

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

APPELLATE SIDE

CRIMINAL APPEAL NO. 53 OF 2001

(From Original Conviction and Sentence in Criminal Case No.1129 of 1999 of the Chief Magistrate's Court at Mombasa – B. Maloba, Ms., S.R.M.)

MATANO RASHID.....APPELLANT

V E R S U S

REPUBLIC.....RESPONDENT

J U D G E M E N T

The State concedes this Appeal on account of the trial court's confusion in the entire Judgement which left issues unframed and undecided. That however, does not detract the court from re-evaluating the evidence on record as it is bound to do on a first Appeal.

The appellant was the 2nd Accused before Mombasa Senior Resident Magistrate where seven counts were laid out in one charge sheet. Two of those counts related to the Appellant alone, that is to say counts 4 & 5, while he was jointly charged with two others in count 7. Counts 4 & 5 relate to Making a Document Without Authority contrary to section 357(a) of the Penal Code while count 7 charges Stealing by Servant contrary to section 281 of the Penal Code.

Upon trial the third joint Accused in count 7 who was also the sole Accused in count 6 was acquitted, while the Appellant or the first joint Accused in count 7 who was also the sole Accused in counts 1, 2 & 3 were convicted. They were sentenced to serve two years on each count without stating whether the sentences shall run concurrently and which counts were involved.

The documents alleged to have been made without authority by the Appellant were a Miscellaneous Income Receipt Serial No.V.385496 dated 1.4.99 purporting to be printed and issued by Mombasa Municipal Council and Municipal Council of Mombasa premises licence S/N 4587 dated 1.4.99 purporting to be a genuine receipt from the council. And the money alleged to have been stolen between 27.1.99 and 1.4.99 was Kshs.48,460/-.

Of all the nine prosecution witnesses who testified only four referred to the Appellant's connection with the offences charged. One was the person who was first arrested by the Police and then turned prosecution witness Ismail Haji PW.3, the other was Stephen Kariuki Mnyoro PW.5, a Council clerk who denied issuing the receipts exhibited as Exhibit 2 and 3, the third was the Document Examiner PW.7, SP. Emmanuel Lenga who gave his opinion on the handwriting on the documents; and finally PW.9, IP Gedion Nyale the Investigating Officer. The evidence of these witnesses was not critically examined in relation to the charges facing the Appellant and the issues arising for determination. Instead, the Learned Trial Magistrate treated all the evidence as if all the Accused persons were facing the same charge. In the end a curious finding was made that the fake documents were indeed made by the 3rd Accused, the cashier, but that is the only Accused who was inexplicably acquitted. The Appellant was only a messenger and it was proved that he was on leave at the time the offence was allegedly committed.

I think, with respect, that there is justification in the complaint raised by the Appellant through

learned counsel Mr. Nyaga who also represented the Appellant in the Lower Court, that the ingredients of the offences charged were not considered nor was the evidence tendered in proof thereof analysed. The veracity of the only witness who directly mentioned the Appellant and who was himself arrested as a suspect was not assessed adequately or at all. The mere finding of some receipts, even if accepted as correct, in the Appellant's house was not probative of the charges laid but no analysis was directed at this piece of evidence.

Finally, I agree with learned State Counsel Mr. Ogoti that the Judgment leaves a lot to be desired and does not comply with S.169 of the Criminal Procedure Code. That section requires in mandatory terms, inter alia, that a Judgement :

“Shall contain the point or points for determination, the decision thereon and the reasons for the decision”

It further provides:-

“In the case of a conviction the judgement shall specify the offence of which and the section of the Penal Code which the Accused person is convicted and the punishment to which he is sentenced”.

A perusal of the Judgement of the Lower Court betrays serious lack of compliance or substantial compliance with these provisions. There was no sound basis for making the findings in respect of the Appellant which the Trial Magistrate did. The manner of sentencing was also fatally erroneous

I would have made an order for retrial but the Appellant has served a considerable part of the sentence.

For those reasons I allow the Appeal quash the conviction and set aside the sentence. The Appellant shall be set at liberty unless he is otherwise lawfully held.

Dated this 25th day of July, 2001.

P.N. WAKI

J U D G E