



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU
Criminal Appeal No. 336 of 1995

JOEL OMULO NYANDIEKA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant, Joel Omulo Nyandieka was charged with the offence of stealing by servant contrary to **Section 281** of the **Penal Code**. The particulars of the charge were that on diverse dates between the months of May 1998 and the 24th of December 1998 at Lomolo Sisal Estate, Mogotio Koibatek District being a servant of the Kenya Plantation and Agricultural Workers Union, stole Kshs 84,375/= from the said Union. When the appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charge. After a full trial, the appellant was convicted as charged and sentenced to serve twelve months imprisonment. Being aggrieved by his conviction and sentence, the appellant has appealed to this court.

In his petition of appeal, the appellant has raised seven grounds of appeal challenging the decision of the trial magistrate in convicting him. He was aggrieved that he had been found guilty on insufficient evidence and against the weight of evidence adduced in court. He faulted the trial magistrate for shifting the burden of proof from the prosecution and thereby reached the decision convicting him. He was aggrieved that the trial magistrate had considered extraneous facts which had not been tendered in evidence in reaching the said decision convicting him. He faulted the trial magistrate for relying on inadmissible evidence to convict him. He was finally aggrieved that he had been sentenced to serve a custodial sentence that manifestly excessive, harsh and oppressive.

At the hearing of the appeal, Mr. Makori learned counsel for the appellant submitted that the prosecution had failed to prove the charge against the appellant to the required standard of proof beyond reasonable doubt. He further submitted that the trial magistrate had shifted the burden of proof and placed the onus on the appellant to prove his innocence. He submitted that the evidence which was adduced by the prosecution witnesses was evidence of mere suspicion which did not support the charge that the appellant had stolen from the complainant by virtue of his employment. He further submitted that the convicting magistrate took over the proceedings from a previous magistrate who commenced the hearing of the criminal case and who had ceased jurisdiction without complying with the provisions of **Section 200** of the **Criminal Procedure Code**.

He argued that the trial magistrate had not considered the evidence that was adduced on behalf of the appellant on his defence to the effect that the sums of money which he had received had been accounted for and the receipts issued by the secretary of the union. He submitted that the trial magistrate had relied on the evidence of the prosecution witnesses without considering the evidence that was adduced by the defence witnesses which exonerated the appellant from the offence for which he was charged. He submitted that if the trial magistrate had taken into consideration the totality of the evidence adduced in the trial, then she would have reached a decision that the appellant ought to have been acquitted of the

charge. He finally submitted that the trial magistrate had erred by not considering the option of sentencing the appellant to serve a probationary sentence before sentencing him to serve the custodial sentence. Mr. Gumo, the Assistant Deputy Public Prosecutor did not make any submissions. He left all the issues raised by the appellant for determination by the court.

As was held by the Court of Appeal in **George Otieno Oloo –vs- Republic Criminal Appeal No. 137 of 2004 (Kisumu)** (unreported) at page 4 of its judgment,

“...it is the duty of the first appellate court to remember that the parties to the court are entitled, as well on the questions of fact as on the questions of law, to demand a decision of the court of first appeal, and that court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and to make due allowance in that respect (See Pandya –vs- R [1957]EA 333, Ruwalla –vs- R [1957]EA 570)”.

The issue for determination by this court, is whether the prosecution proved its case against the appellant on the charge of theft to the required standard of proof beyond reasonable doubt. I have considered the submissions that was made before me by the learned counsel for the appellant. I have also carefully re-evaluated the evidence that was adduced by the witnesses before the trial magistrate.

The charge against the appellant was brought after his former employer the Kenya Planters and Agricultural Workers Union complained that the appellant had been paid the monthly subscriptions by Lomolo Sisal Estate but failed to surrender the said subscriptions received to the union. According to PW1 Mwangi Humphrey Irungu, an accountant employed by Lomolo Sisal Estate, he paid the appellant the sum of Kshs 18,810/= on the 27th of May 1998 to the appellant, who was the branch secretary of the union. He further paid the sum of Kshs 18,045/= to the appellant on the 1st of July 1998. On the 19th of August 1998, he paid the appellant the sum of Kshs 18,270/=. On the 24th of December 1998, he paid the appellant the sum of Kshs 13,770/= and on the 8th of December 1998 he paid him the sum of Kshs 15,480/=. All these payments were paid to the appellant in cash. The appellant signed the payment vouchers acknowledging that he had received the said amount. The said payment vouchers were produced in evidence by PW6 Mao Oyieno, the police officer who investigated the case.

PW4 Antidua Nyanyua, a document examiner testified that he had examined the said payments voucher and was of the opinion that the signatures in the said vouchers were the appellant's. PW2 Francis Kiongo Mwangi the Deputy Secretary General of the Union and PW3 Faith Wanyiengo Njoka, the accountant at the Nakuru Branch office testified that the said Union did not receive the monies which the appellant had collected from Lomolo Sisal Estate and which he had undertaken to deliver to the offices of the union at Nakuru. PW5 Joseph Oywalo Oludali, the Industrial Relations officer of the union testified that the person whom the appellant claimed to have given the monies to (i.e *the late Joel Rono*) was not authorized to receive any monies on behalf of the union.

When the appellant was put on his defence, he admitted that he had received the money from Lomolo Sisal Estate but testified that he had handed over the money to the union. The appellant called a witness DW3 John Njoroge who produced receipts which were allegedly issued by the union in acknowledgment of the monies that were paid to the appellant by the Lomolo Sisal Estate. It is instructive that the people whom the appellant claimed to have paid the money to on behalf of the union were not there to give evidence to support the appellant's evidence that he had given them the said monies. One of them is dead while the other, according to the evidence adduced was admitted to Mathare Hospital during the time that the case was heard by the trial court presumably because he suffered from a mental illness. The appellant when he testified in his defence put so much effort to try and impress the court that the charge brought against him was motivated by malice on the part of the officials of the Kenya Plantation and Agricultural Workers Union. He testified that the said officials were unhappy that he had been engaged by a non governmental organization to champion workers rights and further that the appellant had been elected as a councillor on an opposition ticket.

I have re-evaluated the evidence that was adduced and considered the submission made by the counsel

for the appellant. I will first address the issue of whether or not the convicting magistrate proceeded to hear the case without following the procedure established under **Section 200** of the **Criminal Procedure Code**. **Section 200 (3)** of the **Criminal Procedure Code** requires a magistrate who takes over criminal proceedings to inform an accused person of his right to have the witnesses recalled or to have the case started *de novo*. In this case, the appellant was represented by an advocate during the entire trial before the subordinate court. On the 17th of May 2004, Mr. Omae who was then appearing for the appellant, informed Mrs Muketi Principal Magistrate that the appellant wished to have the case proceed from where the criminal proceedings had reached. The theft case against the appellant was heard by Mrs Ndeda, Chief Magistrate who retired before concluding the case. The appellant did not have any objection to Mrs Muketi Principal Magistrate proceeding with the case from where it had reached. He cannot therefore now complain that he was not given opportunity to indicate whether or not the witnesses who testified should have been recalled. I find no merit on that ground of appeal and proceed to dismiss it.

As to the evidence that was adduced in support of the charge, I do hold that the prosecution proved its case to the required standard of proof beyond reasonable doubt. The prosecution proved that the appellant, who was an employee of the complainant went to Lomolo Sisal Estate on five different occasions and was paid various sums of money in cash to deliver to the complainants offices at Nakuru. The appellant was known to the management of Lomolo Sisal Estate. He signed payment vouchers signifying that he had been paid the said sums of money which were the monthly subscriptions paid by the employees of the Lomolo Sisal Estate who were members of the Kenya Plantation and Agricultural Workers Union. PW4 the document examiner confirmed the signatures in the said payment vouchers to be that of the appellant.

Evidence was adduced by the officials of the union to the effect that the said sums of money which were received by the appellant on behalf of the union were not remitted to the union. Although the appellant in his defence adduced evidence that he had paid the said monies to some officials of the union and even produced some receipts allegedly issued by the union in acknowledgement of the said sums of money, upon re-evaluation of the said evidence adduced, it is clear that the said receipts are not genuine. The evidence of the officials of the union that they had not received the money was not shaken by the evidence that the appellant adduced in his defence. The submission by the appellant that the trial magistrate had shifted the burden of proof and therefore found him guilty of the offence of theft is not supported by the evidence that was adduced before the trial magistrate. Having re-evaluated the totality of the evidence adduced, I do hold that the prosecution proved its case against the appellant on the charge of theft to the required standard of proof beyond reasonable doubt. I find no merit on the grounds of appeal put forward by the appellant challenging his conviction by the trial magistrate. I consequently dismiss the appeal against conviction.

On sentence, this court is aware that when the trial magistrate is sentencing an accused person, such a trial magistrate is exercising judicial discretion. This court, on appeal, can only interfere with the sentence meted out by the trial magistrate if it is proved that the trial magistrate exercised his discretion wrongly or unlawfully in sentencing the convict. In this case the appellant has submitted that the trial magistrate had not considered sentencing him to probation even though she had earlier ordered that a probation report be prepared by a probation officer.

That may well be so, but in the circumstances of this case putting into consideration the facts of this case and especially the circumstances of the theft of the said funds belonging to the union, I do hold that the sentence of twelve months imprisonment ordered by the trial magistrate is neither harsh nor excessive. I find no merit whatsoever on the grounds put forward on appeal against sentence. The appellant shall serve the sentence that was ordered by the trial magistrate. The appeal against sentence is therefore dismissed. It is so ordered.

DATED at NAKURU this 31st day of March 2006.

L. KIMARU

JUDGE