



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 29 OF 2016**

**SAMUEL GITACHU NGUBIA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

***(An appeal from the Judgment of the Chief Magistrate, Embu)***

**J U D G M E N T**

**A. Introduction**

1. The appellant was convicted jointly with one John Kingori Kiragu of eleven (11) counts of stealing by servant contrary to **Section 281 of the Penal Code** and sentenced to two (2) years' imprisonment on each count. The particulars of the charge were that on diverse months between May 2010 and March 2011 at Mt. Kenya Store Limited, being an accountant and clerk jointly stole various amounts as indicated in the charges totalling to Kshs. 6,795,599/=, property of Mt. Kenya Tobacco Stores Limited that came to their possession by virtue of their employment.

2. The appellant preferred this appeal and filed a petition of appeal on the 15<sup>th</sup> August 2016 seeking to quash the conviction and set aside the sentence of the Chief Magistrate, Embu. The appeal is grounded on 17 grounds that can be summarised as follows: -

***a) The Trial Magistrate erred in law and in fact by convicting the appellant whereas the prosecution failed to prove their case beyond reasonable doubt.***

***b) The Trial Magistrate erred in law and fact by failing to consider the appellant's defence.***

3. The parties disposed this appeal by way of written submissions.

**B. Appellant's Submissions**

4. The appellant submitted that the prosecution failed to prove the offence of theft by servant contrary to Section 281 of the Penal Code and that the prosecution failed to prove that he was an employee of Mt. Kenya Store Limited whereas the evidence adduced showed that the appellant was employed as an accountant for Mt. Kenya Business Machine.

5. The appellant further submitted that the prosecution failed to prove theft as is evidenced by the testimony of PW1, which was to the effect that the appellant merely reconciled accounts. The appellant further submitted that the prosecution failed to prove that the bank reconciliations presented by the appellant to the complainant were false and further that it was the appellant who in finding the anomalies in the accounts, informed the person in charge.

6. The appellant further submitted that the appellant was charged based solely on circumstantial evidence contrary to the holding by the Court of Appeal in the case of **Ndurya v R (2008) KLR 135** that before convicting someone on the basis of circumstantial evidence, the court has to be sure there are no other co-existing circumstances which would weaken or destroy the inference of guilt.

**C. Respondent's Submissions**

7. The prosecution submitted that the appellant was an employee of the complainant as there was an oral contract between them. The prosecution based his evidence on **Section 8 & 9 of the Employment Act**, which provide for the recognition of oral contracts of employment as well as validate the existence of a contract for employment where there is no written contract but where an employee continuously works for three months.

8. The prosecution further submitted that the offence of stealing was overwhelmingly proved as the evidence of the prosecution witnesses clearly demonstrated how the appellant and his co-accused conspired to defraud PW1 before the fraud was unearthed. The prosecution further submits that there were no contradictions in the evidence on record.

#### **D. Analysis of Law**

9. The duty of the first appellate court is to re-evaluate the evidence and reach come to an independent conclusion as to whether or not to uphold the convictions and sentences. This task must have regard to the fact that this court did not see or hear the witnesses (see **Okeno v Republic [1973] EA 32**).

10. I find that the issue in this appeal is whether the appellant's conviction for the offences of theft by servant was based on cogent evidence.

11. Stealing is defined in the Black's Law dictionary 8th Edition as:

***“To take (personal property) illegally with the intent to keep it unlawfully”.***

12. The definition of stealing as found in Section 268 of the Penal Code Cap. 63 is:

***“A person who fraudulently and without claim of right takes anything capable of being stolen on fraudulent converts to use of any person, other than the general or special owner thereof any property, is said to steal that thing or property.”***

13. Section 281 of the Penal Code describes the offence of stealing by servant in the following terms: -

***“Stealing by clerks and servants***

***If the offender is a clerk or servant, and the thing stolen is the property of his employer, or came into the possession of the offender on account of his employer, he is liable to imprisonment for seven years.”***

14. Briefly, the evidence on record is that the appellant conspired with his co-accused, stole various amounts of money from the complainant, Mt. Kenya Tobacco Stores, totalling to Kshs. 6,795,599/= over a period of several months. Further, that it was stated the appellant in conjunction with his co-accused, who used to deposit the funds received on behalf of the complainant's company to the Barclays bank account, did this through fraudulent reconciliation of the complainant's accounting records and banking slips from the said account to the Consolidated Bank account.

15. It was PW1's uncontroverted testimony that the appellant had confessed to him that approximately Kshs. 6,000,000/= was missing and that he was willing to refund the same. It is the prosecution's case that the appellant received a total amount of Kshs. 1,200,000/= from his co-accused between 1/06/2010 and 26/02/2011 which monies the appellant and co-accused failed to account for to their employer.

16. The respondent's evidence was that the appellant received the monies in the course of his employment totalling to Kshs. 6,805,599/= which was to be banked in the bank account of the company. Upon reconciliation, this money was not found in the bank though received by the appellant's co-accused.

17. It was also established through evidence that some named customers in various places where there were no Consolidated Bank would bank cash for cigarettes in the beer account at Barclays Bank and submit banking slips to the complainant's office. The appellant was authorised to withdraw the beer money and put it in the tobacco account in the Consolidated Bank according to PW1. The banking slips were acknowledged by issuing a paid-for stock receipt.

18. The loss of the funds was confirmed by PW5 the auditor in his report. This was before the matter was reported to the police. Upon investigations, it was established that the appellant had received Kshs. 1,236,468/= through mpesa transactions sent by his co-accused. It was sent to the appellant's mobile line 0722-359258 or from phone number 0720-993624 of identity card number 22545287 belong to his co-accused.

19. According to PW2, the reaction of the appellant at first was to deny but he later made and offer to refund the money stolen which undertaking he did not fulfil resulting in his being arraigned in court.

20. The appellant has denied being an employee of the complainant. He insists he never dealt with Mt. Kenya Tobacco Stores Account. PW1 testified that he had an oral contract with the appellant to be his accountant for all his businesses.

21. All the prosecution witnesses testified that the appellant was employed by the PW1 as an accountant. Indeed, in his pleadings the appellant cites as a defence that his work was merely to reconcile various accounts for which corroborates the respondent's evidence on employment.

22. Section 8 of the Employment Act provides for the existence of oral contracts, it states;

***The provisions of this Act shall apply to oral and written contracts.***

23. There is no requirement that employment contracts must be in writing. The evidence of PW1, PW2, PW3, PW4 and PW7 was sufficient that the appellant was the employee of PW1 as the accountant in charge.
24. As to whether there was theft, I do note that the appellant, who was supposed to reconcile the complainant's accounts, conspired with his co-accused to put up a front that the complainant's bank books were in order. The appellant confession that there was Kshs. 6,000,000/= missing from the complainant's account was to be confirmed by the investigations.
25. It is inconceivable that the appellant did not notice the money was missing from the complainant's account considering his role of reconciling all the business accounts for PW1. PW1 said the appellant though based in the Embu office had access through the computer of all the business accounts which he was supposed to reconcile. In that position, the appellant ought to have been the first person to note the loss of funds and report to PW1 if he was not responsible for the loss.
26. I have carefully evaluated the evidence and the defence of the appellant. It is my considered opinion that the trial court also considered the defence of the appellant and found it wanting in view of the evidence of the respondent. The claim that the appellant and his co-accused had a miraa business was not credible in the circumstances.
27. The respondent established through PW5 that PW1's business lost money between June 2010 and March 2011. This is the period the appellant received Kshs.1,200,000/= from his co-accused. There was no plausible explanation offered by the appellant on the money transfers between the two employees of PW1.
28. The co-accused was the cashier in the Nyeri office who received money and did banking from customers when they paid for goods. Instead of banking the money, he sent it to the appellant which must have been a conspiracy to steal from PW1.
29. I reach a conclusion that the respondent adduced overwhelming evidence to prove the offence in the eleven (11) counts of stealing by servant against the appellant beyond any reasonable doubt.
30. It is my finding that the convictions were based on cogent evidence and are hereby upheld,
31. The maximum sentence under Section 281 of the Penal Code is seven (7) years imprisonment.
32. The appellant was sentenced to serve two (2) years imprisonment on each count. The sentence was within the law and lenient by any standards.
33. The sentences imposed on counts 1 – 11 are hereby upheld.
34. I find no merit in this appeal and it is hereby dismissed.
35. It is hereby so ordered.

**DELIVERED, SIGNED AND DATED AT EMBU THIS 20<sup>TH</sup> DAY OF MAY 2019.**

**F. MUCHEMI**

**JUDGE**

**In the presence of: -**

**Ms. Mureithi for Mugambi for Appellant**

**Ms. Mati for the Respondent**