



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KITALE**

**CRIMINAL APPEAL NO. 107 OF 2018**

**(BEING AN APPEAL FROM THE DECISION OF HON. V. WANDERA (CM)**

**IN CRIMINAL CASE NO.1421 OF 2014 ON 28TH NOV.2018)**

**BERNARD NYABAYO SAGERO.....APPELLANT**

**VERSES**

**REPUBLIC.....RESPONDENT**

**JUDGEMENT**

1. The Appellant was charged with the offence of **Stealing by Servant contrary to Section 281 of the Penal Code**. The particulars of the charge were that **on diverse dates between 14<sup>th</sup> March, 2013 and 8<sup>th</sup> January 2014 at Khetia Drapers Limited in Kitale Township within Trans-Nzoia County being an Assistant Head of Accounts Department at Khetia Drapers Limited jointly with others not before court stole kshs. 3,897,515.20 the property of the said Khetia Drapers Limited which came into his possession by virtue of his employment.**
2. The second count was **Conspiracy to defraud contrary to Section 317 of the Penal Code**. The particulars of the charge were that **on the diverse dates between 14<sup>th</sup> March, 2013 and 8<sup>th</sup> January, 2014 at Khetia Drapers Limited in Kitale Township within Trans-Nzoia County being an Assistant Head of Accounting at Khetia Drapers Limited and Sales Manager at Car and General Limited Kisumu Branch respectively conspired to defraud Khetia Drapers Limited Kshs. 933,759.50 by fraudulent falsification of invoices resulting in the losses of the said amount.**
3. In the second count the Appellants had been charged with one **ERIC KURUI** who was acquitted. The Appellant was equally acquitted of the second charge. His appeal therefore centres on the first charge. Before looking at the grounds raised in the petition of appeal dated 4<sup>th</sup> December, 2018 it shall be necessary to summarise the evidence as presented during trial.
4. **PW1 YOBESH NYAKANGO INGENDIA** the Head Accountant at Khetia Drapers Limited testified that the Appellant was an employee of the Complainant having been employed in the Accounts Department between 2011 and 2014. That he was in charge of the credit control team from March 2013.
5. He testified and produced several documents which the Appellant falsified so as to pay for goods from the Complainant's Suppliers namely Car and General Limited. He enumerated and produced several transactions and contracts where it is purported that the Complainant purchased Motor Bikes and Tuktuks from Car and General. The said machines were collected by the Appellant's wife one **JESSICA NYANGARISA OMBOGA**.
6. The witness also testified on how the appellant issued some cheques to Car and General Limited which he later had them cancelled and cash was given to him in lieu of the purported purchase of the goods. There were according to PW1 five transactions which were fictitious as per the exhibits produced which the total aggregate is per the amount in the charge sheet.
7. Several documents were produced which included invoices, cheques and other related documentations. This court need not to reproduce the details as they are contained in the proceedings.
8. **PW2 PRAMILA GOVIND AMBEXAR** testified that she worked as an Accounts Clerk at the Complainant's company. She worked with the Appellant and she was tasked with the preparation of cheques, petty cash vouchers and the stocks at the end of the day. In the company the Appellant was her senior whose duty was to confirm payment of the creditors. She said that the Appellant was able to access her computer password and could as well issued cheques in her absence.

9. In that regard she went on to state that in her absence the Appellant issued without her knowledge cheques No.105141 and 105142 for the sum of 410,000 and 360,000 respectively. He also on 18<sup>th</sup> May, 2013 issued cheques no.107906 and 107907 for kshs, 430,000 each respectively. She also enumerated three other cheques for Kshs.430000, 430000 and 460,003.80 respectively issued by the Appellant on diverse dates.
10. Her contention was that the said cheques were issued by the Appellant over lunch time without her knowledge or authority. All the cheques were in favour of Car and General Limited.
11. **PW3 ERNEST KASERA OBUNGA** the Human Resource Manager of the Complainant Company testified that the Appellant was employed by the company in November 2008 as a general worker and because of his good work he was promoted to the position of Accounts Clerk on 1/2/2010 which he held till 2014.
12. His duties were receiving purchasing documents, checking creditors' transactions and other supporting documentations all related with the purchases by the Complainant. He went ahead to produce various letters of appointment and deployment of the Appellant. He said that being in charge of creditors control account he was tasked with dealing with Car and General Limited which was one of the Complainant's Suppliers.
13. **PW4 EVANS KEBABE ABERE** works at the Complainant as an Internal Purchase Audit Officer as from 2002. He said that his work entails the audit of all purchases by the company. He said that it was brought to his attention of a goods received note which turned out to be fictitious. When he informed the Chief Accountant it was realised that it had been posted by the Appellant.
14. An audit was then undertaken on the two accounts of Kenya Tea Parkers Limited and Car and General Limited which he found several anomalies including the amount enumerated in the charge sheet. He produced his audited report dated 11th April, 2014 which indicated the total amount and the supporting documents all prepared by the Appellant on different dates and times.
15. **PW5 JACOB ODUOR** the Forensic Document Examiner carried out examinations of documents which contained the specimen signatures of the Appellant and came up with the finding that the signatures were those of the Appellant.
16. **PW6 LOISE OWINO** a sales person at Ryce Motors Company told the trial court that she previously worked with Car and General Limited together with the Appellants then co accused. She testified that she got some cash from the company and handed the same to the Appellants co accused. He told her that the money which amounted to Kshs 460,000 was from the Complainant.
17. **PW 7 ROSEMARY KEMUNTO OKIBIRU** used to work for Car and General as the Accountant together with the Appellants co accused. She said that she refunded the Appellants co accused a sum of Kshs. 473,000 which was for the purchase of Motor Bikes by the Complainant.
18. **PW8 CHERYL OCHOLA ODHIAMBO** worked at Car and General Limited as a sales executive in the Eldoret Branch. He used to take Tuktuks, Generators etc. on behalf of the company and would receive cash and prepare the receipts as well as do banking. He said that during that period he dealt with the appellant who worked for the Complainant at the Accounting Department.
19. He said that in one of the transaction the Appellant ordered for Motorbikes and he issued a cheque worth Kshs. 473,755.50 and when the said cheque matured the Appellant instead of collecting the motorbikes asked that he be refunded the money as the Complainant had the motorbikes already and did not need them. He said that he gave him cash instead of a cheque which the Appellant acknowledged.
20. **PW 9, DANIEL MIDIWA NYAMAISO** testified against the Appellants co accused who worked at Car and General as a sales person till his dismissal vide a letter dated 24<sup>th</sup> April, 2014.
21. **PW 10 FELIX NDEDE** was also working with Car and General Kitale Branch as a sales person in charge of Tuktuks and Motor Bikes. He also knew the Appellant who worked as an Accountant with the Complainant. He said that the Appellant in his own capacity was their customer. He said that sometime in March 2013 he approached him with a cheque of Kshs. 410,000 and told him that the Complainant had given him loan to purchase Motorbikes and that is why he had been issued with a cheque directly.
22. The Appellant told him to do a cash sale to his wife **JESSICA NYANGARISA OMBOGA** directly. The Appellant's wife collected the 5 motor bikes later as per the delivery book which he produced as exhibit.
23. Again on 4/5/2013 the Appellant approached him with a cheque for Kshs360,000 for the purchase of motorbikes and the Appellant told him that he had been given a loan by the complainant to buy motor bikes. The Appellant came and collected the 4 motorbikes on 4<sup>th</sup> May, 2013 although his wife's name was recorded in the delivery book.
24. The witnesses further enumerated how the Appellant approached him with other cheques of Kshs 430,000 and 399,000 respectively for the purchase of the Tuktuk and in the process he prepared the cash sales in favour of the Appellant's wife. The witnesses produced all the receipts and the related documentations showing the transaction between him and the Appellant as well as the Appellant's wife who to his knowledge was running a boda boda business.
25. **PW11 FRANCIS KARIUKI NJUNO** previously worked as an Internal Auditor at Car and General. He was tasked to carry out an audit of Kisumu, Kitale and Eldoret branches of the company. The instructions were pursuant to a complaint by the Complainant herein who had paid for some goods but were not supplied.
26. The said witness did the audit of the three branches and produced his report which showed that the Complainant had made a total loss of

KShs 3,897,515. He went ahead to produce his report which contained the details of the cheques and their respective numbers and the total amounts.

27. **PW12 P.C LAWRENCE EKENO** was the investigation officer who recorded the witness's statements and preferred charges against the Appellant. He summarised to the court how the Appellant went through the entire transactions together with his co accused. It also emerged during the hearing that the Appellant's wife absconded and she was still on the run.

28. When placed on his defence the Appellant gave unsworn evidence denying the charge. He said that he was a general worker with the Complainant and that at no time did he work with the Complainant at the Accounts Department. He denied that he was a qualified Accountant and that he was generally computer illiterate. He went ahead to produce his payslips which showed that he was paid as a general worker. He denied having been promoted at all by the Complainant.

29. He denied that he had any powers or authority to prepare cheques and he did not possess any password. He said that he was just a sacrificial lamb.

### **ANALYSIS AND DETERMINATION**

30. The court has perused the lengthy proceedings herein as well as the voluminous exhibits relied on by the parties. The duty of the court at this juncture was well stated in the case of **OKENO V. REP. 1973 E.A. 32**. The court stated that;

*“An appellant on a first appeal is entitled to expect the evidence as a whole to be subjected 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”.*

31. The court has perused the submissions by the Counsels on record and for want of space and time there is no reason to reproduce them here.

32. The general content of the petition of appeal by the Appellant has to do with the fact that the trial court failed to analyse the evidence as presented sufficiently and that if it had done so it would not have convicted the Appellant. The Appellant laid great emphasis on the fact that the appellant was not qualified enough to have undertaken such a sophisticated transaction.

33. The issue of the Appellant's employment in my view was well discussed by the trial court. He was employed as a general worker but from the evidence of the Human Resource Manager he rose through the ranks because of his good work. The evidence of the document examiner placed the Appellants prints in the case.

34. It was clear that the signature as found by the said expert witnesses was that of the Appellant. If that was the case, then it defeats logic to suggest that he was unqualified for that position. I also find it difficult to believe that the Complainant will cook documents showing the Appellant's promotion simply to win the criminal case against him.

35. It was in my view uncontroverted that the Appellant and his wife collected the cash as well as the Motorbikes and Tuktuks from Car and General Limited. The documents produced including the copies of the cheques as well as the delivery book signed by his wife was a testimony to this. It is also noted that this was not a one off transaction for that would have given the court to consider a benefit of doubt. The witnesses who dealt with the Appellant at Car and General were people who knew that he was working for the Complainant and they had every reason not to doubt him.

36. Even for arguments sake, if the password was used against the appellants wish, why then were the cheques issued and he went personally to the Car and General Eldoret branch to collect the cash? I do not think that he was not aware of what was taking place.

37. The amount of money the Appellant collected on various dates was the complainant's property and not his. The Audit Report clearly indicated that the complainant though it paid for the goods was not supplied with. The supplier Car and General in my view had weaker controls as it was easy for the customer to be refunded in cash form despite paying vide a cheque.

38. The Appellants defence was not of much probative value as it was not subjected to cross examination. He simply denied that he held the various positons advanced by the Complainant. Although the counsel for the appellant has submitted that the trial court did not interrogate the cross examination by the appellant, I do not find the same very fatal for the simple reason that the cross examination did not pose much challenge to the respondent's case.

39. When cross examined for example on the Appellant's qualification PW1 stated that the Appellant's promotion was based on job training which in essence is usually acceptable. There was no evidence that the Appellant denied the same. That would have been interrogated further had he for instance offered sworn evidence in his defence.

40. In regard to PW2 it appears that all the incidences in which the Appellant is accused of took place around lunch time and it was over a period of time. It is therefore irresistibly clear that the Appellant took advantage of the absence of PW2 especially during lunch break to carry out his schemes. The end day reports produced spoke as much especially on the timings. Although the Finance Manager or the Director was not called to testify as submitted by the Appellant PW2 evidence was corroborated by those of the other witnesses on board.

41. This appeal is not meritorious. The Appellant cannot hide under the fact that he was lowly educated and he had no capacity to undertake the fraud proved against him. Even if he was, what was the basis of him collecting the Motor Bikes and the Tuktuks as proved by the witnesses? He used his wife as a proxy and being known by the employees of Car and General Limited was sufficient to be supplied with the items or a refund of cash.

42. The appeal is otherwise dismissed.

**Dated, signed and delivered via Zoom at Kitale on this 12<sup>th</sup> day of May, 2020.**

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**H. K. CHEMITEI**

**JUDGE**

**12/5/2020**