Kinyotu v Republic (Criminal Appeal E227 of 2023)
[2024] KEHC 10754 (KLR) (Crim) (17 September 2024) (Judgment)

Neutral citation: [2024] KEHC 10754 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CRIMINAL

CRIMINAL APPEAL E227 OF 2023

K KIMONDO, J

SEPTEMBER 17, 2024

BETWEEN

FRANCIS MBAU KINYOTU ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal from the judgment and sentence in Criminal Case No. 1779 of 2018 in the Chief Magistrates Court at Milimani by C. M. Njagi, Principal Magistrate, dated 28th July 2023)

JUDGMENT

1. The appellant was convicted for stealing by servant contrary to section 281 of the Penal Code. He was fined a sum of Kshs 1,000,000 and in default to serve a prison term of five years.

2. The particulars were that on diverse dates between 1st January 2018 and 20th September 2018 at Hills Motor Cycle Mart shop in Kamukunji Trading Centre in Nairobi City within Nairobi county, and being an employee, stole Kshs. 856,000 the property of Daniel Kanja Thuo.

3. Being aggrieved, the appellant lodged a petition of appeal dated 10th August 2023 raising 27 grounds. A number of them are repetitive and can be condensed into eight: Firstly, that the owner of the money or the amount stolen was not proved. Secondly, that there was no proof that the complainant was the proprietor of the company known as Hill Cycle Mart Limited. Thirdly, that whereas it was alleged that the appellant was an employee of the company, the charge sheet named Daniel Kanja Thuo as the complainant. Fourthly, that the learned trial magistrate erred by admitting or relying on electronic evidence (CCTV footage). Fifthly, that there was no nexus between the sums in the appellant's Mpesa wallet and the alleged theft. Sixth, that the trial court fell into error by relying on an audit report and other extraneous evidence. Seventh, that the appellant's defence or submissions were disregarded; and, eighth, that the sentence was draconian.

4. The appeal is contested by the Republic.

5. Learned counsel for the appellant lodged submissions on 1st July 2024 together with a list of authorities. The Republic replied through submissions dated 20th July 2024.

6. On 26th July 2024, I heard further arguments from both learned counsel for the appellant and the Republic.

7. Learned counsel for the appellant, Mr. Ngugi, submitted that the company whose funds were stolen was a distinct legal entity from Daniel Kanja Thuo who was named as the complainant. Accordingly, the charge sheet was fatally defective. he also argued that there was no evidence that the latter was a director of the company or the owner of the funds. Reliance was placed on the decision in Festus Mwongela v Republic [2017] eKLR.

8. Learned counsel further argued that there was no evidence that the appellant was either an employee of the company or Daniel Kanja Thuo a fact denied by the appellant; and, that the entire corpus of circumstantial evidence was unreliable and did not prove the key elements of theft by servant. Counsel relied on among other decisions Sawe v Republic [2003] KLR 364 and Chiragu & another v Republic, Court of Appeal, Criminal Appeal 104 of 2018 [2021] KECA 342 (KLR).

9. Regarding the CCTV footage (exhibit 4), counsel submitted that it was unreliable and inadmissible for want of compliance with section 106 B of the *Evidence Act*. The audit report (exhibit 5) was attacked for a number of reasons: That it was made belatedly in the year 2023 and its conclusions did not connect the appellant with the loss of the funds. As I stated earlier, the appellant also contended that the Mpesa statements (exhibits 19 & 20) did not establish any nexus between the stolen funds and the appellant.

10. It was the appellant's case that had the lower court taken into account his defence and submissions, it would have arrived at a different conclusion. in a synopsis, the appellant contended that the charge was not proved beyond reasonable doubt. Lastly, the appellant submitted that the sentence was too harsh considering all the mitigating factors and that he was a first offender.

11. Learned Prosecution Counsel, Ms. Awino, submitted that on the totality of the evidence, all the essential elements of the offence were proved beyond any reasonable doubt. I was implored to dismiss the appeal.

12. Five witnesses testified for the Republic. The first was Daniel Karanja Thuo (PW1). He testified that his business sold bicycle and motor cycle spare parts. He manned the cash box but it had no lock. In January 2018 he was at work and noted that the items reflected in the point of sales terminal did not match the cash. The discrepancies persisted for a number of months. The situation was getting out of hand and he could not pay his suppliers.

13. Then one of his employees, Nahashon Kamau, informed him that he saw the appellant taking out some cash from the drawer. He would do so when PW1 took a bathroom break. PW1 then installed CCTV cameras in the shop. Later in August 2018 he said he reviewed the footage and saw the appellant taking some money from the cash box twice a day. Four clips from the footage were played in court. He pointed out the appellant wearing a brown dust coat taking some money from the cash drawer and putting it in his pocket. In the second clip, the face of the appellant was visible. The complainant then made a report to the police.

14. PW1 commissioned to carry out an audit (exhibit 5) which revealed that a total of Kshs 856,077 was lost. The report was made by GG Gitau & Associates. However, an accountant, Gerishon Kihumba

(PW2) sought to produce it. The defence rightly objected as he was not the maker of the report. His entire evidence was thus expunged from the record.

15. The CCTV footage was extracted by Sergeant Samwel Chebii (PW3), a forensic examiner attached to the DCI Headquarters, Nairobi. He testified that he received a 4.7 GB DVD-R branded WCD CD marked as exhibit F2 containing one file CCTV video footage together with an Exhibit Memo (exhibit 6) signed on 21st September 2018 by PC Kiptoo (PW4). The request was to analyse the footage and produce some photos.

16. I think there is a discrepancy. According to PW1, the person who installed the CCTV cameras, whom he referred to as Rasta or Mbugua, is the one "who saved the footage in the CD". PW3 received the CD from the investigating officer, PW4. I will revisit the matter shortly.

17. PW3 analyzed the CCTV footage and established that it was genuine. He detailed at length the process he used to produce the still photos (exhibits 7 to 16). He produced his report and certificate made on 23rd January 2020 for that purpose (exhibit 17).

18. The complainant made a report to PC Kiptoo (PW4) on 21st September 2018. The complainant had some CCTV clips allegedly showing the accused stealing money from the shop. The footage and the appellant's identification card were handed over to PW4. He then arrested the appellant. Later, he submitted the CCTV recordings to the DCI with a request for extraction of still photos produced by PW3.

19. PW4 also investigated Mpesa records for cell numbers 0796431705 and 0704556967. The first belonged to the appellant while the second line was registered under the name of Robert Gicheha. However, the Registrar of Persons confirmed that the ID number 35033694 used to open the two accounts belonged to appellant. The first line had deposits of Kshs 268,300 from January 2018 to the date of arrest while the second had received sums of Kshs 208,200.

20. PW5 was the new auditor, CPA Mutitu Dennis Maina. He examined the sales and purchase records of the company from March to September 2018. The tabulations totalled Kshs 684,672. Between January to March 2018 there was a variance of Kshs 174,000. The entire shortfall was Kshs. 856,077. He produced his report as exhibit 24. I have reservations about the timing of this report and I will revisit the matter shortly.

21. When he was placed on his defence, the appellant testified that he worked in Kamukunji area as a mkokoteni (cart) pusher. Sometime in September 2018, he had parked his cart near Hill Cycle Shop. At about 11:00 a.m., three men including PW1 approached him. The other two introduced themselves as police officers and arrested him. He was informed that he had stolen money belonging from PW1. He denied it. According to him, he was framed-up due to a misunderstanding with PW1 over the location of his work.

22. I take the following view of the matter. This is a first appeal to the High Court. I have thus examined the record; re-evaluated the evidence and drawn independent conclusions. There is a caveat because I neither saw nor heard the witnesses. Njoroge v Republic [1987] KLR 19, Okeno v Republic [1972] E. A. 32.

23. It is a truism that the legal and evidential burden rested squarely on the Republic. Woolmington v DPP [1935] AC 462, Bhatt v Republic [1957] E.A. 332.

24. A key issue in this appeal is who should have been the true complainant. Paraphrased, whether the theft was from a company or the person known as Daniel Kanja Thuo. A registered company is distinct

from its shareholders or directors. See generally Salomon v A. Salomon of Company Limited [1892] AC 22, The Fort Hall Bakery Supply Company v Frederick Muigai Wangoe [1958] E.A. 118.

25. A lot of capital has been paid over whether the appellant was an employee of Hills Cycle Mart Limited or Daniel Kanja Thuo; or even whether his employment was proved. From the certificate of incorporation (exhibit 1), I readily find that Hills Cycle Mart Limited was an incorporated company and distinct from its shareholders. In cross examination, Daniel Kanja Thuo said he was the "owner of the company". He did not have documents to show he was its director. But I accept that that he was running the business at Kamukunji and would man the cash box.

26. So, was the charge sheet defective? Firstly, I have kept in mind that this was a criminal charge and not a commercial dispute. The charge sheet expressly stated that on the material date "at Hills Motors Cycle Mart shop in Kamukunji Trading Centre in Nairobi City within Nairobi county, and being an employee, stole Kshs. 856,000 the property of Daniel Kanja Thuo".

27. Reference in the charge sheet is to a shop styled Hills Motors Cycle Mart. The certificate of incorporation is for a slightly different entity known as Hills Cycle Mart Limited registered in the year 2015. Notably, the word "Motor" is not part of the company. I have no course to doubt that the proprietor of the shop was Daniel Kanja Thuo. Furthermore, the discrepancy in the charge is curable under section 382 of the Criminal Procedure Code.

28. According to PW1, in the year 2017, he had three employees: Nahashon Kamau, Ramadhan Said and the appellant. He claimed that they would help him to pack goods. the appellant would pick the goods from the counter and deliver them to customers. He said that employees would surrender their identity cards to him. He produced the appellant's identity card (exhibit 2). The appellant would be paid Kshs 7,500 every two weeks or a total of Kshs 15,000 per month.

29. But when the appellant was placed on his defence, he denied that he was an employee of the company or Daniel Kanja. He claimed that he was a cart (mkokoteni) operator who plied his business outside the shop. He also claimed that he never gave his identity card to PW1 but that the same was confiscated by the police when he was arrested for this offence.

30. I have however seen the records of payment (exhibit 3) in which the appellant would acknowledge and sign for the payments above. I thus concur with the learned trial magistrate that notwithstanding the absence of formal employment contract, the appellant was employed at the shop or by Daniel Kanja Thuo.

31. The appellant submitted that the CCTV footage amounted to hearsay and was inadmissible for want of compliance with section 106 B of the *Evidence Act*. The issue of hearsay was based on the fact that Nahashon Kamau, who had tipped PW1 of the theft was not called as a witness. Following that tip, PW1 installed the cameras. But I concur with the learned trial magistrate, that the CCTV footage and still photographs were produced by PW3 who retrieved the information from the CD and produced the still photographs.

32. PW1 testified on that evidence and identified the appellant as the person who entered the shop on a number of occasions and stole money from the cash box. He would do so when the complainant took a bathroom break. I thus find that the CCTV evidence did not amount to hearsay.

33. Secondly, Nahashon Kamau would have been a material witness. However, from the evidence of PW1, I am not satisfied that he would have exonerated the appellant. The prosecution did not also call the person known as Rasta or Mbugua, who according to PW1, saved the CCTV clips into the DVD. But I am alive that under section 143 of the *Evidence Act*, no particular number of witnesses is required to prove any particular fact.

34. Regarding admissibility of the CCTV footage, it is important to interrogate how it reached PW1, PW3 or PW4. According to PW1, the person who installed the CCTV cameras, whom he referred to as Rasta or Mbugua, is the one "who saved the footage in the CD" and gave it to him. He in turn presented the CD to PW4 when he lodged the complaint. PW3 received the CD from the investigating officer, PW4. PW4 never pretended to have made the CD.

35. I find that PW3 was a competent and qualified forensic examiner. He analyzed the footage and established that it was genuine. He detailed at length the process he used to produce the still photos (exhibits 7 to 16). He produced his report and certificate made on 23rd January 2020 for that purpose (exhibit 17). I thus find that the evidence and the manner in which it was produced largely complied with sections 78 and 106 B of the *Evidence Act*.

36. As to whether the person seen in the footage and photographic prints was the appellant, I am satisfied that PW1 knew the appellant, a fact admitted by the appellant. PW1 identified the appellant as the person seen taking away cash from the drawer. When the footage was played and in cross examination, he said-

> It can be seen by everyone in court. it is not a presumption. the accused would wear different clothes. In the second clip it shows his face. On the left side it shows him. His face can be seen. 100% it is the accused person. It is the accused person on the dock....

37. There is thus no question of identification of the appellant as the person seen in the footage stealing the money. This was evidence of recognition. Wamunga v Republic [1989] KLR 424.

38. The original audit firm could not be traced. It would seem that the complainant then commissioned a fresh audit report in the course of the trial. True, the duty for prior disclosure of evidence is a continuing one, but I find that the introduction of the new report (exhibit 24) by CPA Mutitu Dennis Maina (PW5) was not only belated but highly prejudicial to the appellant. It was made on 8th March 2023. In my view, it was reverse engineering to come to the earlier conclusion by GG Gitau & Associates. But even if I be wrong on that finding, there was no conclusive finding in the report that the entire variance of Kshs 856,077 was stolen by the appellant.

39. Nevertheless, I am satisfied from the evidence of PW1 that the appellant stole some money belonging to the complainant. Paraphrased, I am satisfied that the key ingredients of the offence were established for the following four broad reasons. Firstly, and from my earlier analysis, the accused was employed by PW1 at his shop. Secondly, he was clearly identified by PW1 as the person seen in the CCTV footage entering the shop, taking out some money from the cash box and putting it in his pocket. It is instructive that only PW1 had authority to man the cashbox. Certainly, the appellant was not allowed to take the money.

40. Thirdly, from the evidence of PW1, from 1st January 2018 to September 2018, there was a serious discrepancy in the cash sales. Fourthly, and during the same period, the appellant deposited huge and unexplained sums of money into his two Mpesa accounts. I find his explanation for those deposits lame and a sham.

41. On a full re-appraisal of the prosecution's evidence and the counterfeit and technical defence set up by the appellant, I readily find that all the necessary elements of the offence were present and proved beyond reasonable doubt. It follows that the conviction was safe. The appeal on conviction is hereby dismissed.

42. I will turn briefly to the sentence. Section 354 (3) of Criminal Procedure Code empowers the court to alter the finding, maintain the sentence, or with or without altering the finding reduce or increase the sentence. The parameters were well set out in Macharia v Republic [2003] 2 E.A 559.

43. The trial court considered that the appellant was a first offender. From the pre-sentence report dated 9th August 2023, the appellant was aged 25 and has a young family. He mitigated and prayed for a non-custodial sentence. The law provided for a sentence of up to seven years. He was given the option of a fine of Kshs 1,000,000 or to serve a sentence of five years. Considering the nature of the offence, I am unable to say that the sentence was draconian.

44. The upshot is that the entire appeal is hereby dismissed.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 17TH DAY OF SEPTEMBER 2024.

KANYI KIMONDO

JUDGE

Judgment read virtually on Microsoft Teams in the presence of-

Appellant.

Mr. Ngugi for the appellant instructed by C. N. Ngugi & Associates Advocates.

Ms. Awino for the Republic instructed by the Office of the Director of Public Prosecutions.

Mr. E. Ombuna, Court Assistant.