



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CRIMINAL APPEAL NO. 1220 OF 2001

FROM ORIGINAL CONVICTION AND SENTENCE IN CRIMINAL CASE
NO. 1941 OF 1999 OF THE CHIEF MAGISTRATE'S COURT AT NAIROBI

GEORGE OGOLA OGADA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

GEORGE OGOLA OGADA was convicted for STEALING BY SERVANT, contrary to section 281 of the Penal Code. Following his said conviction, the appellant was sentenced to three (3) years imprisonment. It is then that he lodged this appeal against both conviction and sentence.

The appellant had been employed by the complainant, Kuguru Food Complex Limited, as an accounts clerk. He was said to have stolen Kshs 1,051, 240/= from the complainant, between 2nd June 1997 and 31st December 1997.

PW1, Peter Ngubuni Kuguru, testified that he was the Managing Director of the complainant. He said that the complainant's external auditors prepared an audit report dated 19th April 1999, in which it was stated that the complainant had suffered massive loss of funds. The complainant lost money when cheques payable to it were, instead, directed and paid to other persons, who had an account at Mashreq Bank. As far as PW1 was concerned, the complainant had never had any account at Mashreq Bank. He also produced copies of the Memorandum and Articles of Association which the said bank had received from persons masquerading as officials of the complainant. The said documents were made available to PW1 by Mashreq Bank, when he sought to know from them how come they had been diverting the complainant's cheques to an account which did not belong to the complainant.

Apparently, some fraudsters had presented some forged documents to Mashreq Bank, and thus persuaded the bank to open an account in the name of the complainant.

It was the evidence of PW1 that the paying in slips for the complainant were always filled in by the appellant. The copies of the paying - in slips which were retained by the complainant were all in the handwriting of the appellant. The appellant would fill in the paying - in slips after receiving cheques from the complainant's distributors.

According to PW1, the person who used to do banking was the appellant, as well.. The cheques ought to have been banked at the complainant's bank at ABN Amro Bank.

However, the cheques in issue, whose value amounted to Kshs 1,051,240/= were diverted to Mashreq Bank.

It was submitted by Mr. W. Gachie, Advocate for the appellant, that the prosecution needed to prove that the appellant was responsible for diverting the cheques to Mashreq Bank, and also that the appellant was a beneficiary of the said diversions, if the charges facing him were to be deemed as proved. In his view, the prosecution failed to discharge that obligation.

The appellant pointed out that during cross examination, PW1 admitted that the complainant did sometimes send a messenger to do its banking. In other words, PW1 conceded that banking of cheques was not the sole preserve of the appellant. That being the case, it automatically meant that for the appellant to be held responsible for any particular cheque which may have been diverted, the prosecution would have had to prove that the appellant was the person who not only took it for banking at ABN Amro Bank, but also diverted it to Mashreq Bank.

But more interesting , is the evidence of PW2 and PW3 regarding this issue of banking. PW2, Wellington Bengo, was a clerk at the customer service department of ABN Amro Bank. His duties included receiving cheques from customers, for depositing.

In relation to the cheques which were the subject matter of this case, PW2 testified that the gentleman who deposited them at the bank, was not the appellant.

PW3, Bondy Mbuu Kithita, was a section head, in the customer service department of the ABN Amro Bank. His duties included dealing with customers questions, receipt of customers' instructions, and receipt of cheque deposits. When the prosecutor asked him whether the person who used to deposit any of the cheques which are relevant to this case was in court, the witness answered in the negative.

The appellant submitted that the testimony of PW2 and PW3 confirmed his defence, to the effect that he did not do any banking for the complainant. Clearly, that submission cannot be faulted, as PW2 and PW3 are the only two persons who received cheques from the complainant, which were being banked at ABN Amro. To that extent, the testimony of PW2 and PW3 is a direct contradiction to the evidence by PW1.

But perhaps the most significant piece of evidence was from PW8, Stanley Wambugu Gitonga. He was a messenger at the complainant's company. He testified that the appellant used to make the banking slips and then hand over to him, for banking.

PW8 said he is the person who used to do the banking for the complainant. After doing the banking, PW8 would take the banking slip to the secretary to the financial director, PW1.

Later, when PW11, Anne Wanjiku Kuguru, testified she said inter alia:

“What I mean is the accused would write the banking slips and send the messenger with the slip and the cheques to the bank, or the accused could personally take the cheques.”

Of course, as we have already seen from the evidence of both PW2 and PW3, the appellant never did take any cheques to the bank. That would mean that, even by the testimony of PW11, the only person who did the banking was PW8.

After doing the banking, PW8 took the banking slips to PW11. In my understanding therefore, the only person who might have been able to explain how cheques, whose banking slips were being held by PW11, were missing from ABN Amro, would have been PW8.

PW10, Margaret Kipkorir, was a clerk at Mashreq Bank. Her duties included receipt of cheques, over the

counter. She would then post such cheques to the customers accounts. In relation to all the cheques which relate to this case, PW10 said that none were deposited by the appellant. She was categorical that if she saw the person who had deposited the cheques she would identify him. This is what she said:

“I cannot see the person who deposited. It was the owner of the account who used to come and make deposits. That person is however not in court.”

Who was this person cited by PW10 as being the owner of the account? If the evidence of PW1 is anything to go by, they were Messrs. Joseph Irungu Mwangi, Mike Mwaura Mwangani and Norfat Ngare Wanjohi. Those names were obtained from documents held by Mashreq Bank, from the moment the account was being opened. The pictures of those gentlemen were also held by the bank. In other words, the persons who deposited the cheques in issue were well known as their photographs, identity card numbers, addresses etc were available at Mashreq Bank. But one thing is clear, from the evidence on record, the appellant was not one of the persons who was associated; in any way, with the account.

The mystery, to my mind, is how ABN Amro Bank was able to stamp the banking slips for all the cheques in issue, without having received the cheques cited on such slips. According to PW2, whenever the bank clerk stamps the banking slip, he would keep the cheques whose particulars are cited on such a slip. But in this case, the cheques seem to have left the ABN Amro Bank, even after the banking slips were stamped. The cheques then found their way to Mashreq Bank. Did the appellant divert the cheques from ABN Amro to Mashreq Bank?

I cannot see any evidence at all to show that the appellant had anything to do with the diversion of the cheques.

The learned trial magistrate held that **“the conduct of the accused amounts, to deserting duty which could be a pointer towards guilty knowledge.”**

This conclusion was derived from the evidence of PW1 who had said that the appellant stopped working for the complainant in early 1998. Thereafter, it was not until sometime in 1999 when there was an external audit at the complainant. It is the said audit which revealed the losses suffered by the complainant. From a logical perspective, one could be suspicious of the appellant, for his having deserted the complainant. But save for such suspicion, I find no evidence which I can use to link the appellant's desertion to the offence. I say so because PW1 also testified that there was another person who had also deserted. PW1 said;

“In my office I suspected Richard Kabebe who was an assistant for the accused, because he absconded from duty after that theft, and is still at large.”

By his own testimony, PW1 was saying that there were other persons who may have stolen the money in issue. Indeed, it is very interesting to find PW1 testifying as follows:

“I had no other suspect within the company. Yes I trust Stanley Wambugu the messenger 100%. Yes I once upon a time I trusted the accused 100%.”

One therefore wonders why the appellant was charged with the offence in the first place. That question is even more significant when it is borne in mind that, according to PW1:

“The total amount of money stolen was about Kshs 4 million in total. However, through the cheques I have identified, the same comes to about one million.”

That revelation brings into focus the bigger picture. It shows that the complainant did not have proper mechanism for the control of its financial affairs. It is a cancer that I trust they have done something about, lest the company get crippled. But meanwhile, I do hold that the learned trial Magistrate misdirected himself by finding the appellant guilty simply on the basis of his handwriting on the banking slips. That fact alone, was totally insufficient to found conviction for the offence with which the appellant

was charged.

Having thus re-evaluated the evidence on record, I accept as reasonable, the decision by the learned State Counsel, Ms. Nyamosi, not to oppose the appeal. In conclusion therefore, I find merit in this appeal. I quash conviction and set aside the sentence. The appellant should be set at liberty unless he is otherwise lawfully held.

Dated at Nairobi this 9th day of February 2005

FRED A. OCHIENG

JUDGE

Delivered in the presence of:

Kaigai for Nyamosi For State

Gachie for the Appellant

Mr. Odero Court Clerk