



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL NO. 163 OF 2018

DAVID MAKARI WATILA..... APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

(from the original conviction and sentence in Mumias Criminal Case No. 143 of 2014 by Hon. Cheruto C. Kipkorir, SRM, delivered on 8/11/2018)

JUDGMENT

1. The appellant was charged with 6 counts at the lower court. He was convicted of Counts 5 and 6 that involved offences of stealing by servant contrary to Section 281 of the Penal Code and sentenced to serve 3 years imprisonment on each of the counts. He was aggrieved by the conviction and the sentence and filed this appeal.

2. The grounds of appeal are that:-

(a) The conviction in counts 5 and 6 overly relied on CCTV electronic evidence which evidence was introduced contrary to Section 106 of the Evidence Act.

(b) The Treasury Book and other exculpatory evidence which were heavily relied upon to convict the appellant on counts 5 and 6 were never produced in court in spite of the appellant requesting the same through a letter dated 11th June 2018.

(c) There was a change of magistrates midstream in the trial and the appellant was never informed of his right on whether he wanted the matter to start afresh (de novo) or continue from where it had reached, in breach of Section 200(3) of the Criminal Procedure Code.

(d) The prosecution failed to produce exculpatory evidence that was in their custody.

(e) There was a major inconsistency and discrepancy in the amounts shown on the charge sheet for counts 5 and 6 as Kshs. 6,063,548/- and Kshs. 6,000,000/- respectively yet the appellant was convicted on charge 5 for Kshs. 5,400,000/- and charge 6 for Kshs. 4,500,000/-.

(f) The prosecution failed to call key witnesses who would have exonerated the appellant.

(g) The burden of proof was not beyond reasonable doubt and the conviction was not based on evidence but on suspicion that he may have stolen some unknown amount left to guesswork.

(h) The appellant's rights to a fair trial and hearing as enshrined in Articles 50 (2) (j) and 25 (c) were infringed thereby denying him a fair trial under the Constitution of Kenya (2010).

3. The grounds of appeal were expounded by the written submissions of the advocates for the appellant, Malalah & Co. Advocates. The State did not make any submissions in the appeal.

4. The particulars of the offence in Count 5 were that on the 19th day of March, 2013 at Co-operative Bank of Kenya Limited, Mumias Branch in Mumias Town within Kakamega county jointly with others being an employee of Co-operative Bank Kenya Limited, appointed as strong-room custodian, stole cash Kshs. 6,063,548/-, the property of the said Co-operative Bank of Kenya Limited which came into his possession by virtue of his employment.

5. The particulars of the offence in Count 6 were that on the on the 21st day of March, 2013 at Co-operative Bank of Kenya Limited, Mumias Branch in Mumias Town within Kakamega county jointly with others being an employee of Co-operative Bank Kenya Limited, appointed as strong-room custodian, stole cash Kshs. 6,000,000/-, the property of the said Co-operative Bank of Kenya Limited which came into his possession by virtue of his employment.

6. This being a first appeal, the duty of the court is to analyse and re-evaluate afresh the evidence adduced at the lower court and draw its own conclusions while bearing in mind that the trial court had the advantage of hearing and seeing the witnesses testify – See **Okeno –Vs- Republic (1972) EA 32.**

7. The evidence for the prosecution was that the appellant was working for Co-operative Bank of Kenya limited, Mumias Branch as a checker and co-vault custodian. His duties as a checker were to check all the transactions at the bank and ensure that they were correctly done. As a vault custodian his dues were to remove money from the bank’s strong room and distribute it to tellers on request.

8. That on the 21/3/2013 the Mumias Bank Branch Manager, Emmajejan Lutta PW1 was on duty at the bank when she received a report that the appellant was involved in some suspicious money transactions at the bank and that he had given some money to an unidentified lady. She questioned the appellant on the transactions. The appellant then disappeared from the bank. The branch Manager reported to the police and to the bank headquarters. The matter was investigated by the police through a banking fraud officer from Kisumu office Sgt. Paul Kipkosgey PW5 and the bank’s fraud analyst Paul Korir PW4. A CCTV footage from the bank was reviewed that showed the appellant removing money from the vault and handling it over to an unidentified lady across the counter. Ksh. 6,063,548/= was found to have been stolen on 19/3/2013 and Ksh. 6,000,000/= stolen on 21/3/2013. After investigations the appellant was arrested and charged. During the hearing a CCTV footage was produced as exhibit. The appellant was acquitted of Counts 1-4 but convicted of Counts 5 and 6. He was sentenced accordingly.

9. The evidence of the bank manager PW1 was initially taken by Hon. S. K. Ngetich, SRM but the witness was stood down when testifying on the CCTV footage. Hon. Ngetich went on transfer and the matter went before Hon. Nambafu on 28/6/2016 who proceeded with the matter without complying with Section 200 (3) of the Criminal Procedure Code that provides that:-

“Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be re-summoned and reheard and the succeeding magistrate shall inform the accused person of that right.”

10. Thereafter on 18/7/2017 the matter went before Hon. C. C. Kipkorir who also did not comply with the provisions of the said section. The proceedings before Hon. Kipkorir on the 18/7/2017 were as follows:-

Court: How do you wish to proceed? We have not taken decisions.

Nandwa: We can proceed from where we had reached.

Court: Noted. Let us proceed. PW 1 recalled and re-sworn states in English

11. Mr. Malalah for the appellant submitted that the said provisions are mandatory and that failure to comply with the same renders the entire trial a nullity. He relied on the decisions in the cases of **Cecilia Muthoni –Vs- Republic (2013) eKLR**, **Joseph Ndungu Kagiri –Vs- Republic Criminal Appeal No. 69 of 2012** and **Henry Kailutha Nkairichia & Another (2015) eKLR** where it was emphasized that compliance with the section is mandatory and personal to the accused person. In the latter case the Court of Appeal held as follows:-

“All of these decisions declare that the provisions of Section 200 (3) [of the Criminal Procedure Code] are mandatory and a succeeding Judge or Magistrate must inform the accused person directly and personally of his right to recall witnesses. It is a right exercisable by the accused person himself and not through an advocate and a Judge or magistrate complies with it out of statutory duty requiring no application on the part of an accused person. Further, failure to comply by the court always renders the trial a nullity.”

12. I have gone through the proceedings of 28/6/2016 before Hon. Nambafu and 18/7/2017 before Hon. Kipkorir. Hon. Nambafu did not take any evidence in the case. She only dealt with preliminary issues. The fact that she did not comply with the provisions of Section 200 (3) of the CPC did not occasion any injustice to the appellant as she did not take any evidence in the case. On the other hand Hon. Kipkorir proceeded to take the evidence of PW1 without explaining the rights of the appellant under the section. The trial court is required to address the accused in person and explain to him the said rights and ask him how he wished to proceed. As the trial magistrate did not act accordingly, the question is whether failure to do so rendered the proceedings a nullity.

13. Section 382 of the Criminal Procedure Code provides as follows:-

“Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:

Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.”

14. PW1 was the only witness who had testified in the case when Hon. Kipkorir took over the matter. PW1 was recalled before Hon. Kipkorir whereby she continued to give her evidence. The defence had the opportunity to cross-examine PW1 on her earlier evidence taken before Hon. Ngetich. There was therefore no injustice occasioned to the appellant by failure by the magistrate to comply with the provisions of section 200 (3) of the CPC. The error is curable under the referred to provisions of Section 382 of the CPC. This ground of appeal therefore does not stand.

15. Mr. Malalah challenged the admissibility of the CCTV footage on the grounds that the same was produced without compliance with Section 106 (B) (4) of the Evidence Act that provides that:-

“In any proceedings where it is desired to give a statement in evidence by virtue of this section, a certificate doing any of the following—

(a) identifying the electronic record containing the statement and describing the manner in which it was produced;

(b) giving such particulars of any device involved in the production of that electronic record as may be appropriate for the purpose of showing that the electronic record was produced by a computer;

(c) dealing with any matters to which conditions mentioned in subsection (2) relate; and

(d) purporting to be signed by a person occupying a responsible position in relation to the operation of the relevant device or the computer shall be evidence of any matter stated in the certificate and for the purpose of this subsection it shall be sufficient for a matter to be stated to be the best of the knowledge of the person stating it.”

16. Learned Counsel submitted that there was no certificate produced in compliance with sub-section (4) of Section 106 B of the Evidence Act. That the branch manager who produced the CCTV footage in court as evidence was not the person who was in control of the ICT department. That the trial magistrate wrongly admitted the same as evidence in court and overly relied on it to find the appellant guilty of the offences. Counsel cited the case of **Republic –Vs- Barisa Wayu Matuguda (2011) eKLR** where the court emphasized the provisions of the referred to section as follows:-

“Any information stored in a computer which is then printed or copied ... shall be treated just like documentary evidence and will be admissible without the production of the original. However, section 106B also provides that such electronic evidence will only be admissible if the conditions laid out in the provisions are satisfied ... The provision makes it abundantly clear that for electronic evidence to be deemed admissible it must be accompanied by a certificate in terms of Section 106 B(4). Such certificate must be signed by a person holding a responsible position with respect to the management of the device... without the required certificate this CD is inadmissible as evidence.”

17. The branch manager PW1 took the trial court through the CCTV footage that showed the appellant removing money from the strong room and giving it to a certain lady over the counter. PW1 in her evidence did not inform the court as to how the CCTV footage was produced. She did not refer to any certificate as required by sub-section 4 of Section 106B of the Evidence Act.

18. Geoffrey Ombati PW3 testified that in 2013 he was working at Co-operative Bank Mumias as a Systems Administrator. His duties were to ensure that the bank’s computers were working. He played the CCTV footage to the court during the hearing. He however never told the court that he prepared any certificate as required by Section 4 of Section 106B of the Evidence Act.

19. The court record shows that a document was produced as P.Ex 8 (b) purporting to be a certificate under section 106B of the Evidence Act. The same was purported to have been made and signed by Geoffrey Ombati Nyabuto (PW3 on 22/3/2013. In his evidence in court PW3 never stated that he made and signed such a document. The police officer who investigated the case PW5 stated that Mr. Ombati (PW3) gave him copies of CCTV footage in a flash and a certificate under Section 106 B of the Evidence Act. He however did not produce the certificate in court as exhibit. How then did the document come to be marked and produced as Ex 8 (b) when it was neither produced by Mr. Geoffrey Ombati (PW3) nor by the investigating officer PW5? I find that there was no certificate made under S. 106B of the Evidence Act that was produced in court as exhibit. It would have been unprocedural for the investigating officer to produce the document in court as exhibit when the person who was purported to have made it PW3 did not identify it as having been made by him. In fact it would appear that PW3 was not aware of the document.

20. The end result is that there was no certificate produced to show how the CCTV footage was produced. Without the said certificate the evidence on CCTV footage was wrongly admitted and is therefore of no consequence.

21. Mr. Malalah submitted that the prosecution in this case failed to provide the appellant with documents that they intended to rely on in the case. That the appellant was not provided with a copy of the treasury book and the bank statement that the trial court relied upon to convict the appellant in Counts 5 and 6. That vide a letter dated 11/6/2018 the advocate for the appellant requested the prosecution to be provided with the following documents: the treasury book, bank statement, reversed transaction register, High Value Transactions Register, Missing Voucher Register, Partition Print Register and Supervisor-Teller Log. That the same were not provided. That this was a contravention of Article 50 (2) (j) of the Constitution. That in the premises, the appellant was not accorded a fair trial. Counsel submitted that the evidence that was withheld from the appellant was used to convict him yet he had no opportunity to cross-examine witnesses on the same.

22. Article 50 (2) of the Constitution provides that:-

“Every accused person has the right to a fair trial, which includes the right—

(j) to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence.”

23. The importance of this article of the Constitution was emphasized by Mativo J. in **Joseph Ndungu Kagiri –Vs- Republic (2016) eKLR** where he held that:-

“The Constitution of Kenya 2010 is highly valued for its articulation. Some such astute drafting includes but not limited to Article 50 which provides for the fundamental right to a fair hearing. Article 50 (2) (j) provides for the right of the accused person to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence while sub-article (c) provides for the right of the accused to have adequate time and facilities to prepare his defence.

The right to a fair trial is a norm of international human rights law designed to protect individuals from the unlawful and arbitrary curtailment or deprivation of other basic rights and freedoms, the most prominent of which are the right to life and liberty of the person. It is guaranteed under Article 14 of the International Covenant on Civil and Political Rights (ICCPR). The fundamental importance of this right is illustrated not only by the extensive body of interpretation it has generated worldwide but, by the fact that under article 25 (c) of our constitution, it is among the fundamental rights and freedoms that may not be limited.”

24. The court record indicates that on the 22/8/2017 the advocate for the appellant at the trial court Mr. Nandwa complained to the court that he had not been supplied with the Treasury book and some statements from the Central Bank. When the matter came up for the next hearing date on 18/9/2017 Mr. Nandwa stated that he had just been supplied with the documents. PW1 proceeded to produce the treasury book as exhibit, P.Ex 5. Mr. Nandwa cross-examined the witness on the document. It is therefore not true that the appellant was not provide with the treasury book during the hearing.

25. On the other documents requested by a letter dated 11/6/2018 the prosecution stated during the trial that the documents related to the year 2013. That they had been forwarded to the bank’s headquarters and that they could not be found.

26. The appellant submitted that the prosecution deliberately withheld to produce the said documents and that had they been produced they would have exonerated him from the charges. This question should be considered together with the question whether the prosecution had proved the charges against the appellant beyond all reasonable doubt.

27. Mr. Malalah submitted that the prosecution did not prove the charges beyond all reasonable doubt.

28. The case against the appellant was that he removed money from the vault and posted it to a teller called Seline Indara. However that Seline did not receive the money but the appellant instead handed it over to an unidentified lady over the counter.

29. In his defence the appellant stated that his other duties were that of a vault custodian. That it is the operations manager who was in charge of the money in the vault. That all that he was required to do was to ensure that the money he and the operations manager removed from the vault was entered in the treasury book and posted to the relevant teller who had verbally requested for the money. The teller would also sign the treasury book to confirm that he/she received the money. That on the 19/3/2013 the treasury book showed that there were two transactions of Ksh. 3M and 2.4M removed from the vault and sent to Seline Indara.

30. The appellant also stated he was a checker. That his role as a checker was to check all transactions the bank had dealt with. That the transactions were summarized in the partition print. That he would check the postings against the vouchers. Where a voucher was missing he would capture it in a Missing Voucher Register. That at times vouchers would have mistakes and the transaction had to be reversed. In that case the transaction would be entered in a Reversal Register.

31. The appellant further stated that the operations manager authorized payments and maintained the Supervisor Teller Log which showed all the transactions that he had authorized. That all transactions above 1 million had to be approved by a supervisor and by a call from the treasury and entered into the Big Value Confirmation Register. That the register would show the person who confirmed and the time the call from the treasury was made. 32. The appellant stated that the prosecution did not produce the above stated documents. That there was no audit done to show whether there was any money lost.

33. The trial magistrate relied on the treasury book P.Ex5, the main cash account P.Ex 6, the teller cash account P.Ex 8, the Central Bank Account P.Ex 9 and the CCTV footage to come to a conclusion that the appellant had stolen 5.4 million in Count 5 and 4.5 million in Count 6. The referred to documents only showed that on 19/3/2013 and 21/3/2013 there was Ksh. 5.4 million and Ksh. 4.5 million respectively moved from the strong room and posted to Seline Indara. There were no documents produced to show what happened to the money when it was posted to Seline. Though the prosecution alleged that Seline did not receive the money, there was no audit done to show whether she actually received the money into her account or not. There was no audit done on the relevant period to ascertain whether there was any money lost and if so how much. There was no audit done to show how much money was in the vault before the said transactions and how much was missing, if at all. In the absence of documents to prove the above there was insufficient evidence to prove that the appellant stole the money. The trial magistrate relied on wrongly admitted evidence of CCTV footage to convict the appellant. When the evidence of CCTV footage is discarded the prosecution evidence was barely insufficient to prove the offences.

34. The upshot is that the prosecution did not prove the charges in Counts 5 and 6 beyond all reasonable doubt. The appeal is thereby merited. The conviction on the appellant in Counts 5 and 6 is quashed and the sentences entered therein set aside. The appellant is hence set at liberty forthwith.

Delivered, dated and signed at Kakamega this 21st day of May, 2020.

J. N. NJAGI

JUDGE

In the presence of:

Mr. Malalah for Appellant

Mr. Mutua for State/Respondent

Appellant - present

Court Assistant - Polycap

14 days right of appeal.