REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Criminal Appeal 662 of 2003

BEAUTTAH MAALI ……..…….……...……..…APPELLANT

VERSUS

REPUBLIC …….……..…….. RESPONDENT

JUDGMENT

BEAUTTAH MAALI, the Appellant was on 4th June, 2003 convicted for the offence of stealing by servant contrary to Section 281 of the Penal Code and sentenced to a fine of Kshs.250,000/= and in default 2 years imprisonment. He was aggrieved by the conviction and sentence and therefore lodged this Appeal.

When the Appeal came up for hearing, Mr. Makura, Learned State Counsel conceded to the Appeal on the grounds that the sentence is illegal. Secondly, that the circumstantial evidence on record relied on to convict the Appellant was not strong enough to justify a conviction. Thirdly that the circumstances outlined by the Appellant were capable of explanation other than on the hypothesis that the Appellant was guilty. Finally that PW4 also used to play the role of the Appellant on certain occasions. In that regard the conviction of the Appellant was not safe.

The Appellant through Mr. Kang'ahi Learned Counsel welcomed the decision by the State to concede the Appeal. Counsel submitted that although the trial Magistrate relied on circumstantial evidence to convict the Appellant, the same did not irresistibly point to the Appellant as having committed the offence. That although the responsibility of depositing the money in the Complainants accounts lay with the Appellant other people could deposit the money as well.

I have carefully re-evaluated the evidence tendered during the trial in the Lower Court as required of me as the first Appellate Court in terms of ***OKENO VS REPUBLIC (1972) EA 32.***

As regards sentence, it is clearly illegal as correctly submitted by the Learned State Counsel. This is not an offence which ordinarily should attract a fine. The punishment for the offence from my reading of the Section is imprisonment for a period up to seven (7) years. Further even if the trial Magistrate was

minded to impose the fine, considering the amount involved the fine imposed by the trial Magistrate was manifestly lenient as to amount to a miscarriage of justice. Further under Section 28 (2) of the Penal Code, where a Court imposes a fine in excess of Kshs.50,000/=, default sentence should be 12 months. In the instant case however, the trial Magistrate imposed a fine of Kshs.250,000/= in default the Appellant was ordered to serve 2 years imprisonment. This was illegal. The aforesaid illegalities are sufficient to dispose off this Appeal.

However, I need to say something regarding the conviction. It is common ground that the Appellant's conviction was based on circumstantial evidence. The Learned trial Magistrate delivered herself thus:-

"……***In the absence of the Prosecution adducing direct evidence of the same, this finding by me is based on circumstantial evidence arising out of the evidence on record. Circumstantial evidence has been held to be the best evidence…."***

As stated in the case of ***REPUBLIC VS KIPKERING ARAP KOSKE AND ANOTHER 16 EACA 135:-***

" ……***. In order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt…."***

From the recorded evidence it does appear that it was not the Appellant alone who had the responsibility of handling cash at the Complainant offices in Nairobi. This comes out quite clearly from the evidence of PW6. Under cross-examination by the then Appellant's Lawyer, Mr. Ombeta the witness stated:-

"…..***It was Mr. Maali who was responsible for depositing but all of as banked money……..."***

Even PW4 confirmed that he would on occasion be sent to bank to bank the money. As it is therefore, there were other people who handled the money apart from the Appellant. These other people too had opportunity to steal the money. It cannot therefore be said that all the inculpatory facts irresistibly pointed to the Appellant and were incapable of no other explanation other than the guilt of the Appellant.

The Appellant was under the direct supervision of the sales Manager. The loss incurred in the case was premised on an audit report. However the accountant from the evidence tendered does agree that he verified the amount against deposit slips, sales reports and bank statements and did not come across any discrepancy. The sales Manager (PW7) in his testimony agreed that all the sales reports were dispatched through his offices and if there were any loss or discrepancy he would be the first to know. Because of the internal control systems employed by the Complainant company, it does appear that it was difficult for the Appellant to have committed the offence if at all, alone. What there is that there was some laxity in the supervision of the Appellant by both the accounts office and the sales management team. However that laxity cannot be visited upon the Appellant as the trial magistrate attempted to do when she held that:-

"……***A sum of money was lost then only the Appellant would have been responsible…."***

Further it should be noted that the amount was lost and or stolen over along period of time. It is therefore difficult to pin down on the Appellant the money which was lost when he handed the same and which was lost when it was handled by the other employees.

It does also appear to me that the Appellant's conviction was based purely on suspicion. Apart from the circumstantial evidence which as I have already held was insufficient there was no other evidence apart from mere suspicion. As stated in the case of ***JOAN CHEBICHI SAWE VS REPUBLIC, CRIMINAL APEPAL NO. 2 OF 2002:-***

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

In my Judgment and having reconsidered the entire evidence I am constrained to hold that the evidence does not satisfy the legal requirements of circumstantial evidence to warrant or justify the conviction of the Appellant on the basis of the evidence on record. The Learned State Counsel was therefore right in conceding to the Appeal.

That being my view of the matter I would allow the Appeal, quash the conviction and set aside the sentence. I order that the fine imposed if paid be refunded to the Appellant forthwith. Orders accordingly.

Dated at Nairobi this 11th day of January, 2006.

…….

MAKHANDIA

JUDGE