REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CRIMINAL APPEAL 165 OF 1996

RAPHAEL NGARI WAMAE.....APPELLANT

Versus

REPUBLIC.....RESPONDENT

(Being appeal against conviction and sentence of Muga Apondi, Senior Principal Magistrate, in the Senior Principal Magistrate's Court at Nyeri on 28th June, 1996 in Criminal Case No. 1834 of 1995)

JUDGMENT

This is an appeal against the conviction and sentence of the Appellant who faced the charge of stealing by a person employed in the Public Service contrary to Section 280 of the Penal Code. Particulars alleged that on various days between October, 1990 and June 1991 the Appellant, being a person employed in the Public Service as a clerk in the Ministry of Health in Karatina Town, stole Ksh.104,651/70 the property of the Kenya Government.

In brief the evidence adduced was that the Appellant was employed by the Ministry of Health as a Revenue Clerk at Karatina District Hospital and worked as a cashier receiving money from other clerks who were collecting money at the hospital so that he accounts for the money at the District Treasury – following banking. Following an audit inspection carried out under the supervision of the Government Senior Auditor, Central Province from 3rd to 4th August, 1993, it was found that there was a sum of Ksh.104,651/70 which the Appellant had not accounted for. That was why he was charged and prosecuted in this case for theft of that money.

In his defence the Appellant said that he had overspent the hospital vote and when a new Hospital Secretary was posted to the hospital, that Hospital Secretary refused to pass the payment vouchers the Appellant had.

That was the evidence before the learned trial magistrate and in this appeal, Counsel for the Appellant, M/S Mukuha argued the six grounds of appeal together stating that the learned trial magistrate admitted hearsay evidence resulting into miscarriage of justice. He pointed out that the case against the Appellant was based on an audit report which was prepared by two officers under the Senior Auditor who gave evidence as P.W.1 and that the audit inspection had been done by the two officers without P.W.1 being on the site with them. Although he signed the report as a public document from his office and produced it together with supporting documents in the evidence, the two officers did not give evidence and therefore it was submitted that the audit report was hearsay and ought not to have been accepted in the evidence.

M/S Ngalyuka, State Counsel, did not agree saying that evidence was no hearsay and was properly admitted.

During the trial that evidence was admitted without any objection from Mr. Waweru who was defending the Appellant. It was during his submission of "no case to answer" that he started attacking that evidence as hearsay and he was subsequently overruled on that point and the Appellant put on his defence. After the Appellant was convicted and sentenced, Mr. Waweru attacked the evidence again and criticized the judgment when applying for a stay of execution of the sentence on the ground that he wanted to appeal. A dispute has been over the interpretation of Section 33 of the evidence Act the prosecution saying that the Audit report was properly tendered in the evidence under that Section while the Appellant's side is saying that what happened was not proper. But they would talk without specifying the relevant paragraph of Section 33. The trial magistrate took one of the paragraphs and used it.

This was a straightforward and easy case but it is not clear why the prosecution decided to handle it so casually. P.W.1 sends two of his officers to do the auditing. They do the work and produce a report which P.W.1 signs and proceeds to produce it at the trial. But nobody cares to call, in addition, at least one of the two junior officers since P.W.1 did not do the auditing himself and did not supervise the work on the site although he may have supervised from his table at his office in Nyeri Town.

Only three prosecution witnesses. P.W.1 the Senior Auditor, P.W.2 a former Karatina District Hospital Secretary and P.W.3 a Police Constable to whom another Police Officer had handed over the case. That was all and the prosecutor closed the prosecution's case. The evidence to sustain conviction of the Appellant on the charge of stealing Sh.104,651/70? The Audit Report which only showed that out of Shs.592,840/= the Appellant had received Kshs.104,651/70 had not been accounted for.

That was evidence of books or record of accounts which did not necessarily mean that the Appellant had stolen that money. Moreover that evidence, taking that it was admissible, was weakened by the fact that it was produced by P.W.1 without the support of the two officers who did the actual auditing. But even if that weakness were not there, that evidence needed further evidence proving the actual theft. As things were left, the evidence proving theft was not adduced. Actual receipts had to be produced in the evidence showing how much the Appellant received on each day it was alleged theft took place and how much he accounted for and did not account for for that day and that was expected to add up to the total sum alleged stolen.

In other words, a part from the figure in the Audit report, evidence should have been there using the receipts which were being issued when the Appellant was receiving that money. That is evidence outside books of accounts to corroborate evidence in the books of accounts to sustain the charge of stealing.

Since such evidence was not there the prosecution's case had to fail even if it were not weakened by the failure to call the two auditing officers.

From what I am saying therefore, there was no sufficient evidence to sustain the Appellant's conviction. I do hereby allow his appeal. Quash his conviction and set aside the sentence imposed upon him.

Dated this 28th day of June, 2005.

J. M. KHAMONI

JUDGE

Present:

Mrs Mukuha for the Appellant

Mr. Orinda for the Republic

Appellant In The Dock