REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL APPEAL NO 5 OF 2020

BENSON WAHINYA MATHENGE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against both conviction and sentence in criminal case no 1013 of 2016

in Milimani chief magistrate court at Nairobi rendered on 14th October 2019,

before hon. P. Ooko SPM)

JUDGEMENT

1) The appellant was charged with the offence of stealing by servant contrary to section 281 of the penal code, the particulars of which were that on the 24th day of June, 2016 at Equity Bank Kilimani Branch in Nairobi county, being a servant to Equity Bank, to wit, as a clearing officer, stole Ksh.5,000,000/- (five million) the property of the said Equity Bank which came to his possession by virtue of his employment.

2) He pleaded not guilty, was tried, convicted and sentenced to a fine of Kenya shillings one million (Ksh.1,000,000) in default one-year imprisonment.

3) Being dissatisfied with the said conviction and sentence, he filed this appeal and raised the following grounds of appeal: -

a) The learned trial magistrate erred in law and fact in convicting the appellant when the evidence and testimony on record was manifestly insufficient and had glaring gaps hence incapable of sustaining a conviction.

b) The learned magistrate erred in law and fact in convicting the Appellant against the weight of evidence on record.

c) The learned magistrate erred in fact and in law in failing to pay due circumspection to the testimony of the second prosecution witness who recorded his statement on the same day of hearing.

d) The learned Magistrate erred in law and in fact in failing to reckon that the Appellants right to fair trial had been violated owing to the fact that he had not been furnished with the second prosecution witness' statement prior to the hearing.

e) The Learned Magistrate erred in law in failing to give due and/or adequate consideration to the appellant's defence of mistake which depicted that he had no ill motives.

f) The learned Magistrate erred in law in shifting the burden of proof to the appellant and in failing to apply the required standard in law (i.e. beyond reasonable doubt) prior to conviction.

g) The learned Magistrate erred in law and in fact by convicting the Appellant notwithstanding that no evidence was led on his mental status/motive/mens rea.

h) The learned Magistrate erred in law and in fact in failing to consider the ramification of the no show by the Investigating Officer who would have led evidence on the outcome of investigations appertaining to the charges and the mental status/motives of the appellant.

i) The learned Magistrate erred in law and fact by passing a sentence which was manifestly harsh and excessive in the circumstances.

4) The Appellant therefore sought the orders that:

a) the conviction and sentence of the Appellant be quashed and set aside

b) Alternatively, the sentence mated on the Appellant be reviewed

c) the fine paid by the appellant be refunded.

SUBMISSIONS

5) When the appeal came up for hearing before me, Mr. Omari for the appellant submitted that the trail court failed to consider the appellant's defence, to the effect that he made the postings in error and therefore the trial court did not consider the mens rea of the appellant. It was submitted that there was no nexus between the appellant and the beneficiary of the misposting and that the conduct of the appellant of not absconding duties showed an innocent mind.

6) It was submitted further that the Investigating Officer did not testify and that his evidence was very critical as he would have given exculpatory evidence in favour of the appellant. It was submitted further that the trial court did not take into account the evidence of the Branch Manager and did not take into account the provisions of Section 9 of the penal code and proceed as if the offence was a strict liability offence.

7) It was contended that there was no evidence of intention on the part of the appellant since there was no nexus between the appellant and the owner of the account wherein the funds were posted and therefore the conviction was erroneous as the charge was not proved beyond reasonable doubt.

8) On behalf of the prosecution, Ms. Nyauncho submitted that the appellant was found guilty of theft by servant having posted cheques which were in favour of Excel Petroliam into the account of Tandu Alarm Systems ltd. It was submitted that the correct account number was written at the back of the cheques and therefore the postings could not have been in error. It was submitted that failure to call the Investigating Officer was not fatal to the prosecution case which was proved beyond reasonable doubt.

9) This being a first Appeal, the court is under a legal duty to re-evaluate the evidence tendered before the trial court to come to its own conclusion, though giving allowance to the fact that it did not have the advantage of seeing and hearing witnesses, unlike the trial court as was stated in the case of **OKENO V REPUBLIC.**

10) The prosecution case as per the evidence of **PW1 CHARLES GITONG A NDUNGU,** the Branch Manager at the Branch where the appellant was working, was that on 28th June 2016, he was informed by a customer that the cheques he had deposited on 24th had not been cleared. Upon checking on their records, he realized that the said cheques had been deposited into the account of Excel Petroleum where they had all been cleared and not the account of Tandu Alarms Systems where they were supposed to be deposited.

11) It was his evidence that on the material day, the Appellant was the only clearing officer at the said Branch and that it was his duty to put the cheques into the system, whose duties were to confirm that the name on the cheque and on the account agrees before proceeding to deposit the cheque into the account indicated on the cheque or the deposit slip. He confirmed having verified all the cheques but failed no notice the account into which they had been deposited.

12) When he inquired from the Appellant where he got the account number of excel petroleum, he stated that he did not know, but after an hour he went back to his office and said that the Proprietor of Excel Petroleum had interrupted him as he was processing the cheques when he had gone to check his balance and stop some cheques, which could have caused the mixed up.

13) In cross examination, he stated that the branch was normally busy and that it was within his powers to correct anomalies during his verification of the cheques but did not notice miss-postings by the appellant. He admitted that wrong posting do happen and that he could not tell if there was any link established between the appellant and Excel Petroleum.

14) PW 2 NICHOLAS CHAW a Security Office with the bank in charge of investigations interrogated the Appellant, who was unable to explain why he posted the said cheques into a wrong account as the back of the cheques had the proper name of the account plus the number and the cell phone contacts. That upon the deposit the funds were drawn vide a cheque which was verified by the Operation Manager and payment made by the appellant. it was his evidence that the said beneficiary account was opened on 22nd June 2016.

15) In cross examination, he stated that Allan Murna who withdrew the funds had an existing loan with the bank which was offset from the cheque deposits and that he made a withdrawal of ksh 60000, on the same day the miss postings were done.

16) When put on his defence, the appellant stated that he was the person who would receive cheques from clients, then in put the same into the system before they are verified by the supervisor. He stated that on 28th June 2016, while on duty, a colleague from Kimathi branch called him on the cheques he had deposited and when he checked, he realized that he had deposited them into a wrong account, which he did due to a customer who destructed him.

17) It was his evidence that there was no nexus between him and the beneficiary of the funds and that it was his first time to make such a

mistake and that all the said cheques were verified by the Manager and therefore could not be reversed.

18) In cross examination, he testified that a reversed wrong posting could only be done if the money had not been withdrawn. He had worked with the bank for 33 years as at that time and was familiar with cheque clearance. He confirmed having interacted with the beneficiary of the five cheques when he had gone to stop payments of his other account.

ANALYSIS AND DETERMINATION.

19) From the proceedings, petition of appeal and the submissions herein, I have identified the following issues for determination:

a) whether failure to call the Investigating officer was fatal to the prosecution case

b) whether there was proof of intention to commit the offense on the part of the accused person.

c) whether the appellant defence was considered.

d) whether the prosecution case was proved beyond reasonable doubt.

20) On the issues of failure to call the Investigating Officer, the appellant submitted that he was a crucial witness whose evidence would have exonerated him as he would have provided exculpatory evidence, however there is no legal requirement as to the number of witnesses the prosecution has to call to prove a fact. Section 143 of the Evidence Act, clearly provides that no particular number of witnesses shall, in the absence of any provision of the law to the contrary, be required for proof of any particular fact.

21) This position was reinstated in the case of **KETER vs R [2007] 1EA 135** where the court stated thus

"The prosecution is not obliged to call a superfluity of witnesses but only such witnesses as sufficient to establish the charge beyond reasonable doubt."

22) In this case it is clear that the Investigating Officer was not called to testify, however the appellant has not indicated the nature of his testimony which ought to have been presented in court for which the court would have drawn an adverse inference to the prosecution case. To my mind the evidence which the Investigating Officer would have presented to court was covered by that of the prosecution witnesses whom he interviewed and who testified before the trial court, I am therefore unable to draw any adverse inference as was stated in the case of **BUKENYA vs UGANDA [1972] E A 549.**

23) On the issue of intention to commit the offense on the part of the appellant; it was the appellant contention that the entries were posted in error and that he did not have the intention to steal the said sums of money; it was contended that section 9 (1) of the penal code requires proof of intention or motive on the part of an accused person to commit the offense.

24) Justice Mativo in the case of **LEONARD MWANGI MUHUTHIA V R [2016] eKLR** had this to say on the issue of intention: -

"When a person intending to commit an offense begins to put his intention into execution by means adopted to its fulfilment and manifest his intention by some overt act……. in every crime there is first intention to commit it, secondly, preparation to commit it thirdly to commit it …."

25) In this matter, there is no dispute that it is the appellant who received the cheques for clearance on behalf of his employer, and that it is him who posted them into the wrong account. It was the appellants case that the said cheques were posted in error and that it was because he had been distracted by the beneficiary of the account to which the said cheques were posted. This was an information which was within the special knowledge of the appellant which under the provision of section 109 of the Evidence Act, he was under an obligation to prove.

26) Further since it was the Appellant's contention that he did not have the intention to steal the said sum of money by making wrong posting and since the prosecution had placed enough evidence before the trial court that he had the exclusive control of what happened to those cheques, I am satisfied that the prosecution had placed upon the appellant the statutory burden to discharge a rebuttable presumption that he had the intention to steal the said sums of money and indeed succeeded in execution of the said intention. The statutory rebuttable presumption is spelt out under Sections 111(1) and 119 of the Evidence Act which provides as follows:-

"111(1) When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him:

Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecution, whether in cross-examination or otherwise, that such circumstances or facts exist:

Provided further that the person accused shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either the prosecution or the defense creates a reasonable doubt as to the guilt of the accused person in respect of that offence.

119. The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common

course of natural events, human conduct and public and private business, in their relation to the facts of the particular case. "

27) From the proceedings, it is clear that when the appellant was asked by the Branch Manager (PW1) where he had gotten the account into which he posted the cheques, his first answer was that he did not know. This was also confirmed by PW 2 whose evidence was that the appellant would not on interrogation explain the reasons why he posted the said cheques into a wrong account. It is therefore clear that his later account that he had been distracted by the proprietor of that account, was an afterthought. There was no evidence tendered to confirm the allegations that the beneficial owner of the said account had visited the bank neither was there any evidence that he had made an enquiry on his account. The appellant therefore failed to discharge the burden on their part and to displace the prosecution case.

28) I therefore on re-evaluation of the evidence tendered find that the circumstantial evidence on record which include the fact that he has the account details in which the entries were made and that when the payments were made out, it was also him who made those payments to the beneficiaries of the funds proved that the appellant had the necessary intention or the mental element (mens rea).

29) In dismissing the Appellant's defence, the trial court had this to say: -

> ***"In his own evidence tendered as well as in his own recorded statement marked exhibit 'D-1' he never alluded therein that the client whom he claims to had allegedly distracted him on the material day is the one who gave him the aforesaid wrong account number. In light of this grave anomaly and further taking into consideration that no plausible explanations were given by the accused person as to why he chose not to deposit the aforesaid cheques in the correct account as expressly disclosed on the reverse thereof. I do find and hold that he deliberately and fraudulently deposited the said cheques into the said wrong account."***

30) It is therefore clear that the appellant's defence was considered by the trial court and rejected and therefore his submissions that the court placed upon him the burden of proof has no merit in view of the finding that he had a rebuttable and evidential burden to discharge.

31) The prosecution case against the Appellant was therefore proved beyond reasonable doubt and his conviction was safe.

32) On sentence: the appellant in his grounds indicated that it was excessive. Sentencing is at the discretion of the trial court and the appellate court would only interfere with the same where there is material misdirection by the trial court as was well stated by Odunga J in the case of **SIMON KIPKURUI KAMORI V REPUBLIC [2019] eKLR** thus: -

> ***"Since the appellant is only appealing against sentence, it is important to set out the circumstances under which an appellate court interferes with sentence. The principles guiding interference with sentencing by the appellate Court were properly, in my view, set out in S vs. Malgas 2001 (1) SACR 469 (SCA) at para 12 where it was held that:***
>
> ***"A Court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court…However, even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate court would have imposed had it been the trial court is so marked that it can properly be described as "shocking", "startling" or "disturbingly inappropriate"***
>
> ***6. Similarly, in Mokela vs. The State (135/11) [2011] ZASCA 166, the Supreme Court of South Africa held that:***
>
> > ***"It is well-established that sentencing remains pre-eminently within the discretion of the sentencing court. This salutary principle implies that the appeal court does not enjoy carte blanche to interfere with sentences which have been properly imposed by a sentencing court. In my view, this includes the terms and conditions imposed by a sentencing court on how or when the sentence is to be served."***
>
> ***7. The predecessor of the Court of Appeal in the case of Ogolla s/o Owuor vs. Republic, [1954] EACA 270, pronounced itself on this issue as follows: -***
>
> > ***"The Court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors."***
>
> ***8. To this, I would add a third criterion namely, "that the sentence is manifestly excessive in view of the circumstances of the case". (R - v- Shershowsky (1912) CCA 28TLR 263) while in the case of Shadrack Kipkoech Kogo - vs - R. Eldoret Criminal Appeal No.253 of 2003 the Court of Appeal stated thus: -***
>
> > ***"sentence is essentially an exercise of discretion by the trial court and for this court to interfere it must be shown that in passing the sentence, the sentencing court took into account an irrelevant factor or that a wrong principle was applied or that short of these, the sentence itself is so excessive and therefore an error of principle must be interfered (see also Sayeka –vs- R. (1989 KLR 306)"***
>
> ***9. The Court of Appeal, on its part, in Bernard Kimani Gacheru vs. Republic [2002] eKLR restated that:***
>
> > ***"It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that***

rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already states is shown to exist."

33) The Appellant was sentenced to pay a fine of Kenya shillings one million or in default to serve one year imprisonment whereas the sentence provided for in Section 281 of the Penal Code on conviction is imprisonment for seven years. Having stated herein above that the trial court has discretion in passing sentence I will not interfere with the sentence herein.

34) The upshot of the matter stated herein is that the Appellant's appeal herein lacks merit and is therefore dismissed both on conviction and sentence and the Lower Court's determination thereon is hereby affirmed.

35) On sentence: the appellant in his grounds indicated that it was excessive

36) The appellant has a right of appeal both on conviction and sentence and it is ordered.

Dated, Signed and Delivered at Nairobi This 7th Day of October, 2020 Through Microsoft Teams.

……

J. WAKIAGA

JUDGE

In the presence of: -

Mr. Omari for the Appellant

Ms Akunja for the Respondent

Court clerk Karwitha