



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

(CORAM: CHERERE-J)

CRIMINAL APPEAL NO. 05 OF 2020

BETWEEN

REPUBLIC..... APPELLANT

AND

DAVID GITONGA.....RESPONDENT

(Appeal against acquittal in Githongo Principal Magistrate's Court Criminal Case Number 271 of 2018 by

Hon. E.W.Ndegwa (RM) on 06th January, 2020)

JUDGMENT

1) **David Gitonga, (Appellant)** was charged with stealing by servant contrary to Section 281 of the Penal Code. The particulars of the charge are that:

On diverse dates between 01.08.2017 and 19.02.2018 at Githongo Market, Abothoguchi West Division in Imenti Central Sub-County within County being an employee of Chalkman Energy stole Kshs. 809,089.00 the property of Chalkman Energy which came to his possession by virtue of his employment

2) By a judgment dated 06th January, 2020, the Respondent was found not guilty and acquitted.

The Appeal

3) Dissatisfied with the acquittal, the Appellant lodged the instant Appeal mainly on the ground that the Appellant's case was proved beyond any reasonable doubt.

Analysis and determination

4) The duty of the first Appellate Court is to carefully examine, consider and set out the evidence that was tendered before the trial court and subject the whole evidence to a fresh and exhaustive re-examination and re-evaluation so as to arrive at own independent conclusions on the appellant's guilt or otherwise. (See *Michael Muriuki Munyori v Republic* [2107] eKLR).

5) From the evidence on record, I have deduced two issues for determination.

1. Whether Respondent was an employee of the Chalkman Energy (complainant)

2. Whether the Appellant proved that Respondent stole Kshs. 809,089.00 the property of Complainant

Whether Respondent was an employee of the Chalkman Energy (Complainant)

6) The Respondent confirmed that he was indeed employed by the Complainant.

Whether the Appellant proved that Respondent stole Kshs. 809,089.00 the property of Complainant

7) In order to establish the Respondent's culpability, the Appellant relied on a forensic audit report PEXH. 7 prepared by AGM-Kenya Certified Public Accountants and tendered in evidence by PW3. PW3 explained that the report was signed by Mr. Omollo, an auditor, and with respect, there was therefore no basis for the court to reject the report.

8) Concerning the merits of the auditor's report, a perusal of the same reveals that it is shallow summary of figures without specifically and precisely stating the documents that the auditor relied upon to come up with the report or from where the figures in the schedules thereof were lifted from.

9) An auditor's report that the Appellant placed a high premium in support of its case ought to be self-explanatory. In this case, the auditor threw figures at the trial court without any credible evidence in support thereof and expected the court to find that there was evidence of theft.

10) Indeed, the auditor's report was not credible documentary evidence in support of the alleged theft and on that basis alone, the learned trial magistrate's finding that the report did not add any value to the Appellant's case was well founded.

11) The foregoing notwithstanding, I have considered whether there exists other evidence in support of the Appellant's case.

12) It was the *Appellant's* case that the Respondent collected all the money from the petrol station and in support thereof relied on shift sheets that were allegedly made by the Respondent between the period *01.08.2017 and 19.02.2018*.

13) Of interest to note as was rightfully noted by the trial court was that the shift sheets for the period *01.08.2017 and 19.02.2018 were not subjected to document examination*. The shift sheets submitted for examination were for the period 21.12.2016, 24.12.2016 and 21.12.2016. Clearly this sheets do not relate to the period in issue and the trial magistrate's finding that there was no evidence that Respondent had manipulated the shift sheets for the period *01.08.2017 and 19.02.2018* was well grounded.

14) The Appellant argues that the deposits made into the Respondent Mpesa account were monies stolen from the complainant where the Respondent was working as a full time employee on a daily basis.

15) It is important to remember that suspicion cannot suffice to infer guilt.

16) The Court of Appeal in the case **Joan Chebichii Sawe v Republic Crim. App. No. 2 of 2002** had this say about suspicion in a criminal case:

“The suspicion may be strong but this is a game with clear and settled rules of engagement. The prosecution must prove the case against the accused beyond any reasonable doubt.....”

17) From the foregoing analysis, I am persuaded that the evidence presented before the trial court was insufficient to sustain a conviction and the trial magistrate acted lawfully in acquitting the Respondent.

18) Accordingly, this decision by the trial court is upheld and the appeal dismissed.

DELIVERED AT MERU THIS 13th DAY OF May 2021

T. W. CHERERE

JUDGE

In the presence of:

Court Assistant - **Kinoti**

Appellant - **Ms. Mbithe**

For the State - **N/A**