

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
APPELLATE SIDE
CRIMINAL APPEAL NO. 131 OF 2000

(From Original Conviction and Sentence in Criminal Case No. 870 of
1999 of the Senior Principal Magistrate's Court at Machakos: J. S.
Kaburu Esq. on 24.2.2000)

SILVESTER MULI MUTHEMBWA :::::::::::::::::::: APPELLANTS

VERSUS

REPUBLIC :::::::::::::::::::: RESPONDENTS

Coram: J. W. Mwera J.

Appellant not willing to be present
Orinda State Counsel for Respondent
C.C. Muli

JUDGEMENT

The appellant faced eleven charges under S.347(a) as read with S.349 Penal Code in that from June 1998 to March 1999 with intent to defraud or deceive he made he made several documents, all as detailed in the charges, purporting them to be genuine and valid invoices for payment. That these documents were issued by the appellant at M/s B. K. Stores for sales purchases of various types of cigarettes from M/s Mastermind Tobacco (Kenya) Limited.

The twelfth count fell under S. 281 Penal Code in that on diverse dates between 1.6.98 and 6.3.99 being a sales representative of M/s Mastermind Tobacco he stole Sh.599,918/20 the property of that company which came into his possession by virtue of this employment.

After hearing twelve (12) prosecution witnesses and the appellant, the Learned Trial Magistrate wrote a judgement and delivered it on 24.2.2000. He found him guilty and ordered that he serve 4 years imprisonment all each of those 12 counts concurrently.

In the petition of appeal it was contended that the Learned Trial Magistrate relied on hearsay evidence that was even contradictory. That the appellant was framed-up in the charges.

The Learned State Counsel went over the evidence and was of the opinion that the prosecution evidence proved the case beyond a reasonable doubt and that those who gave evidence had no reason to frame up the appellant. And that the sentence was lenient.

As the first appellate court, time was taken to go over the entire lower court proceedings and judgement. Simon Kithome (P.W.1) ran a sales manager's office for M/s Mastermind Tobacco from which the appellant took stocks to sell at Kitui. Sales were by cash or on credit. As the two transacted along, discrepancies that raised doubts in the credit invoice arose, and investigations leading to the charges herein followed. Then followed Patrick Mbuvi (P.W.2) Kithuka Mwale (P.W.3) Pius Mulinda (P.W.4) Philip Sungula (P.W.5) Mumo Mutisya (P.W.6), Benjamin Musau (P.W.7) and Charles Kyalo (P.W.8) – all M/s Mastermind Tobacco products retailers who got stocks from the appellant and either paid cash or paid up on their credit. They denied that they owed any money on credit (or cash) as the

appellant had made to appear by his returns to Cecilia Mutangili (P.W.9) – the depot clerk at the tobacco company's offices. All the evidence even with that from other witnesses including S. P. Kengo (P.W.12) left no doubt that these tobacco retailers did not make out the credit invoice returns as the appellant had claimed. On its own review this court is of the like mind to find as the lower court did that the appellant made the documents in issue and by that he collected and kept for his own use the total sum in proceeds which the retailers paid him.

The conviction was on cogent evidence – nothing hearsay or contradictory. It did not appear to the lower court or this one that anybody brought drummed up charges against the appellant.

As for the sentence, under S. 349 Penal Code the maximum is 3 years. The Learned Trial Magistrate imposed 4 years. This was an unlawful sentence. If aggravating circumstances obtained the lower court could only go up to 3 years. Granted eleven counts of forgery is something serious. But being a first offender this court sets aside the lower court sentence and imposes one of twenty four (24) months.

Under S. 281 Penal Code the maximum sentence is 7 years. The Learned Trial Magistrate imposed 4 years for theft over Sh.500,000/=. The appellant was a first offender but he abused the trust to transact business on behalf of his employer faithfully. That sentence remains and it runs concurrently with the others.

In sum the appeal is dismissed on conviction while the sentence is varied as to amount to only 4 years imprisonment.

Judgement accordingly.

Delivered on 27th February 2001.

J. W. MWERA

JUDGE