? What basis had the prosecution established – no witnesses from the neighbouring shops were called by prosecution to confirm that they did not hear any commotion from the shop. I don't think this circumstantial evidence pointed to the appellant alone to the exclusion of any other possible persons.

Consequently my finding is that-

(1) The conviction was unsafe and must be set aside. The appellant is thus acquitted of the charge.

(2) If he had paid the fine then the same to be refunded to him

Delivered, signed and dated this 16th day of April, 2008 at Nairobi.

H.A. OMONDI

JUDGE