REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISUMU
Criminal Appeal 132 of 2008

SAM OTIENO KOJWANG …….. APPELLANT

VERSUS

REPUBLIC ……..…….. RESPONDENT

[From original conviction and sentence in Criminal Case number 54 of 2008 of the Chief Magistrate's Court at Kisumu]

JUDGMENT

The appellant, Sam Otieno Kojwang, appeared before the Chief Magistrate at Kisumu charged with two counts viz:-

(i) Stealing by servant contrary to Section 281 of the Penal Code, in that on the 4th April 2005 at Koinaike Taisei Joint Venture in Kisumu Town Nyanza province being a servant to Swift Global Ltd Kisumu Branch stole one drawn cheque number 000275 for Kshs. 500,655/75 valued at Kshs. 20/= which came into his possession on account of his employment

(ii) Attempting to obtain money by false pretences contrary to Section 313 of the Penal Code as read with Section 389 of the Penal Code, in that on 4th June 2005 at Pep Intermedia Kisumu in Kisumu District Nyanza Province with intent to defraud attempted to obtain Kshs. 500,656/75 from Paul Otieno Akeyo, a director of the said Pep Intermedia Ltd by falsely pretending that cheque number 000275 for Kshs. 500,655/75 was a good and genuine order for the payment of the said amount to Sam Otieno Kojwang.

After trial, the appellant was found guilty of the second count, convicted and sentenced to two years imprisonment by a Resident Magistrate who read and delivered the judgment on behalf of the trial chief magistrate.

As for the first count, the appellant was found not guilty and acquitted accordingly

Being dissatisfied and aggrieved by the conviction and sentence, the appellant presented this appeal through the firm of Bruce Odeny & Co Advocates.

The grounds of appeal are contained in the Petition of Appeal filed herein on 3rd October 2008 and are as follows:-

(i) The learned trial magistrate erred in law and fact by convicting the appellant on evidence of handwriting and signatures that were not verified by a handwriting expert

(ii) The learned trial magistrate erred in law and fact in convicting the accused while there was insufficient material evidence linking the accused to the crime

(iii) The learned trial magistrate erred in law by failing to give reasons for her findings

(iv) The conviction and sentence was unlawful manifestly harsh and excessive in the circumstances of the case.

(v) The learned magistrate failed to observe the principles of sentencing in giving the accused a custodial sentence with no option of a fine despite the appellant having no criminal record

At the hearing of the appeal, the appellant was represented by Mr. Maube while the respondent was represented by the learned Senior State Counsel, M/s Oundo.

As regards the first three grounds of appeal, the learned counsel, Mr. Maube, stated that there was insufficient evidence linking the appellant to the offences and that there was a variance on the indictment, the charge sheet and the facts of the case.

He said that in the second count, the appellant was charged with attempting to defraud Paul Otieno Akeyo (PW3) who was a shylock whose work was to receive cheques, cash them and obtain a commission.

Learned Counsel went on to state that no payment was obtained from the material cheque and even if there was payment, PW3 would still have retained his commission. He was therefore incapable of obtaining any money by fraud.

Learned Counsel further stated that it was Swift Global who would have complained about any loss of money. It's witness (PW1) produced the appellant's terms of service indicating that he was entitled to commissions for his own sales. He could not have attempted to steal any money as he was entitled to a commission from the money. He was issued with cheques which he did not steal.

Learned Counsel also stated that the prosecution did not prove that it was the appellant who presented the cheque to PW3 who banked it and obtained money on behalf of the appellant. He said that PW3 referred to three letters handed to him by the appellant but which were not produced. The learned Counsel contended that there was no basis for the conviction of the appellant in court two and that the three letters were crucial evidence since the cheque was accepted by PW3 on their strength. He relied on the case of SILUMU & ANOTHER =vs= REPUBLIC [1986] KLR 259 and contended that the ingredients of Section 313 of the Penal Code were not established as there was lack of false pretence. He went on to contend that the appellant was convicted on the basis of handwritings and signatures not verified by a handwriting expert. He relied on the case of PIUS CHORONGO MBASHU =vs= REPUBLIC CR/APP NO. 154 OF 2000 (C/A) to affirm the point. He further contended that there was no evidence from Swift Global Ltd to show that the material cheque was or was not received. He said that Swift Global may have received and presented the cheque to PW3 without the involvement of the appellant. He said the appellant denied knowing the said PW3.

On sentence, the learned Counsel contended that two years imprisonment was excessive and contrary to the provisions of Section 389 of the Penal Code. He said that the sentence was unlawful and relied on the case of Jane Wanjiku Gathuku =vs= Republic HCCRA No. 398 of 2003 (NYERI). In finality, he urged the court to allow the appeal, quash the conviction and set aside the sentence.

In response, the learned State Counsel, did not oppose the appeal. She said that the appellant was convicted on the basis of documents not subjected to expert opinion and that a document examiner ought to have been called to testify on the same documents. She also said that Section 169 of the Criminal procedure Code was not adhered to by the trial magistrate as the contents of the judgment are missing in that there are no points for determination, no decision and no reason for the decision.

The learned State Counsel further stated that the sentence was harsh and excessive since the appellant was

charged with an offence of attempt, a misdemeanour carrying a maximum sentence of one and a half years. She said that the sentence of two years imprisonment was unlawful.

Having heard all the arguments which it would seem are consistently in favour of the appeal, this court is however mandated to scrutinize the evidence afresh with a view to arriving at own conclusion bearing in mind that the trial court had the advantage of seeing and hearing the witnesses (See OKENO =vs= REPUBLCI [1972] EA 32 and ACHIRA =vs= REPUBLCI [2003] KLR 707). The prosecution's evidence was that Swift Global is a company providing E-mail and internet services and its Kisumu branch had employed the appellant as a technical advisor whose role was to secure clients for the company. In February 2005 the company was contracted to provide services to Konoike Satellite Services at Sondu Miriu. The contract was secured by the appellant and part payment of Kshs. 900,000/= was made. The next payment was due after completion of the contract. It was a balance of Kshs. 500,000/= of which Kshs. 100,000/= was for a firm known as Kensat, a division of Telkom Kenya which was to certify and approve the completed work.

Somewhere in the month of May or June, the branch manager of Swift Global Kisumu Sinal Ginesh Rachal (PW1) received information from the company's managing director based in Nairobi that their cheque of about Kshs. 500,000/= was to be returned as it was to be dishonoured.

The said managing director Mohamed Jaish (PW6) had been informed by an employee of Citi Bank about a cheque from Konoike payable to Giro Bank for Kshs. 500,000/=. He informed the said employee not to honour the cheque and instead fax to him a copy. He then alerted the Kisumu office about the unfolding events and made enquires with Giro Bank and learnt that the appropriate account was a Sacco account. The suspect cheque (PEX1) was forwarded to him and he reported the matter to the police who commenced investigations.

Captain David Yegon (PW7) of the Banking Fraud Unit took over the investigations which revealed that the suspect cheque was deposited into a wrong account belonging to Pep Intermedia Ltd by the appellant. The cheque was presented to Giro Bank Kisumu branch by the said Pep Intermedia on 4th June 2005.

Pep Intermedia ltd deals in Micro finance business in Kisumu and in the month of May 2005 its director Paul Otieno Akeyo (PW3) was approached by the appellant to have the suspect cheque encashed. He initially declined but on 4th June 2005, he accepted the cheque after three letters were shown to him by the appellant. The letters were from the appellant to Konoike and from Konoike to the appellant replacing a cheque and forwarding another to him. The letters and the suspect cheque were then taken by Paul (PW3) to Giro Bank where it was deposited but it was returned unpaid after five days due to irregularities. It was eventually handed back to the appellant together with the letters.

The cheque had been drawn by Konoike Taisei Joint Venture in favour of Swift Global ltd and was handed over to the appellant after it was signed by Shoichi Okin (PW4), the Chief Administrator Manager at Konoike Taisei Joint Venture who said that it was never stolen but handed over to the appellant after it was written by an accountant Samwel Onyango Ominde (PW5) and then signed appropriately.

After the necessary investigations, the appellant was charged with the material offences. His defence was that he had been employed by Swift Global as a technical salesman and dealt with corporate clients. In the month of March 2005, he co-ordinated a contract for the installation of an internet connection via visat. As was his duty, he went to the client on or around the 15th April 2005 for payment. He was given the suspect cheque for Kshs. 500,655/75 written in the name of Swift Global. He took it to the company and it was received accordingly. He had never previously known Paul Otieno (PW3) who lied in court that they had been in communication.

With regard to the first count, the issue that arose for determination is whether the accused stole the suspect cheque which came into his possession on account of his employment with Swift Global Ltd.

The appellant in denying the offence indicated that the cheque was for the payment of services rendered by Swift Global ltd and was handed to him on behalf of the company. The company's Managing Director

(PW6) confirmed that the appellant was authorised to receive payments on behalf of the company and did not therefore steal the material cheque.

The Chief Administration Manager for Konoike Taisei Joint Venture (PW4) the drawers of the cheque also confirmed that the cheque was never stolen by the appellant.

Consequently, the ingredients of the offence of theft under Section 281 of the Penal Code were not established against the appellant by the Prosecution. He was therefore entitled to an acquittal in count one as was held by the trial court.

This court would uphold the acquittal on the basis of the findings by the trial court.

With regard to the second count, Section 312 of the Penal Code defines a false pretence in the following terms:-

"Any representation made by words, writing or conduct of a matter of fact, either past or present, which representation is false in fact and which the person making it knows to be false or does not believe to be true is a false pretence".

The definition connotes an element of dishonesty on the part of the person making the representation.

Section 313 of the Penal Code creates the offence of obtaining by false pretences and provides that:-

"Any person who by any false pretence and with intent to defraud, obtains from any other person anything capable of being stolen or induces any other person to deliver to any person anything capable of being stolen is guilt of a misdemeanour and is liable to imprisonment for three years".

The evidence by the prosecution established without particular dispute that the material cheque number 000275 for the sum of Kshs. 500,655/75 (PEX 1) was drawn by Konoike Taisei Joint Venture in favour of Swift Global (K) Ltd. It was also established that the cheque was received by the appellant for onward transmission to Swift Global Ltd.

The appellant said that he took the cheque to Swift Global where it was received and stamped.

A perusal of the cheque by this court shows that it contains at the back a stamp belonging to Swift Global (K) Ltd. The stamp does not indicate the date of receipt although it is accompanied by a signature.

The Stamp was neither disputed by Swift Global Kisumu Branch Manager (PW1) nor its Managing Director (PW6). It was the branch manager (PW1) on instruction from the Managing Director (PW6) who handed over the cheque to the investigations officers. He (PW1) stated that the signature accompanying the stamp was that of the appellant. He did not however, explain the procedure that followed after a cheque is received at their company and who was responsible for banking it. The Managing Director (PW6) also did not give such explanation.

Both the Branch Manager (PW1) and the Managing Director (PW6) were consistent and in agreement that the appellant was authorised to receive payments on their behalf. This implied that the appellant was also authorized to bank a cheque received from a client by himself on behalf of Swift Global Ltd.

The branch Manager (PW1) indicated that cheques drawn in favour of the company are normally banked with its bankers i.e. Barclays Bank.

The evidence shows that the suspect cheque was not banked with Barclays Bank but Giro Commercial Bank Ltd Kisumu Branch.

Captain Yegon (PW7) in the course of investigations established that Swift Global did not maintain an account with Giro Bank Kisumu. He also established that the material suspect cheque was handed over to

Pep Intermedia Ltd who forwarded it to Giro Bank Kisumu.

Pep Intermedia Ltd is a micro-finance firm based in Kisumu. It deals with encashment of cheques among other things. It's director Paul Otieno Akeyo (PW3) stated that in the month of May 2005 the appellant went to his office to encash the suspect cheque. He (PW3) hesitated and asked the appellant to prove that there was authority for him to collect the cheque and payment. He said that the appellant returned on 4th June 2005 with three letters referring to the drawer of the cheque Konoike. It was on the strength of the said letters that he accepted the cheque and took it to Giro Bank for necessary clearance and payment. He said that the cheque was returned to him after five days. It was returned unpaid due to irregularities. He said that the transaction was undertaken by the appellant on behalf of Swift Global and that the cheque and letters were handed back to him (appellant).

The director (PW3) further stated that had the cheque been paid the proceeds would have been handed over to the appellant less commission due to Pep Intermedia.

It is apparent from all the foregoing that the appellant had the authority to receive cheques and payments on behalf of Swift Global Ltd and that if the suspect cheque had been paid the proceeds would have been forwarded to the appellant on behalf of Swift Global Ltd less commission due to Pep Intermedia (if at all).

It is established that the appellant did not steal the cheque from Swift Global and had ostensible authority by virtue of his employment with the company to bank cheques received on behalf of the company by himself.

The evidence suggests that the appellant's mistake or fault was to bank the cheque in the wrong account, at a wrong bank. No doubt, the said act invariably raised suspicion as to the appellant's actual intentions. However, mere suspicion does not amount to evidence of a commission of an offence. It is apparent that the appellant was charged on the basis of the said suspicion.

In the case of MARY WANJIKU =vs= REP CR.APP NO. 17 OF 1998 (unreported) the Court of Appeal stated this:-

"Suspicion however strong, cannot provide a basis for inferring guilt which must be proved by evidence.

The evidence has shown that there was no payment made to the appellant and if it could have been made then it was duly authorised by his employer Swift Global Ltd who would have been the real complainants in the event of any wrong doing rather than Paul Otieno Akeyo (PW3). Again, if the cheque had been paid Pep Intermedia Ltd would only be entitled to their commission in facilitating the payment. And if, the payment was not eventually handed over to Swift Global Ltd as required then the appellant would have a case to answer to Swift Global and not Pep Intermedia and/or Paul Otieno Akeyo (PW3).

Further, if there was to be any fraudulent and dishonest intent on the part of the appellant then Paul Otieno Akeyo (PW3) would have been an accomplice in the intended crime again Swift Global Ltd. The appellant said that he did not know Paul Otieno Akeyo (PW3) but this was mere denial and not a true reflection of the fact as may be deciphered from the evidence. The denial may have been intended to disentangle himself from their joint activities revolving around the suspect cheque.

It is therefore difficult in the circumstances to find and hold that the appellant attempted to obtain money by false pretences from Paul Otieno Akeyo (PW3).

The necessary ingredients of Section 312 of the Penal Code, Section 313 of the Penal Code and even Section 389 of the Penal Code have not been established against the appellant by the prosecution's evidence.

The trial court was clearly in error and misdirection when it stated the following:-

"Konoike were not willing to do a cheque in the name of third party. So this prompted the accused to look for an institution that could accept that. Pep Intermedia fell for it. Had it not been for the quick action by Giro Bank, the cheque could have gone through. There is no reason why PW3 would lie against the accused if it was not him who took him the cheque. He explained that after the cheque was returned unpaid he returned the cheque and letters to the accused person. What would one call this kind of conduct by the accused?. It was an attempt to obtain by falsely pretending that the cheque could be paid to him for the services rendered to Swift Global a fact he knew to be false. Whether he'd be paid less by the 5% commission or not is immaterial……

For my part, I find the offence in the second court proved against the accused and I do convict him under Section 215 CPC".

There was insufficient or no evidence at all to show that the appellant made representations to the effect that services were rendered by himself to Swift Global Ltd. If anything, it was Swift Global Ltd who rendered services to Konoike Taisei Joint Venture and the appellant acted as the linkman between the two.

It would appear that the trial court took into consideration extraneous and irrelevant matters to arrive at the erroneous conclusion that the second count had been proved against the appellant.

This appeal is merited and the respondent was correct in conceding as much.

Consequently, the appeal is allowed to the extent that the appellant's conviction in the second count is quashed and the sentence set aside. The appellant shall be released forthwith unless otherwise lawfully held.

Dated, signed and delivered at Kisumu this 31st day of October 2008.

J. R. KARANJA

JUDGE

JRK/aao