



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**Criminal Appeal 82 of 2008**

*(From original conviction and sentence in SRM CR. Case No. 3499 of 2004 of the Senior*

*Resident Magistrate's court at Mombasa)*

**ANTONY MUTHINI NZUVI .....APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

**J U D G M E N T**

Anthony Muthini Nzuvi, the appellant herein was tried on a charge of stealing by servant, contrary to Section 281 of the penal code. After undergoing a full trial he was convicted and sentenced to serve three years imprisonment. Being aggrieved, the accused preferred this appeal. Through the firm of J.O. Magolo & Co. Advocates, the appellant put forward a total of 5 grounds in his petition of Appeal.

The first ground argued on appeal by Mr. Magolo is that the evidence tendered by the prosecution did not establish that the appellant committed the offence of theft. It is said the evidence did not prove the offence beyond reasonable doubt. The appellant's advocate pointed out that the appellant was convicted on the basis that the duplicate documents left with the receptionist and the cashier could not tally with the original documents left with the appellant when the cashier and the receptionist presented money to the appellant. It is said the trial court erred because there was no evidence of banking of the money. This court was invited to peruse the document which had alterations. It is suggested that the accused (appellant) could have been careless but he was not a thief in view of the fact that the receptionist was not called upon to testify.

The second ground argued is that the sentence of 3 years is harsh and excessive it should be set aside.

Mr. Monda, learned Senior State Counsel opposed the appeal. It is the argument of Mr. Monda that P.W.III's evidence established that the appellant had stolen Kshs.1, 722, 415/- from his former employee. It was pointed out that the original documents of surrender were at variance with the duplicate. The evidence of P.W.4, a document examiner indicated that the alterations and erasures were done by the appellant. Mr. Monda further argued that the sentence was not harsh nor excessive.

I have considered the submissions presented by Mr. Magolo, learned counsel on the part of the appellant and those of Mr. Monda learned Senior State Counsel. This being the first appellate court, the appellant is entitled to have his case re-evaluated by this court. The trial learned Senior Resident Magistrate convicted the appellant mainly on the basis of the evidence of Faruk Oxborn Sambu (P.W.3) and that of Emmanuel Kenga (P.W.4). P.W. 3 was tasked to carry out a forensic audit of certain documents namely: bank slips, guest bills and cash collection of Tamarind Village Mombasa. In the end it was established and confirmed by the appellant in his defence that when receiving cash from the cashiers or the receptionists the appellant would go through the collection forms against the cash handed over to him. If the accountant (Appellant) was convinced that the amount surrendered was correct, he would sign the cash collection forms. He would then hand over a duplicate of the cash collection form and retain the money plus the original cash collection form. The accountant would prepare the necessary forms for banking the cash. There was evidence from both the prosecution and the defence that if the

accountant (Accused, now appellant) received the cash collection forms which did not tally with the cash given, he would return back the cash and forms for correction. The forms which gave rise to the complaint which landed the appellant in court were forwarded for examination by A.C.P Emmanuel Kenga (P.W.4), a document examiner. P.W.4, examined the cash collection forms, the appellants known handwriting and signatures plus his specimen handwriting and signatures. P.W.4 opined that the signatures and handwritings in the questioned documents were of the same hand i.e. those of the appellant. In his defence the appellant claimed that there is doubt that he committed the offence because none of the cashiers or receptionist who had given him cash had been called upon to testify. He said it is possible that they altered the documents. He denied ever committing the offence.

After carefully re-evaluating the evidence, it is clear that the appellant was an employee of Tamarind Village, Mombasa. It is also established that a sum close to Kshs. 1,722,415/15 was lost while the appellant was in the employment of Tamarind Village. It is not disputed that the cashiers and receptionist surrendered cash to the appellant. It is not also disputed that the appellant would receive the cash plus the original of the cash collection forms after which he would acknowledge receipt of the cash and the form by appending his signature on the cash collection form before surrendering duplicates of the forms to the cashier who brought the form and the cash. The evidence of P.W.3 and P.W.4 indicate that the original collection forms were altered and or erased while the duplicate surrendered to the cashiers remained unaltered. There was no evidence that the cashiers and receptionists had access to the forms after they had been surrendered to the appellant. The evidence of P.W.4 clearly show that the appellant is the person who made the alterations in the original forms which contradicted the duplicate forms surrendered to the cashiers and receptionists. I am convinced the appellant altered the documents with the sole aim of concealing the fact that he stole his employers money which he had been entrusted to handle for onward banking. He opted instead to steal. I am satisfied the learned trial Senior Resident Magistrate came to the correct conclusion by convicting the appellant. It has been said that the sentence pronounced against the appellant is harsh and excessive. I note that the appellant was sentenced to serve three years imprisonment. The record shows the appellant was a first offender. The trial court considered the appellant's mitigation and the fact that he was a first offender. Under Section 281 of the penal code, such an offence attracts a sentence of up to 7 years imprisonment. I am satisfied that the sentence pronounced by the trial court is not harsh nor excessive. For the above reasons, I dismiss the appeal in its entirety.

**Dated and delivered at Mombasa this 27<sup>th</sup> day of October 2008.**

**J.K. SERGON**

**J U D G E**

In open court in the presence of the appellant and in the presence of Mr. Ondari learned Assistant Director of Public Prosecutions.

N/a Magolo