



REPUBLIC OF KENYA



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**Musungu v Republic (Criminal Appeal E006 of 2022)
[2023] KEHC 2243 (KLR) (15 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2243 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MARSABIT
CRIMINAL APPEAL E006 OF 2022
JN NJAGI, J
MARCH 15, 2023**

BETWEEN

DAVID MUSUNGU APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the original conviction and sentence by Hon. S.K.Arome, Senior Resident Magistrate, in Marsabit CM's Court Criminal Case No.E429 of 2020 delivered on 14/6/2022)

JUDGMENT

1. The Appellant was convicted of the offence of stealing by servant contrary to section 281 of the Pena Code and was sentenced to a fine of Ksh 700,000/= in default to serve two years imprisonment. The particulars of the offence were that on diverse dates between the March 4, 2020 and September 5, 2020 in Marsabit town within Marsabit County being a servant to Food for the Hungry, he stole Ksh 291,000/- the property of Food for the Hungry which came into his possession by virtue of his employment.
2. The appellant was aggrieved by the conviction and the sentence and preferred the instant appeal. The grounds of appeal are that:
 1. That learned trial magistrate erred both in law and fact by failing to find that the prosecution had failed to prove its case against the appellant to the required standards of beyond reasonable doubt thereby arriving at a finding that is grossly unjust.
 2. That the learned trial magistrate erred both on facts and law by proceeding to arrive at a conviction when the material ingredients of the charge/offence were not proved against the appellant.



3. The honourable trial magistrate erred both in law and fact by convicting the appellant on evidence that was grossly inadequate and material corroboration.
4. The learned trial magistrate erred in law by meting to the appellant an illegal sentence.
5. The learned trial magistrate erred both in law and fact by failing to evaluate the defence testimony and accord it the weight it deserved thereby arriving at an unjust & untenable conclusion.

Brief facts of the case –

3. The case for the prosecution was that the Appellant was working with an Non-Governmental Organization called Food for the Hungry (FFH) Marsabit branch office as an accountant. The NGO has its headquarters office in Nairobi. Mr Abudho Boru Sharamo PW1 was in the year 2020 a supervisor at the Marsabit branch office and was a signatory to the organization's bank account domiciled at Kenya Commercial Bank, Marsabit. Kula Jaldesa PW2 was also working at the Marsabit branch office and was a signatory to the bank account. Mr John Marangu PW3 is the organization's finance manager based at the headquarters office. There was another accountant at Marsabit branch office called Stephen Opinya who resigned in July 2020.
4. It was the evidence of the prosecution witnesses that the organization had stopped making payments through cheques in the month of March 2020 and was instead paying through online transfers. That in the month of August 2020 the Finance Manager PW3 was going through the bank statement for the month of August 2020 when he noticed payment of a cheque of Ksh 96,000/= that was not in their record. In the month of September 2020, they noticed another cheque of Ksh 88,000/= that was also not in their record. Another cheque of Ksh 106,000/= was also noted in the month of September 2020. The finance manager instructed Mr Sharamo PW1 to follow up the issue with the bank. PW1 and Kula Jaldesa PW2 wrote a letter to the bank requesting to be provided with images of the said cheques. They were provided. The three cheques were shown to have been paid to one Adan Hussein Idema and were purportedly signed by the two witnesses, PW1 and PW2. The two denied to have signed or authorised the payment of the cheques. It was their evidence that the accountants were the custodians of the cheque books which were locked up in a safe at their office. After the irregularities were discovered, the Appellant reported that 14 cheque leaves were missing from the cheque books. The cheques in issue had been plucked off from those cheque books.
5. It was the evidence of Sharamo Pw1 that for any payment above the sum of Ksh 80,000/= the bank was required to call the signatories for clarification but in this case the bank did not contact him.
6. It was the evidence of the Investigating officer PC Norman Mwakawa PW5 of DCI Marsabit Central that it is the Appellant who reported to him of the suspicious cheques of Khs 96,000/= and Khs 88,000/=. He provided him with images of the cheques and a bank statement for the months of August and September 2020. He also provided the officer the 4 cheque books and the officer confirmed that there were some cheque leaves missing from them. The officer commenced investigations. He summoned the purported signatories of the two cheques, Abudho Sharamo PW1 and Kula Jaldesa PW2. The two denied signing the cheques. He recorded their statements and took their specimen handwriting and signatures. He prepared an exhibit memo. He obtained certified copies of the cheque images from the bank. He forwarded the documents to the document examiner in Nairobi for forensic analysis. On November 24, 2020 he received a report from the Document Examiner stating that the two documents were forged. He then received the bank statements for the FFH and that of Adan Hussein Edema.



7. It was further evidence of PC Mwakawa that as he perused the statement of FFH he came across another suspicious payment of Ksh 107,000/= from cheque No 063065. He asked the Appellant to find out if it had supporting documents. The Appellant reported back that it did not. The Appellant made a formal report on the cheque in OB No 46/01/02/2021. The Appellant furnished him with a cheque book from which the cheque originated. The officer then prepared one exhibit memo for the three cheques. On the 19/2/2021 he sent the cheques to the Document Examiner together with the specimen handwriting and signatures of the Abudho Sharamo, Kula Jaldesa and the Appellant.
8. The Document Examiner PW4 examined and compared the signatures and handwriting on the three cheques with the specimen signatures and handwriting of Abudho Sharamo and Kula Jaldesa and found no matching. He examined and compared the handwriting on the cheques with the specimen handwriting and known handwriting of the Appellant and concluded that the handwritings were made by the same author. PC Mwakawa arrested Hussein Edema and the Appellant. He charged them with 10 counts of forgery and stealing. Edema was acquitted of all the counts under no case to answer. The Appellant was acquitted of the other counts but found to have a case to answer in count 2 which was stealing by servant of the sum of Ksh 291,000/= .

Appellant's defence -

9. In his defence the Appellant stated that he works with FFH Marsabit Field office. That during the Corona outbreak in March 2020, the workers left the office and operated online. That on September 8, 2020 he received a call from the finance manager PW3 inquiring about a cheque of Ksh 96,000/= that had been cleared by the bank on August 27, 2020 yet they were at the time not making payments by way of cheques but through online payment. He called Abudho and asked him to obtain an image of the cheque from the bank. Abudho obtained the same. It was clear that it was not written by any of the accountants. Kula denied to have signed the cheque. He travelled to Marsabit from Western Kenya. He visited the bank on September 21, 2020. He was issued with a bank statement. He realised that there was another cheque of Ksh 88,000/= that had been cleared on September 5, 2020. He informed the finance manager. He noted that the two cheques were from some cheque books that they had not started using. He checked the said cheque books and realised that there were 14 cheque leaves missing from them. He informed the finance manager. The manager instructed him to write a letter to the bank inquiring as to who wrote the cheques and who cleared them. He wrote the letter but the bank did not respond. He reported to the police and recorded a statement on September 22, 2020. Later the police called him and informed him of another cheque of Ksh 107,000/=. He called the other accountant, Stephen Opinya and the finance manager and informed them. The finance manager later called him and told him that Mr. Opinya had informed him that the cheque was void. He was later arrested and jointly charged with Edema. He was tried and acquitted of all the other counts except the one of stealing the sum of Ksh 291,000/= in count 2.
10. It was further evidence of the Appellant that there is a procedure for collecting cheques from the office. That the procedure is that after the accountants have written the cheque, it is sent to the receptionist who is supposed to issue the cheque to the payee after taking details of the cheque, the payee and the person who has collected the cheque. The details are recorded in a book. However, that in this case there was no evidence on how the cheque was issued and collected. The Appellant further said that the material cheques are not in his handwriting. That he was on leave when the cheques were drawn. That the police did not take his specimen signature and neither did they collect his known handwriting.



Submissions –

11. The advocate for the Appellant, Ms. Wambulwa, submitted that the Appellant is the one who reported the matter to the police. That his conduct was not that of a person who had stolen the money. That the Appellant raised a plausible defence that he was on leave when the cheques were drawn. That the accountant who was on duty at the time the cheques were drawn, Stephen Opinya was not called to testify in the case which draws the inference that his evidence would have been adverse to the prosecution case.
12. It was submitted that the Investigating Officer did not take the Appellant's specimen signatures. That Adan Edema in whose account the money was shown to have been banked was acquitted of all the charges including that of stealing. One then wonders which money the Appellant is being accused of stealing. More so that the Appellant was acquitted of forgery charges and it therefore begs the question as to how he stole the money. Counsel urged the court to find that the Appellant was wrongly convicted of the charge of stealing by servant and acquit him accordingly.
13. The state did not make submissions in the case.

Analysis and determination -

14. This being a first appeal the duty of the court is to analyze and re-evaluate afresh the evidence adduced before the trial court and draw its own independent conclusions. In the case of *Okeno v Republic* [1972] EA 32, East Africa Court of Appeal put this duty as follows:

“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (*Pandya v R*, [1957] EA 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (*Shantilal M Ruwala v R*, [1957] EA 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see *Peters v Sunday Post*, [1958] EA 424.”

15. In the case of *David Njuguna Wairimu -v- Republic* (2010) eKLR the Court of Appeal stated that;

“The duty of the first appellate court is to analyze and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decision.”



16. The Appellant was facing a criminal charge. The standard of proof in criminal cases is that of beyond reasonable doubt. Lord Denning in *Miller v Ministry of Pensions*, [1947] 2 ALL ER 372 stated this degree to be as follows:

“That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible, but not in the least probable, the case is proved beyond reasonable doubt, but nothing short of that will suffice.”

17. The appellant was convicted of the offence of stealing by servant contrary to section 281 of the *Penal Code*. Section 268 of the Penal Code defines “stealing” in the following terms:

- (1) A person who fraudulently and without claim of right takes anything capable of being stolen, or fraudulently converts to the use of any person, other than the general or special owner thereof, any property, is said to steal that thing or property.
- (2) A person who takes anything capable of being stolen or who converts any property is deemed to do so fraudulently if he does so with any of the following intents, that is to say—
 - a. an intent permanently to deprive the general or special owner of the thing of it;
 - b. an intent to use the thing as a pledge or security;
 - c. an intent to part with it on a condition as to its return which the person taking or converting it may be unable to perform;
 - d. an intent to deal with it in such a manner that it cannot be returned in the condition in which it was at the time of the taking or conversion;
 - e. in the case of money, an intent to use it at the will of the person who takes or converts it, although he may intend afterwards to repay the amount to the owner.

18. Section 281 of the *Penal Code* sets out the offence of stealing by servant in the following terms:

“Stealing by clerks and servants

If the offender is a clerk or servant, and the thing stolen is the property of his employer, or came into the possession of the offender on account of his employer, he is liable to imprisonment for seven years.”

19. There is no dispute that the Appellant was an employee and an accountant for FFH. He was a custodian of the cheques that were used to steal the money. The question was whether he stole the money as charged.

20. The charges against the Appellant were made up of 3 cheques that were said to have been forged and the money paid into the account of one Adan Hussein Edema. According to the evidence of the organization’s Finance Manager, Mr John Marangu PW3, the cheques that had raised queries were the cheques of Ksh 96,000/= and Ksh 88,000/=. As regards the cheque of Ksh 107,000/= which was cleared on March 4, 2020, the finance manager told the court that it was a correct cheque and they never followed it up.



21. The Investigating Officer PW5 stated in his evidence that he is the one who flagged off the cheque of Ksh 107,000/= as being suspicious. Since the Finance Manager of the organization says that the cheque was genuine, the Investigating officer had no basis of claiming that it was an illegal payment. The trial magistrate did not consider the evidence of the Finance Manager that the payment as regards that cheque was genuine when he convicted the appellant of stealing the said sum of Ksh 107,000/=. The learned trial magistrate was in error to enter a conviction in respect to the said sum when there was no evidence that such sum was stolen.
22. The Appellant was convicted of the offences on the ground that the Document Examiner found that the handwriting on the three questioned cheques matched the specimen hand writing (D1 & D2) and known handwriting (E1 & E2) of the Appellant. The Appellant in his defence denied that the cheques were in his handwriting. He said that the Investigating Officer did not take any specimen handwriting from him and neither did he collect his known handwriting.
23. The Exhibit Memo dated February 19, 2021 indicates that the only exhibits that were sent to the Document Examiner are the specimen signatures of Abudho Sharamo PW1 and Kula Jaldesa PW2. The memo did not indicate that there was known handwriting of the Appellant sent to the document examiner through that memo. Though the Document Examiner seems to have examined known handwriting labelled as E1 and E2 it is not known where they came from as it was not part of what the Investigating Officer sent to the Document Examiner through the Exhibit Memo dated February 19, 2021. The fact that the known handwriting of the Appellant was not contained in the Exhibit memo gives credence to his evidence that his known handwriting was not collected. Though the Investigating officer in his evidence in court said that the documents labelled E1 and E2 were the known handwriting of the Appellant, he did not state when and where he collected them. He could not explain why they were not mentioned as among the documents that were sent to the Document Examiner in the Exhibit memo dated February 19, 2021. There is thus no clear evidence that the documents labelled E1 and E2 were known handwriting of the Appellant. That being the case there was no sufficient evidence that the handwriting on the questioned cheques belonged to the Appellant. The report of the document examiner cannot have been conclusive in the absence of credible evidence that the known handwriting of the Appellant was also examined. There was no evidence that the Appellant is the one who wrote the cheques.
24. The dates when the cheques of Ksh 88,000/= and Ksh 96,000/= were drawn is not clearly visible in the cheques produced in court. It however appears from the evidence that they were drawn when the other accountant called Stephen Opinya was still working with FFH. His handwriting was not examined to rule out that he is the one who wrote the cheques.
25. It was also clear from the evidence that the bank was required to call the signatories to confirm any payment above the sum of Ksh 80,000/=. In this case the bank did not call the purported signatories. There is no witness from the bank who testified in the case to explain why they did not call. Was then somebody in the bank involved with the loss of the money?
26. From the above observations, it is obvious that the learned trial magistrate failed to critically examine the evidence that was before him and as a result came to an erroneous conclusion that it is the appellant who wrote the cheques. It is my finding that the Appellant was wrongly convicted of the offence.
27. The upshot is that the prosecution did not prove the charge of stealing by servant against the Appellant. The appeal is thus upheld. Consequently, the conviction is quashed, sentence set aside and the Appellant set at liberty.

DELIVERED, DATED AND SIGNED AT MARSABIT THIS 15TH DAY OF MARCH 2023.



J. N. NJAGI

JUDGE

In the presence of:

Ms Wambulwa for Appellant

Mr. Otieno for Respondent

Appellant – present

Court Assistant - Jillo

14 days R/A.

