



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

Criminal Appeal 145 of 2004

TITUS B. MURUGU.....APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

JUDGMENT

The Appellant, Titus Bundi Murugu, was in Mombasa Chief Magistrate's Criminal Case No. 2179 of 2000 charged with five counts of stealing by servant contrary to Section 281 of the Penal Code. The particulars of the five counts were to effect that on diverse dates between the 24th day of November 1999 and the 12th day of May 2000 at the Kenya Power and Lighting Company Limited offices at Malindi in Malindi District within Coast Province being a servant of the said Kenya Power and Lighting Company Limited he stole from it a total of KSh. 10,327,632.90 which came to his possession by virtue of his employment. He denied all the counts but after trial before the Senior Principal Magistrate he was convicted on all the counts and sentenced to four years' imprisonment on each count. The sentences were ordered to run concurrently. He has appealed to this court against both the convictions and the sentences on 10 grounds of appeal. A perusal of all the grounds of appeal show the Appellant as complaining that there was no sufficient evidence to warrant his conviction. He therefore prays that the convictions be quashed and the sentences be set aside.

The brief facts of the case are these: The Appellant was an employee of the Kenya Power and Lighting Company Limited (the complainant). At the material time he with Benjamin Kahindi were stationed at the complainant's offices at Malindi as cashiers. Their duties were to collect payments from customers, in both cash and cheques, in settlement of their bills, receipt them and post them into the computer. At the end of each day after confirming that the cash in hand plus the cheques tallied with the receipts and computer entries each of them would hand his individual collections together with the computer print out to the Revenue Accountant, Mr. Abuya PW 2. The latter did or supervised the banking.

Though they both used one computer, each by the use of his own personal number and password identifiable by the system, would during his turn log into the system, receive and receipt the payments for his session and close the system when his period was over. At the material time the company router which connected several computers to the network failed. The company resorted to the use entirely of the off-line system that is the Local Collection System (LCS) to collect cash. During that period the company could not establish from the net-work system which customer had paid.

One day a customer, Sarah Drammo, complained to PW 2 that though she had settled her bill the previous week, her power supply had not been restored. Upon production of a receipt PW 2 noted that that customer had paid in cash Sh. 119,818/= but the same had not been handed over to him and did not appear in the sessional reports. Investigations by PW 2 revealed other cash payments which were also not

handed to him. PW 2 then informed his boss who sent auditors to the branch. The audit exercise revealed a theft of a total of Sh. 10,327,632.90 of which the Appellant was charged with in the five counts.

The Appellant filed long submissions and when the appeal came up for hearing before me he did not wish to add anything. In those submissions he attacked the learned trial magistrate's judgment on several points.

The first point the Appellant took was that his conviction was based mainly on the evidence of PW 2, PW 3 and PW 13. According to him the evidence of those witnesses should not have been relied upon.

As against PW 2 the Appellant submitted that being in charge of the Appellant and the other cashier, Benjamin Kahindi PW 11, it was PW 2's duty to ensure that the daily cash operations were in order. He failed to do that and the audit report indicted him for negligence. He in particular unprofessionally received collections from the cashiers in that he kept no record of those receipts. His evidence could therefore not be relied upon as he obviously shifted blame to the Appellant.

As regards PW 3, the internal auditor, the Appellant submitted that he confessed having made errors in the audit report. His evidence which formed the backbone of the prosecution case should therefore have been rejected.

The Appellant accused the investigating officer Joachim Ileri PW 13 of shewed investigations. He said that apart from the fact that he did not carry on independent investigations and relied on what PW 2 told him, he did not deem it necessary to investigate the other cashier Benjamin Kahindi PW 11. He said that PW 11 said that if someone knew the Appellant's password he would log into the system and tamper with that other person's entries. Having worked with him it could not be ruled out that PW 11 did not know the Appellant's password and did not tamper with the Appellant's entries.

The Appellant also submitted that the Internal Auditor PW 3 having recommended that disciplinary action be taken against PW 2 and Mrs. Consolata Inziani the Appellant was a scapegoat to cover the fraudulent acts of those two.

As a whole the Appellant attacked the entire prosecution case and submitted that there was no evidence to warrant his conviction. He urged me to allow this appeal quash the convictions and set aside the sentences.

In response Mr. Monda, learned state counsel, submitted that this appeal should be dismissed in its entirety. He said that as stated by PW 1, the Systems Analyst with the complainant, each cashier was assigned his own password and no one could tamper with the work of the other. The audit report together with some session reports which were recovered from the Appellant's house showed that all the missing money was paid to the Appellant. The Appellant failed to account for it, he said. The convictions were therefore proper and the appeal against convictions should be dismissed.

On sentence Mr. Monda submitted that Section 281 of the Penal Code, under which the charges against the Appellant were laid, provided for a maximum sentence of 7 years imprisonment. Four years imprisonment cannot therefore be said to be harsh. He urged me to dismiss the appeal against sentences also.

I have carefully read the lower court record and considered these submissions. It is not in dispute that the Appellant was a cashier with the complainant and at the material time he was stationed at Malindi. It is also not in dispute that he received payment from customers both in cash and in cheques. He used a computer system known as Local Collection Application which generated daily reports with sequentially numbered sessions. There could be several sessions in a day and the sequence could never be skipped. According to PW 1 the files were encrypted in the system and cannot be edited or tampered with by the end users or anyone else.

Each user had a password known only to himself. One cashier could not receipt on behalf of another. In his audit PW 3 found out that between November 1999 and May 2000 a total of 54 sessions were missing from the physical file and that all of them were receipted by the Appellant and totalled to KSh. 10,327,632/90. Appellant was unable to account for that sum. Some of the missing sessions and some other financial documents as well as cheques payable to the complainant were recovered in the Appellant's house where they had no business to be.

The submissions made by the Appellant implied that someone could have known his password and tampered with his entries. He did not suggest who that could have been and how he could have been able to know it. PW 1 said that one can change one's password even several times in one day. Appellant did not say that he had any suspicions for if he had he could have changed his password.

Having considered all the evidence on record I agree with the learned trial magistrate that there was overwhelming evidence against the Appellant. His conviction was therefore proper and I accordingly dismiss the appeal against the convictions.

As to sentence, the complainant lost a whopping Sh. 10 million plus, not to robbers but to the Appellant, a person it placed great trust in. In the circumstances I do not find a sentence of 4 years imprisonment excessive. The appeal against sentences is also dismissed.

In the result this appeal is dismissed in its entirety.

DATED and delivered this 16th day of May 2006.

D. K. MARAGA

JUDGE