

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

APPELLANT SIDE

CRIMINAL APPEAL NO. 210 OF 2002

(From Original Conviction and Sentence in Criminal Case No. 515 of 2002
of the District Magistrate's Court at Mombasa G. Oyugi

JOSPHAT MILOAPPELLANT

VERSUS

REPUBLIC..... RESPONDENT

JUDGEMENT

The appellant was charged and convicted for the offence of stealing by servant contrary to section 281 of the penal code and sentenced to serve 12 months imprisonment. He preferred an appeal and cited 5 grounds which attack the courts finding that an employment relationship did exist between the appellant and complainant and that the appellant had indeed received Kshs.77,000 through one Meshack Makau Mwanzui, PW2. The other point raised was that the court erred by relying on the evidence of Meshack Makau, PW2 who should have been a complainant as opposed to a witness.

The brief facts of the case are that PW1, TERESIA WAIRIMU CHEGE was in a business relationship with MESHACK MAKAU MWANZUI of buying coconut fruit and selling at Taita Taveta. To facilitate the same they decided to engage the services of the appellant who was to buy the coconuts from Kaloleni and arrange for transport to Taita Taveta. PW1, said she didn't know the appellant before he was introduced to her by PW2 and therefore she used to hand over all the money required to PW2 who would in turn hand-over to the appellant. For the performance of the said work PW1 gave PW2 Kshs.77,000 to hand over to appellant and in consideration, appellant was to receive Kshs.7,000 for his salary.

Appellant however disappeared and PW2 embarked on a search exercise and when he finally caught up with him, he handed him over to the police. According to all the 4 witnesses, appellant is said to have admitted receipt of Kshs.77,000 from PW1 and had promised to refund the same.

However throughout the evidence and cross-examination the issue of the Appellant having been in the employment of PW1 is denied. In his sworn defence, the Appellant denied the same as well as having received any money from PW1 and PW2.

The state counsel supported the conviction and sentence. From the evidence which I have evaluated, there is no concrete evidence to show that an employment relationship did exist between PW1 and appellant. This becomes even difficult to establish because apart from the evidence by PW1 and PW2, there is no independent evidence to prove the appellant did receive kshs.77,000 from PW1 through PW2. Even the police officers evidence did not improve the situation as not even a statement by appellant admitting receiving the money as alleged to was produced.

I do agree with the counsel Mr. Makau that in the face of the evidence on record a conviction could not safely be reached. The appellant may have received the money from PW1 but the matter was poorly handled and evidence cannot support a safe conviction. In the circumstances, the appeal is allowed. The appellant is to be set free forthwith unless held for other lawful reasons.

Dated and delivered this 26th day of September 2002.

P.M. TUTUI

COMMISSIONER OF ASSIZE