



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

(CORAM: CHERERE-J)

CRIMINAL APPEAL NO. E 156 OF 2021

BETWEEN

PATRICK MUNYILU.....APPELLANT

AND

PROSECUTION.....RESPONDENT

(Appeal against acquittal in Isiolo Chief Magistrate's Court Criminal Case No. 50 of 2016 by Hon. E.Ngigi (PM) on 14th July, 2021)

JUDGMENT

1) **PATRICK MUNYILU, (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 30th March, 2015 and 29th May, 2015 at the K-REP Bank Isiolo branch within Isiolo County being an employee of K-REP Bank Isiolo branch stole Kshs. 400,000.00 the property of K-REP Bank Isiolo branch which came to his possession by virtue of his employment

2) By a judgment dated 14th July, 2021, the Appellant was found not guilty and sentenced to serve 2 years' imprisonment.

The Appeal

3) Dissatisfied with the conviction and sentence, 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 K-REP Bank Isiolo branch (complainant)

2. Whether the Respondent proved that Appellant stole Kshs. 400,000.00 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 Respondent proved that Appellant stole Kshs. 400,000.00 the property of Complainant

7) Aidid Abdi stated that he was acquainted to the Appellant who would occasionally serve him at the bank. It was his evidence that a statement for his account PEXH. 1 issued by Appellant for the period 01.04.2015 to 18.07.2015 revealed that he had a credit balance of Kshs.

2,304,063.19. That when another statement of the same account from 01.04.2015 to 14.07.2015 revealed that the credit balance was Kshs. 662,558/-, he complained to the bank since he had not withdrawn much. Evelyn Njambi, the bank manager, Benard Rotich, the Bank's Operations Manager and Victor Mureithi an auditor stated that upon interrogating the system, they noticed some 8 withdrawals of Kshs. 50,000/- each totaling Kshs. 400,000/- all passed by the Appellant against vouchers whose signature did not match the customer's signature in the system. Robin Maero reset Appellant's password on 09.09.2015 after Appellant complained that it had been hacked. After investigations, Appellant was charged.

8) Appellant in his sworn defence denied the offence. He faulted the Prosecution for not supplying him with withdrawal slips that were allegedly forged.

9) From the evidence on record, I find that the trial magistrate rightly found that a teller is as a matter of course required to compare the signature in the withdrawal slip with the one in the system and only allow the withdrawal if the signatures match.

10) Whereas there is evidence that the password used in the suspected transactions was assigned to the Appellant, the Prosecution did not avail the vouchers that were used to withdraw the money to confirm their position that the signature thereon did not match that of the customer.

11) I have considered the holding in **Philip Muiruri Ndaruga v Republic [2016] eKLR** cited by the Appellant which cited the Supreme Court of Canada in R vs Lifchus {1997}3 SCR 320 with approval where it was held: -

“A reasonable doubt is not imaginary or frivolous doubt. It must not be based upon sympathy or prejudice. Rather, it is based on reason and common sense. It is logically derived from the evidence or absence of evidence.

12) In the absence of the withdrawal vouchers, there was clearly no evidence to support the prosecution case that the withdrawals in issue were not made by the customer. Appellant denied issuing the statement from which the trial magistrate drew its conclusion that he had a guilty mind without giving any explanation why in the absence of other corroborating evidence he believed the customer and disbelieved the Appellant.

13) From the foregoing analysis, I am persuaded that the evidence presented before the trial court was insufficient to sustain a conviction. The prosecution case was not proved beyond reasonable doubt and the conviction was against the weight of evidence.

14) Accordingly, the conviction is quashed and the sentence imposed on the Appellant set aside. Unless otherwise wise lawfully held, it is hereby ordered that Appellant be set at liberty forthwith.

DELIVERED AT MERU THIS 09TH DAY OF DECEMBER, 2021

T. W. CHERERE

JUDGE

In the presence of:

Court Assistant - Kinoti

Appellant - Present in person

For the State - Ms. Mwaniki