



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CRIMINAL APPEAL NO. 79 OF 2002

**(Being an appeal from original conviction and Sentence in Criminal Case
No. 1310 of 2002 of the Senior Resident Magistrate's Court at Kilifi –P.
Mutani, Esq., SRM**

KHAMISI KULDONDAH KUVYODAH APPELLANT

VERSUS

REPUBLIC RESPONDENT

JUDGMENT

The appellant in this Appeal Khamisi Kulonda Kuvyonda was charged with the offence Stealing by Servant contrary to Section 281 of the Penal Code in that on diverse dates between September 2000 and April 2001 at Mtwapa Market in Kilifi District within Coast Province, being a servant to Paul Musango he stole from the said Paul Musango cash KSh.78520/-. He pleaded not guilty but after a full hearing he was convicted and was sentenced to pay a fine of KSh.60,000/- or to serve 18 months imprisonment. It was also ordered that in the event the fine was paid KSh.50,000/- would be paid to the complainant as compensation.

He has appealed against conviction and sentence and has filed four grounds of appeal all maintaining in effect that the conviction was not proper as the learned Magistrate failed to find that no proper evidence was adduced to prove the charge.

The learned State Counsel Mr. Ogoti did not support conviction and in my humble opinion rightly too.

First the Appellant was charged with the offence of stealing by servant. PW.1 the complainant said in his evidence in chief that the Appellant was his salesman and that he had employed him but in cross examination he said:

*“I have hired you on commission basis. I can't recall the date
of employment. No formal employment contract.”*

This evidence shows that the question as to whether the appellant was a servant of the complainant was in doubt for from this answer one gets the feeling that the Appellant was an agent. He would take medicine from the complainant's pharmacy, go and sell them and hand over the proceeds to the complainant and he would be paid commission depending on what he sold.

Secondly, the prosecution produced a document Exh.1 list of names which PW.1 called a list of clients who allegedly paid to the appellant some money for transmission to PW.1 but whose money the Appellant is alleged not to have remitted to the complainant. None of those listed was called to give evidence in court. In any case the list contained 14 names and not 16 as PW.1 alleged in evidence. It thus remained an allegation and no more that they paid money to Appellant to remit to the complainant. On the face of denial by the Appellant, it was necessary to call them to give evidence to prove that each of them indeed paid money to Appellant which the Appellant failed to remit to complainant. Without that evidence in court, the allegation that the Appellant took money from them and did not remit it to the complainant remains a mere allegation without proof in law and cannot sustain a conviction. It was in fact no more than hearsay evidence. PW.1's KSh.2000 was given to Kahindi and not to the Appellant.

Thirdly the Prosecution and particularly PW.1 says in his evidence that he discovered theft "after auditing the books." No auditor's report was produced in evidence and no auditor gave evidence in the entire case. It must be remarked that this was to a large extent a case based on accounts and without the auditors evidence and report, one cannot tell what the appellant is alleged to have stolen and how he stole it.

The fourth ground why this appeal must succeed is that the prosecution witness PW.2 says the pharmacy used to raise invoices and deliveries, yet none of the alleged invoices were produced in court and none of the deliveries were produced in court.

The next ground is that PW.1 says in his evidence in cross examination as follows:

"You sign on a book after taking the drugs ."

Only for PW.2 to say:

"The accused never used to sign for the receipt of the drugs"

Which version was the court to believe? As no records were availed one cannot say the accused stole money in respect of which drugs supplied to him.

I need not go any further. There are several reasons why this appeal must succeed. However, I cannot end this judgment without commenting on what I may call a serious misdirection by the learned Magistrate in the judgment. He says in the judgment inter alia as follows:

"I find the accused admitted and signed for loss vide

exhibit 1. In other words the accused acknowledged the

money before Mr. Musango (PW.1) and cannot turn round

and say he never took any money."

I have perused the evidence of PW.1 thoroughly and I have perused the evidence of all witnesses but I cannot see this alleged admission. I have also scrutinised the one page Exh.1 and I cannot see that admission. Clearly this was the learned Magistrate's own making and I do with respect feel it is serious for it adds on to the evidence what was never in evidence at all. However even if that admission were to be there, PW.1 was a person in authority over the appellant and such a confession, if it ever existed would have had to be subjected to the required tests before being admitted.

I have said enough, but I need to add here that the sentence was also not proper as the default sentence could not exceed 12 months.

Appeal allowed, conviction quashed, sentence set aside. Fine to be refunded to the Appellant if already paid. Appellant set free forthwith unless otherwise lawfully held.

Dated and delivered this 11th Day of December, 2002.

J.W. ONYANGO OTIENO

JUDGE