

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

Criminal Appeal 264 Of 2005

STEPHEN MUTISYA MUINDE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant was tried and convicted of the offence of theft by servant contrary to Section 281 of the Penal Code and sentenced to three years imprisonment. He has appealed against both the conviction and sentence and listed six grounds of appeal in his petition of appeal. The first five grounds are on conviction and are to the effect that there was no sufficient evidence to justify the conviction of the Appellant. The last one is on sentence and in it the Appellant complains that the sentence meted out to him was excessive in the circumstances. I will first deal with the appeal on conviction and then come to the one on sentence.

The brief facts of this case which are not in dispute are that the Appellant was the main cashier of Mombasa Beach Hotel. In that position he kept one of the keys to the Hotel safe which was a two-way locking mechanism. The other key was kept by any front office cashier who was on duty. That meant that the safe could only be locked and opened by the use of the two keys. A holder of one key could therefore not gain access into the safe without the other holder being present or giving him the other key.

At about 8.00 a.m. each day the Appellant as the Chief Cashier used to be given all the money collected the previous day by all the other cashiers in the Hotel the previous day. After verifying its correctness from the computer print out the Appellant used to issue an internal receipt and then bank the money or use some of it for petty cash. The Appellant used to maintain a cash box to which he was the only one with the key. At the end of each day the Appellant used to lock the money he had in the cash box and have it put in the Hotel safe. As he held one of the keys to the safe he used to go with the front office cashier with the other key to the room behind the front office where the safe was kept and lock the money in the Hotel safe. In his testimony in the lower court the Appellant said that from the year 2000 PW1, the Hotel Chief Accountant, changed the system and instructed him to be handing over the locked cash box to the front office cashier through a small window together with his key to the safe. The front office cashier would then go alone to the rear of his office with the two keys to the safe and lock the cash box in the safe. The Appellant claimed that although he trusted the front office cashiers he did not see what was happening at the back where the safe was.

Mr. Kenzi counsel for the Appellant submitted that the change in the system of operating the safe requiring the Appellant to hand over the cash box with his safe key to the front office cashier created a loophole that may have been exploited and the money stolen by someone other than the Appellant. That, he said, created a doubt in the guilty of the Appellant and he should have been given the benefit of that doubt. Mr. Kenzi also submitted that no particulars were given of the sum of Sh. 476,377.45 allegedly stolen and that the whole sum was not shown as having been stolen by the Appellant. Receipt No. 22149 of 15th May 2003 for Sh. 83,640/=, for instance, was admittedly not signed by the Appellant.

On sentence Mr. Kenzi submitted that in the circumstances of this case three years imprisonment was excessive.

On his part Mr. Monda submitted that this appeal is unmeritorious and should be dismissed in its entirety. All the money collected by the other cashiers was handed over to the Appellant who kept it in a

cash box to which he was the only one with the key. The cash box was not broken into.

The evidence of the document examiner, Mr. Monda further submitted, was not material and that is why the prosecution did not call it. On sentence, he said, three years against a maximum of seven years cannot be said to be harsh. He urged me to dismiss the appeal in its entirety.

I have considered these submissions and the lower court record as a whole. The system put in place for operating the Hotel safe was not the best. That notwithstanding, however, it was the Appellant's testimony that he used to count the money every day and record the amount taken then put it in the cash box, locked it and handed it over for keeping in the safe. On the 17th May 2003 he did not count the money. He did not say why. The cash box was also not broken into or tampered with in any way. The Appellant when asked about the whereabouts of the money simply said he did not know where it went.

Appellant did not deny that he was given the money by the other cashiers. He received it and recorded it in the summary exhibit 17. In the absence of any break in it was only him who would say where the money went. He did not say.

Mr. Kenzi harped on the fact that the Appellant did not sign Receipt No. 22149 as having received a sum of Sh. 83,640/=. That may very well have been so. But where is the rest of the money. If one is charged with stealing Sh. 100,000/= and the prosecution is only able to prove that one stole only Sh. 10/= the offence of theft is proved. So the argument that the Appellant did not sign that receipt does not help him.

For these reasons I find that the appeal against conviction has no merit and I accordingly dismiss it.

As regards sentence it has to be remembered that the Appellant was in a position of trust. He abused that position. A sentence of three years imprisonment cannot be said to be excessive in the circumstances and I also dismiss the appeal against sentence.

In sum this appeal is dismissed in its entirety.

DATED and delivered this 30th day of March 2006.

D. K. MARAGA

JUDGE