Musani v Republic (Criminal Appeal E035 of 2022)
[2023] KEHC 3773 (KLR) (20 April 2023) (Judgment)

Neutral citation: [2023] KEHC 3773 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT LODWAR

CRIMINAL APPEAL E035 OF 2022

JK SERGON, J

APRIL 20, 2023

BETWEEN

SHADRACK KIPCHELELE MUSANI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal from the Judgment of Hon.Mayamba (SPM) in Kakuma Law Courts Criminal Case No.61 of 2020 on 30/8/2022)

JUDGMENT

1. Shadrack Kipchelele Musani, the Appellant herein was tried on a charge of three counts; The first Count is that of Stealing by Servant Contrary to Section 281 of the *Penal Code*. The second Count is that of fraudulent Accounting by an Officer Contrary to Section 328 (b) (i) of the Penal Code and the third Count is of False Accounting by a Servant contrary to Section 380 (b) of the Penal Code.

2. At the conclusion of the trial, Hon Mayamba, Learned Principal Magistrate, convicted the appellant in all Counts.

   In Count 1, the learned Principal Magistrate sentenced the Appellant to pay a fine of Kshs 8,000,000/= in default to serve six (6) years imprisonment.

3. In the Counts 2 and 3, the Appellant was sentence to each pay a fine of Kshs 100,000/= in default to serve two years imprisonment. The sentences were ordered to run consecutively.

4. Being dissatisfied, the Appellant preferred this appeal and put forward the following grounds in his Petition:-

   i. That the learned Magistrate erred in law by convicting the Appellant on an incurably defective charge sheet with the resultant miscarriage of justice on his part.

ii. That the learned trial Magistrate erred in law and in fact in disregarding and or flouting the Rules of Evidence and the Mandatory Elements of Stealing by Servant; Fraudulent Appropriation by an Officer and elements together with evidentiary requirements of intention to defraud.

iii. That the learned trial Magistrate erred in law and fact by gravely misdirecting herself by failing to appreciate at all material times when the alleged crime was committed, the Appellant produced factual evidence explaining the purported discrepancies and how the said discrepancies were addressed by Complainant herein.

iv. That the learned Magistrate erred in fact and in law by totally misdirected inself by making contradictory findings that it was only the appellant who had access to the Money Vault and not any other person.

v. That the learned Magistrate erred in fact and in law by sentencing the appellant excessively notwithstanding the Prosecution's failure to prove their case beyond reasonable doubt.

vi. That the learned Magistrate erred in fact and in law by grossly misdirecting itself in determining the matter without the input of an expert witness and disregarding the glaring discrepancies in the Prosecution's Case.

vii. That the learned Magistrate erred in fact and in law by concluding that the appellant was solely responsible for the money vault at the bank without the benefit of considering any documentary evidence adduced in Court.

viii. That the learned Magistrate erred in fact and in law by conclusively holding without the benefit of any evidence whatsoever adduced by the prosecution that the appellant stole money from the vault and has thereafter wrongly convicted the Appellant without any regard to the Rules of Evidence.

ix. That the learned Magistrate erred in fact and in law by arriving at a conviction after the Prosecution's failure to prove their case beyond reasonable doubt as its evidence was entirely contradictory, inconsistent and insufficient to warrant a conviction.

x. That the learned Magistrate erred in fact and in law by convicting and sentencing the Appellant on the basis of the evidence obtained vide a poorly conducted investigation and/or no investigation at all.

xi. That the learned magistrate erred in fact and in law by failing to take into account the mitigation as given by the Appellant.

xii. That the learned trial Magistrate erred in fact and in law by disregarding the Appellant's submissions and list of authorities in support of his case with the resultant miscarriage of Justice to the Appellant.

xiii. That the learned Magistrate erred in law by shifting the burden of proof to the Appellant herein in total disregard of the cardinal principle in Criminal Cases that the burden of proof always lies with the Prosecution.

5. When the Appeal came up for hearing, this Court gave directions to have the appeal disposed of by written submissions. I have re-evaluated the case that was before the Trial Court. I have further considered the rival written submissions. Though the appellant put forward a total of thirteen grounds of appeal, those grounds may be determined under two main broad grounds.

6. The first main ground is whether the prosecution proved its case against the appellant beyond reasonable doubt. Secondly, whether or not the sentences meted out were harsh and punitive and whether the default sentences imposed is lawful.

7. In respect of the first ground of appeal, the appellant is of the submission that the Respondent did not prove the case against the Appellant beyond reasonable doubt. The appellant argued that the evidence adduced did not satisfy the elements of the offence and further stated that the findings were contradictory. The Appellant further pointed out that there was no expert witness who came to testify to buttress the Prosecution's case.

8. It is the submission of the Respondent that the Prosecution proved the case against the Appellant beyond reasonable doubt and therefore the Appellant's Appeal lacks merit. The question which must be answered on Appeal is whether the Prosecution proved the case against the Appellant to the required standard in Criminal case of beyond reasonable doubt. I have already outlined the competing positions taken by the parties before this Court. The Appellant faced a charge of stealing by a servant Contrary to Section 281 of the Penal Code. The recorded evidence shows that the first prosecution's witness PW.1 stated that the Primary custodian of the bank branch cash is the Operations Manager (the Appellant) and that there was a second custodian who is the Clerk namely, Casper Ekesa.

9. PW.1 stated that after the money was physically counted, a sum of Kshs 22,733,300/= was found missing. It is also the evidence of PW.1 that the Primary Custodian cannot touch the keys from the second custodian.

10. PW.1's evidence appear to be contradictory in that in his evidence in chief, he stated that both custodians can gain access to the bank strong room where cash is kept. The evidence of PW.2 seem to corroborate the evidence of PW.1 that both custodians are the ones who open the strong room. The question is whether the evidence points at the appellant as the only culprit.

11. It is apparent that only one employee, the Appellant herein was charged and convicted yet two of them could access the strong room since each had a key. In his Judgment, the Trial Principal Magistrate was categorical that the Appellant had the key to the main door of the bank and one of the keys to the vault together with another staff Casper Ekesa who carried another key. It is clear that both the appellant and Casper Ekesa each could gain access to the strong room.

12. It is therefore possible that Casper Ekesa may have gained access. The Prosecution's evidence was therefore doubtful. It is also apparent from the evidence tendered that the Prosecution's case appear to be substantially circumstantial. There is a presumption that since the appellant had the key access the strong room, he was the person who stole the missing cash. That presumption has now been displaced by the possibility of another bank employee particularly the second custodian namely, Casper Ekesa having solely taken part in the theft. I find that Count 1 was not proved beyond reasonable doubt.

13. In respect of Court 2, the Appellant was accused jointly with others not before the Court with intend to defraud of falsifying the branch ledger book belonging to KCB Bank. The Prosecution was required to present evidence showing that the appellant was the one filing the ledger books. However, the Prosecution failed to tender such evidence. What emerged from the evidence is that other bank employees prepared the bank ledger books and the Appellant was meant merely to go through and sign. The people referred to as 'others' were not identified nor arrested or arraigned in Court.

14. In the 3rd Count, the Appellant was charged with the offence of false accounting by a servant Contrary to Section 330 (b) of the Penal Code. In order to prove such a charge, the Prosecution is required to tender credible evidence to show the appellant's involvement in the alleged fraudulent transactions.

The recorded proceedings does show the Appellant's Personal involvement in posting the suspect fraudulent transactions.

15. It is clear from the recorded proceedings that the learned Principal Magistrate relied on circumstantial evidence to convict the Appellant. The trial Magistrate stated that the appellant's computer was used to post the suspect transactions. There was no evidence to indicate that no other person could access the Appellant's computer to use it to post such transactions. There was no direct evidence to show that the Appellant personally made the false entries or that he falsified the accounting books directly or knowingly.

16. Having re-evaluated the evidence presented before the Trial Court. I am convinced that the prosecution did not prove its case to the required standard in criminal cases of beyond reasonable doubt.

    A critical examination and analysis of the evidence would show that other persons other than the appellant could have committed the offences. With the aforestated glaring doubts, it was not safe to convict the Appellant.

17. The Second and final main ground touches on the sentences meted out. I have already set out the sentences pronounced by the Trial Court in each Count. The Appellant argued that the Trial Principal Magistrate gave punitive sentences Contrary to the laid down law and sentencing Policy.

18. The Appellant further argued that the Trial Court failed to consider the mitigating factors before meting out the sentence. In response, Respondent urged this Court not to interfere with the sentences meted out because the Trial Court considered the colossal amount lost. It is the Respondent's submission that the sentences are lenient hence should not be interfered with.

19. I have considered the competing arguments on the issue. I have already set out the sentences pronounced in each Count. The record shows that in the first count, the Appellant was sentenced to a fine of Kshs 8 Million in default serve 6 years imprisonment. In counts 2 and 3, the Appellant was sentenced in each count to pay a fine of Kshs 100,000/= in default serve 2 years imprisonment.

20. With respect, I am persuaded by the Appellant's submission that the alternative sentences are punitive, excessive and contrary to the provisions of the Criminal Procedure Code. Section 342 of the *Criminal Procedure Code* provides as follows:-

    > ' No commitment for non-payment shall be for a longer period than six months unless the law under which the conviction has taken place enjoins or allows a longer period.'

21. Section 28 (2) of the Penal Code provides for imprisonment for twelve months where the amount in default exceeds Kshs 50,000/=. It is apparent that the fine imposed by the Trial Court is more than Kshs 50,000/=. In Count 1, the Penal Code prescribes a sentence of 7 years. However, the Trial Court pronounced a sentence of a fine of Kshs 8 Million in default 6 years imprisonment. The default sentence appear to be harsh and punitive.

    In Counts 2 and 3, the law provides a sentence of 7 years imprisonment. In the aforesaid counts, the Trial Magistrate pronounced a default sentence of 2 years imprisonment.

22. The provisions where the Appellant was convicted did not provide for a longer default period than that prescribed under Section 28 of the Penal Code and under Section 342 of the Criminal Procedure Code. In the circumstances, it is apparent that the maximum default sentence which could be imposed should not be more than 12 months.

23. I find the default sentences to be harsh and punitive. Those default sentences also run contrary to those prescribed by Statute. The same should be set aside and be substituted with a sentence of 12 months imprisonment.

In the end, the Appeal is found to be meritorious, it is allowed.

Consequently, the Appellant's conviction is quashed and the sentences are set aside.

The Appellant is hereby set free unless lawfully held.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 20TH DAY OF APRIL, 2023.

.....**.....**

J.K. SERGON

JUDGE

In the presence of:

C/Assistant – Chepkoech

Appellant – Present in Prison

Maryanne Kariuki for the Appellant

No appearance for the Respondent