



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

APPELLATE SIDE

CRIMINAL APPEAL NO. 460 OF 2001

(From Original Conviction and Sentence in Criminal Case No. 441 of 2000
of the Resident Magistrate's Court at Mombasa – A.W. Ngugi – R.M.)

LILIAN KALEKYA MAINGI APPELLANT

- VERSUS -

REPUBLIC RESPONDENT

J U D G M E N T

The Appellant was charged and convicted on 4 counts.

(1) Count 1 - Stealing by servant contrary to Section 28 of the Penal Code.

(2) Count II, III and IV - Fraudulent false accounting Contrary to Section 330(b) of the Penal Code.

She was sentenced to serve an imprisonment term of 2 years on Count 1, 1 year on count II, 15 months on Count III and 1 year on Count IV. She preferred an appeal and cited 3 grounds through her counsel Mr. Gakuhi. On Ground 1 and II - Mr. Gakuhi submitted that the Magistrate erred in convicting the appellant against the weight of the evidence and that the charges had not been proved beyond any reasonable doubt.

On Count III he submitted that taking all the circumstances into consideration and the mitigating factors the sentence was manifestly high.

The evidence before the trial court was that PW1, the complainant had on spot checking the Books of accounts in respect of her business discovered that some payments were not reflected in the registers while others were not Banked. She said the appellant was entrusted with the responsibility of collecting and issuing the receipts for the Rent and that the Appellant was responsible for Banking the money collected. However on cross-examination she said the appellant would collect, issue receipts and hand over to a messenger named Charles for Banking. She also said the Appellant's work was confined to the office and that she had within the period in question asked her to send some Kshs.7,500/= to her at a Restaurant known as Carlos. In her evidence she gave details of payments either received and not receipted or Banked and that some records were missing.

PW2, an employee of the PW1 confirmed how she discovered that payments made on behalf of Panafric by one Kimeu was not reflecting the correct amounts as the Tenant wanted to pay Rent for the month of November 1999 yet their records showed rent due was for October, 1999. This changed when Mr. Kimeu produced a receipt to show he had paid Kshs.16,000/= to cover September and October, 1999 rent. In the meantime the Appellant was sent home and was arrested when she went to Nyalii Police

Station to follow up on a complaint she had lodged against her said employer.

At the hearing several Tenants were called to testify on how they had made payments to the Appellant.

The Appellant had given a sworn defence and stated that she used to receive the Rent after which she would hand over the receipts to one Rhoda PW2 to enter into the register. After that the money would be Banked by the messenger one Charles who completed the Banking slips and she only did the Banking if the messenger was away. She narrated how money was collected and records kept and infact said out of the amount of 16,000/= paid by Panafric, Kshs.8,000/= was collected by PW1 through Carlos Bar and Restaurant which PW1 confirmed.

Appellant says the problem started when PW1 learned she was looking for another Job and threatened she could destroy her life as she had the money and influence to do to. She then ordered her to surrender the receipt books and registers on 10.12.99 after which she asked her to leave without issuing a dismissal letter.

In cross-examination she admitted receipt of various amounts. She called one Tenant as a defence witness who confirmed having paid 25,000/= in cheque form but this was also said to have been stolen.

The State Counsel analyzed the evidence on record and submitted that it didn't support the charges. I have on my part read the record and note there were a lot of discrepancies in the evidence. There were no records produced by the auditor to confirm money was indeed missing nor were Bank Statements availed to show that even the amounts paid by cheque were never Banked.

From the evidence by the prosecution and the Defence, there appears to be amounts that could be accounted for by the Appellant such as the 25,000/= paid by DW2 and Shs.8,000/= CASH TAKEN BY pw1. therefore the charge of stealing Kshs.90,700/= could not stand at that point.

On the other counts of fraudulent accounting, no documentary evidence was produced to confirm the same save for a Register which the court confirms disappeared while in it's custody and before completion of the trial. In the circumstances, it's evidence cannot be relied upon.

The case appears to have either been very badly investigated or as the Appellant stated, the prosecution was as a result of other issues between the complainant and PW1. I agree with the State Counsel that the evidence as adduced could not sustain a conviction and for these reasons the appeal is allowed and Sentence set aside. As the appellant is currently out on Bail she is set free.

Dated and Delivered at Mombasa this 28th day of June, 2002.

P.M. TUTUI

COMMISSIONER OF ASSIZE