



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MIGORI**

**CRIMINAL APPEAL NO. 69 OF 2015**

**(Formerly Kisii High Court Criminal Appeal No. 100 of 2012)**

**JOSEPH NYANCHIRI ONDARA.....APPELLANT**

**-VERSUS-**

**REPUBLIC.....RESPONDENT**

**(Being an appeal against the original conviction and sentence from Hon. A. K. Ndege Senior Resident Magistrate's Court Kehancha in Criminal Case No. 366 of 2009 delivered on 17/04/2012)**

**JUDGMENT**

1. **Mastermind Tobacco (K) Limited** (hereinafter referred to as '**Mastermind**') is a company engaged in *inter alia* tobacco growing, buying and processing. To that end, it contracted farmers to plant tobacco under support contracts where Mastermind variously aided the farmers in the growing and development of the tobacco. Upon maturity of the tobacco, Mastermind would buy it and accordingly pay the farmers.
2. It is on the aspect of paying the farmers that Mastermind contracted the **Postal Corporation of Kenya** (hereinafter referred to as '**the Corporation**') to pay on its behalf. Mastermind would prepare Payrolls and send them over to the Corporation with cheques for the total amount to be paid to the farmers. The Corporation would then use the Payrolls and the Buying Receipts to pay the farmers.
3. In this case the farmers in issue were from Kuria West of Migori County and the paypoint was the Corporation's Kehancha Post Office. Out of some payments made to farmers in February 2009 the Corporation commenced investigations on suspicious payments leading to the arrest and prosecution of the Appellant herein, **Joseph Nyanchiri Ondara**, who was one of the Corporation's Postal Officers at Kehancha Post Office and the then Post Master of Kehancha Post Office one **Edward Kipneng'eno Yegon Maina**.
4. The two were charged with two counts. The first count was **Stealing by Servant** contrary to **Section 281** of the **Penal Code** and the second count was **Uttering a False Document with intent to defraud** contrary to **Section 357(b)** of the **Penal Code**. The particulars of the two respective counts were as follows: -

**Count 1: Stealing by servant contrary to Section 281 of the Penal Code.**

***On diverse dates between 10th and 19th day of February 2009 at Kehancha Post Office, in Kuria District within Nyanza Province, jointly with others not before the Court, being servants to Kenya Postal Co-operation, stole from the said Kenya Postal Co-operation cash Kshs. 871,593/=.***

**Count 2: Uttering a False Document with intent to defraud contrary to Section 357 (b) of the Penal Code.**

***On diverse dates between 10th and 19th of February 2009 at Kehancha Post Office, in Kuria District within Nyanza Province, jointly with intent to defraud or deceive knowingly uttered certain documents namely Payment Schedule and TBR slips of Mastermind Company; which had been made without lawful authority to one CHRISTINE BOKE GIKAR)***

5. The offences were denied and a trial was ordered. Seven witnesses testified in support of the prosecution's case. **PW1** was **Peter Bernard Owoko**. He was the Corporation's Senior Investigations Officer stationed at Kisumu. **PW2** was **Alfred Amukune Yalwala** who was the Corporation's Internal Auditor. **Christine Boke Gekaro**, **Daniel Ongweni Otaalo** and **Edmond Oyiega Akumu** were Postal Officers at Kehancha Post Office who testified as **PW3**, **PW4** and **PW5** respectively. **PW6** was Mastermind's Accountant one **Martin Kimathi Miriti** and the investigating officer one **No. 37859 Sgt. Winston Kadzomba** attached to DCI Kuria Office testified as **PW7**. The Appellant was represented by Counsel during the trial. For the purposes of this judgment I will refer to the witnesses according to the sequence in numbers in which they testified before the trial court.

6. At the close of the prosecution's case the trial court placed the then accused persons on their defences. They both tendered unsworn testimonies without calling witnesses. Thereafter the court rendered its judgment on 02/04/2012 where the Appellant was found guilty of the twin offences and was convicted whereas his co-accused **Edward Kipng'eno Yegon Maina** was acquitted on both counts. The Appellant was thereafter sentenced to 30 months imprisonment on each count which sentences were to run concurrently.

7. Being dissatisfied with the convictions and sentences, the Appellant preferred an appeal by filing a Petition of Appeal on 19/04/2012 where he challenged the entire judgment and the sentences. With the leave of this Court the Appellant filed a Supplementary Petition of Appeal through his Counsel **Mr. Anyona Mbunde** of **Messrs. Anyona Mbunde & Co. Advocates** on 02/10/2015 and a Supplementary Record of Appeal on 23/07/2018. The Appellant challenged the judgment and sentence on nine supplementary grounds as follows: -

- 1. The trial magistrate erred in law and in fact in convicting and sentencing the appellant against the weight of the evidence on record.*
- 2. That the trial magistrate erred in law and in fact in convicting and sentencing the appellant when the evidence on record was based on and relied on extraneous documents.*
- 3. That the trial magistrate erred in law and in fact in convicting and sentencing the appellant without appreciating that the system used was to blame for the alleged loss of any money.*
- 4. The trial magistrate erred in law and in fact in shifting the burden of proof from other officials who were liable especially accused NO2 to the appellant.*
- 5. The trial magistrate erred in law and in fact in convicting and sentencing the appellant when the prosecution deliberately omitted to call the documents examiner to give evidence.*
- 6. That the trial magistrate erred in law and in fact in convicting and sentencing the appellant when the evidence on record does not support the charge hence defective.*
- 7. That trial magistrate erred in law and fact in convicting and sentencing the appellant when the evidence on record was not corroborative.*
- 8. The trial magistrate erred in law and in fact in convicting and sentencing the appellant when the offence stealing by servant and uttering a false document with intent to defraud were not proved.*
- 9. That the trial magistrate erred in law and in fact in convicting and sentencing the appellant when mesreal was not proved against the appellant*

8. The Appellant prayed that the appeal be allowed, the convictions quashed and the sentences set-aside. Directions were taken and the appeal was disposed of by way of written submissions where the Appellant argued that the charges were not proved and that he was convicted on insufficient evidence. The appeal was opposed by the State who submitted that the offences were proved beyond any peradventure and prayed that the appeal be dismissed.

9. This being the Appellant's first appeal, the role of this appellate Court of first instance is well settled. It was held in the case of **Okemo vs. R (1977) EALR 32** and further in the Court of Appeal case of **Mark Oiruri Mose vs. R (2013) eKLR** that this Court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyse it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and give allowance for that.

10. In line with the foregoing, this Court in determining this appeal is to satisfy itself that the ingredients of the offences of **Stealing by Servant** and **Uttering a False Document with intent to defraud** were proved and as so required in law; beyond any reasonable doubt. Needless to say, I have carefully read and understood the proceedings and the judgment of the trial court as well as the record before this Court and also the submissions.

11. To be able to effectively discharge the foregone duty it is imperative that I briefly revisit the prosecution's case. There is no doubt the Appellant was employed by the Corporation as a Postal Officer whose duties included paying clients over the counter. He was in-charge of the operations in Counter 3 at the Corporation's Kehancha Post Office. The Post Master would ordinarily receive the Payrolls, the Buying Receipts and their respective cheques from Mastermind under delivery notes. The Post Master would then organize and cash the cheques and then hand over the Payrolls and the Buying Receipts together with the money to the Cashiers for payment to the farmers. Since the Cashiers also dealt with other non-farmers customers they would ordinarily be expected to have more money in their possession than what is contained in the Payrolls. The prosecution's case is therefore centred on the allegation that the Appellant, with clear intent to steal, made payments to non-existent farmers based on non-genuine Payrolls. It is imperative to note it was the Post Master who found out the suspected loss of revenue and reported to the Corporation's Regional Office.

12. There were three questioned payments totaling to Kshs. 871,593/=. The first payment was made on 10/02/2009 for Kshs. 370,593/= in the name of Chelangat Betty Kutuny of Identity Card Nos. 22614301 and 22612301, the second payment was made on 19/02/2009 for Kshs. 150,000/= in the name of Chelangat Betty Kutuny of Identity Card Nos. 22614301. This payment was fragmented in two parts of Kshs. 85,000/= and Kshs. 65,000/= respectively. The third payment as also made on 19/02/2009 and it was for Kshs. 351,000/= in the name of Chelangat Betty Kutuny. It was fragmented into four parts. Kshs. 98,000/= in favour of Identity Card Nos. 226144301, Kshs. 85,000/= in favour of Identity Card Nos. 22612301, Kshs. 80,000/= in favour of Identity Card Nos. 22612301 and Kshs. 88,000/= in favour of Identity Card Nos. 22612301.

13. As the questioned payments were allegedly based on three **suspected Payrolls**, the suspected Payrolls were then examined. PW1 was the first one from the Regional Office to do so. He visited the Corporation's Kehancha Post Office on 23/02/2009 and called for all the documents relating to the questioned transactions. He compared the Payrolls from Mastermind with the suspected Payrolls. He readily noticed several discrepancies in the suspected Payrolls including that they did not have a Mastermind Letter head, two Identity Card Numbers allegedly for the same farmer Chelangat Betty Kutuny were used, the batch numbers in the same Payrolls were different, the Payrolls were not carbonated, the cash balances in the Payrolls could not balance with the total amounts and that the last coloum in the genuine Payroll indicated TBR whereas in the suspected Payrolls it appeared as TFR and that the perforations on the suspected Payrolls were irregular.

14. PW2 carried out an audit on the suspected transactions. He found out that the three suspected Payrolls did not appear in the delivery note from Mastermind dated 29/01/2009. That delivery note was received on 29/01/2009 and it forwarded only two payrolls with serial number 23000025 for Kshs. 218,110/= and serial number 23000026 for Kshs. 27,830/=. The delivery note was produced as Exhibit 5. PW2 confirmed that all the three suspected Payrolls were paid by the Appellant who was in-charge of Counter 3. He also found out that the Appellant had on 10/02/2009 and 19/02/2009 borrowed money to the tune of Kshs. 574,000/= from Counter Nos. 1 and 2. PW2 also confirmed the discrepancies which were pointed out by PW1 and produced the Audit Report as Exhibit 10.

15. PW6 also confirmed the discrepancies on the suspected Payrolls and the Buying Receipts and confirmed that the suspected Payrolls did not originate from Mastermind and that Mastermind did not forward any cheque in favour of the said Chelangat Betty Kutuny who according to their records was not one of their contracted farmers. He also confirmed that Mastermind did not lose any money in the questioned transactions.

16. PW7 who was the investigating officer also dealt with the suspected Payrolls and the Buying Receipts. He took samples of the handwriting and signature of the Appellant and forwarded the same to the Document Examiner together with the suspected Payrolls under an Exhibit Memo Form. PW7 wanted the Document Examiner to verify whether the handwriting and signature on the suspected Payrolls were similar to the samples of the handwriting and signature of the Appellant. The Examiner prepared the Report which was produced in evidence by PW7. The Report confirmed that both the handwrittings and signatures on the suspected Payrolls and the Buying Receipts were similar to the samples of the handwriting and signature of the Appellant. The Delivery Notes, samples, the suspected Payrolls, the genuine Payrolls, the Exhibit Memo Form, the Document Examiner's Report were all produced as exhibits.

17. From the evidence of PW1, PW2, PW6 and PW7 there was no doubt that the suspected Payrolls did not enamate from Mastermind but from within Kehancha Post Office. The examination by the Document Examiner revealed how the suspected Payrolls and the Buying Receipts were acted upon. The hand which wrote the name and identity card numbers of the alleged Payee was the same hand that indicated that the amount in the suspected Payrolls and Buying Receipts had been paid out and on which date. The same hand also wrote the name and identity card of the alleged Payee and also signed the Buying Receipts confirming that the alleged Payee had received the sums. It was confirmed that the hand which did all that was that of the Appellant. It was therefore proved beyond any peradventure that it was the Appellant who was firmly behind the questioned transactions.

18. Having so found, the question which follows is whether the Corporation lost any money. Mastermind confirmed that it did not lose any money as it used to forward its payrolls with cheques of the corresponding amounts. Further, none of its contracted farmers had complained. The money which the Appellant paid himself was hence from the Corporation and that is explained by the Appellant's borrowings from his fellow Counter Officers.

19. On whether the Appellant uttered a false document with intent to defraud, PW3 testified that her role was to verify all receipts and payment documents at the Kehancha Post Office. That, she received the suspected Payrolls and the Buying Receipts from the Appellant and verified that all was well. PW3 then forwarded the documents to the Post Master who noted the anomalies and notified her. PW3 testified that initially it was not easy for her to notice that the suspected Payrolls and the Buying Receipts were not from Mastermind until when the Post Master alerted her when she also confirmed several anomalies. It is clear that the documents used in the questioned transactions were false.

20. It was therefore the testimony of PW3 that she received the documents relating to the questioned transactions from the Appellant. The Appellant hence uttered the false documents to PW3 with intent to defraud.

21. I now come to the finding that the two counts against the Appellant were rightly proved and that the Appellant was properly found guilty as charged and convicted. There is cogent evidence on the Appellant's outright involvement in committing the offences. The appeal against the conviction is hereby disallowed.

22. On sentence, the Court in the case of **Wanjema v. Republic (1971) EA 493** laid down the general principles upon which the first appellate Court may act upon in dealing with an appeal on sentence. An appellate Court can only interfere with the sentence imposed by the trial Court if it is satisfied that in arriving at the sentence the trial Court did not consider a relevant fact or that it took into account an irrelevant factor or that in all the circumstances of the case, the sentence is harsh and excessive. However, the appellate Court must not lose sight of the fact that in sentencing, the trial Court exercised discretion and if the discretion is exercised judicially and not capriciously, the appellate Court should be slow to interfere with that discretion.

23. I have noted from the sentencing proceedings that apart receiving mitigations the court did not request for any other background information for the Appellant. As the Appellant was a first offender, the circumstances of this case called for the court to have enquired on his background prior to sentencing. I will therefore respectfully set-aside the sentence and call for a Pre-Sentence Report for the Appellant prior to sentencing.

24. The upshot is that the following final orders do hereby issue: -

**(a) The appeal against the convictions is hereby dismissed.**

**(b) The sentence is hereby set-aside to await a Pre-Sentence Report and in the meantime the Appellant shall be held in custody.**

Orders accordingly.

**DELIVERED, DATED and SIGNED at MIGORI this 12<sup>th</sup> day of March 2019.**

**A. C. MRIMA**

**JUDGE**

**Judgment delivered in open Court and in the presence of: -**

**Mr. Anyona**, Counsel instructed by the firm of Messrs. Asati, Anyona & Company Advocates for the Appellant.

**Mr. Kimanthi**, Senior Principal Prosecution Counsel instructed by the Office of the Director of Public Prosecutions for the Respondent.

**Miss Nyauke** – Court Assistant