



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 120 OF 2015

CAROLYNE AKEYO OKWEMBA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An Appeal arising out of the conviction and sentence of Hon. L. Mbugua (CM) delivered on 20th June 2015 in Nairobi Criminal Case No.1898 of 2010)

JUDGMENT

The Appellant, Carolyne Akeyo Okwemba was charged with four counts of the offence of **stealing by servant** contrary to **Section 281 of the Penal Code**. The particulars of the offence were that on 16th July 2010 at Commercial Bank of Africa Upper Hill Branch, Commercial Bank of Africa Wabera Street Branch, Commercial Bank of Africa Mama Ngina Street Branch and Standard Chartered Bank Moi Avenue Branch respectively within Nairobi County, the Appellant, being an employee of The 410 Bridge International, stole Kshs.6,273,450/-, Kshs.670,200/-, Kshs.4,550,500/- and Kshs.2,012,000/- respectively which came into her possession by virtue of her employment. When the Appellant was arraigned before the trial magistrate's court, she pleaded not guilty to the charges. After full trial, she was convicted as charged on all four counts. She was sentenced to serve two (2) years imprisonment in each count. The sentences were to run concurrently. The Appellant was aggrieved by her conviction and sentence. She filed an appeal to this court.

In her petition for appeal, the Appellant raised several grounds of appeal challenging her conviction and sentence. She faulted the trial court for failing to acknowledge that the prosecution witnesses conceded that it was normal practice at the Appellant's place of employment to leave large sums of money in the office. She was aggrieved by her conviction which was based on circumstantial evidence that could be explained by other hypothesis other than the Appellant's guilt. She was further aggrieved that the trial court shifted the burden of proof from the prosecution to the defence. She was of the view that the trial court failed to consider her explanation with respect to her absence from the office in arriving at its decision. She complained that the trial magistrate did not exhaustively consider her defence and submission in making its determination. In the premises, the Appellant urged this court to allow her appeal, quash her conviction and set aside the sentence that was imposed on her.

During the hearing of the appeal, both parties filed their respective written submission. In addition, this court heard oral submissions from Mr. Ongoya for the Appellant and Ms. Sigei for the State. Mr. Ongoya submitted that the trial court shifted the burden of proof from the prosecution to the defence in requiring the Appellant to state where she kept the money. He asserted that the prosecution witnesses told the court that it was not unusual for money to be kept at the office. He stated that the trial court failed to acknowledge that there existed a grudge between prosecution witnesses and the Appellant. He was of the view that their testimonies were therefore incredible. He maintained that the prosecution failed to establish its case to the required standard of proof beyond any reasonable doubt. In the premises therefore, he urged this court to allow the Appellant's appeal.

Ms. Sigei for the State opposed the appeal. She asserted that the Appellant was convicted based on circumstantial evidence. She stated that PW1 noticed that some money was missing. All the prosecution witnesses testified that the Appellant was a signatory to the company's bank accounts and therefore had authority to access the funds. She submitted that the prosecution established that the Appellant prepared the cheques and collected the money from the banks. She averred that after the money was discovered missing, the Appellant disappeared. Her conduct therefore raised suspicion. Learned State Counsel submitted that the evidence of the document examiner established that the cheques were all signed by the Appellant. She observed that the prosecution proved its case against the Appellant to the required standard of proof beyond any reasonable doubt. She therefore urged this court to dismiss the Appellant's appeal.

The facts of the case according to the prosecution are as follows: PW1, Andrew Muiruri, was the Country Director of The 410 Bridge International, a Non-Governmental Organization. He was in charge of the general operations of the organization's projects in Kenya. The organization had four bank accounts; three at Commercial Bank of Africa and one at Standard Chartered Bank. The signatories to the bank accounts were himself, the Appellant, Moses Mwangi (PW3) and Mr. Kurt Kandler (PW2). He stated that any two signatories were sufficient to sign a cheque if money needed to be withdrawn from the bank accounts. If a department needed funds, the department was required to

raise an invoice and forward it to the Finance Department. The Finance Department then prepared a cheque. He testified that the Appellant was employed at the Finance Department.

On 20th July 2010, PW1 received a call from a Commercial Bank of Africa bank manager. The manager informed him that the organization had issued cheques which could not be honoured due to insufficient of funds in the account. PW1 immediately contacted PW4, Lucy Odhiambo who was the Appellant's assistant. PW4 informed him that they had enough funds in the bank account. The bank manager informed PW1 that money had been withdrawn from the organization's bank accounts on 16th July 2010. PW1 and PW4 went to the bank. The manager showed them three cheques which had been used to withdraw funds from the three bank accounts. The said cheques were signed by two signatories; the Appellant and PW3. PW1 asked PW3 to join them at the bank. The Appellant was not at the office. PW3 informed him that he signed four blank cheques on account of vouchers that had been attached to them by the Appellant. The cheques were to be forwarded to PW1 for further action. PW1 immediately reported the matter to the police. The Appellant was nowhere to be found. Her phones had been switched off. The Appellant was later tracked and arrested in Bungoma County.

PW2, Kurt Kandler, was the Executive Director of The 410 Bridge International. He told the court that the Appellant was their employee. PW3, Moses Mwangi was an employee of the organization stationed at the Logistics Department. He was also one of the signatories to the organization's bank accounts. He stated that on 15th July 2010, the Appellant requested him to sign four blank cheques in respect of payment vouchers had been attached. The Appellant informed him that she would forward the cheques to PW1 who was to authorize the same and countersign the cheques. PW3 identified the four cheques together with the payment vouchers in court. PW1 called him on 20th July 2010 and informed him of suspicious cash withdrawals from the organization's bank accounts. PW3 informed him that he had countersigned the said cheques on 15th July 2010. He however noticed that the cheques had inflated amounts as compared to the payment vouchers that had been attached to them.

PW4 told the court that she was present when the Appellant asked PW3 to sign the blank cheques on 15th July 2010 at the office. She stated that she prepared the payment vouchers that were attached on the cheques produced before court. The amounts on the payment vouchers were Kshs.100,000/-, Kshs.6,072/-, USD 77,392.47 and Kshs.165,400/-. PW4 told the court that after PW1 noticed that money was missing from the organization's bank accounts, he reported the matter to the police. She testified that PW1 later instructed her to prepare the payment vouchers produced in evidence and back date them to 15th July 2010 since the police needed vouchers to support the cheques produced in evidence. PW4 testified that herself, the Appellant or any signatory could collect money from the bank after the same was approved. She said that they had a safe at the office where the withdrawn money was kept.

PW5, Gerald Nyamaye was a Cashier at Standard Chartered Bank, Moi Avenue Branch. He told the court that the Appellant visited the bank on 16th July 2010. She presented to him a cheque of Kshs.2,012,000/-. It was for a cash payment. The cheque had been signed by the required minimum signatories. It was to be drawn against the account of The 410 Bridge International. He testified that the said cash was withdrawn by the Appellant.

PW6, Wendy Syombua was a Logistics Officer at The 410 Bridge International. Her duties included receiving invoices and drafting requisitions for the same. She was required to forward the requisitions to the Finance Department. After the Finance Department obtains funds to pay the invoices, the money was forwarded to her. She was tasked with paying out the money to the respective end users. She kept a record of all payments that she made. On 16th July 2010 at about 4.30 pm, the Appellant gave her Kshs.188,075/- in respect of four requisitions that she drafted. The requisitions were for Kshs.33,200/-, Kshs.45,975/-, Kshs.48,600/- and Kshs.60,300/-. She identified the same in court.

PW7, Stanlaus Bitihi worked at the Security Department at Commercial Bank of Africa in Upper Hill. On 21st July 2010, he was informed of fraudulent withdrawals from The 410 Bridge International accounts. The account had four signatories. However, a minimum of two signatories were required for a withdrawal to be done. The Appellant was one of the signatories. The Appellant presented three cheques at three different branches on 15th July 2010. The cheques were all payable to the Appellant. A cheque for Kshs.4,550,500/- was presented at the International House Branch, a cheque for USD.77,450 was received at the Upperhill Branch and a cheque of Kshs.670,200/- was presented at Wabera Street Branch. PW7 identified the said cheques in court. PW9, Martin Wanjohi, a teller at Commercial Bank of Africa Wabera Branch confirmed that the Appellant presented to him a cheque for Kshs.670,200/- on 15th July 2010. The conditions requiring the cheque to be paid out were met. He paid out the said amount to the Appellant. PW10, Marica Mwendu, working at Commercial Bank of Africa Upperhill branch also confirmed to the court that the Appellant presented to her a cheque of USD.77,450. The amount was paid out to her. She was an authorized signatory of the account.

PW8, PC Michael Cherotich was the arresting officer. He was based at Bungoma. He received instructions from DCIO Chief Inspector Julius Mbatia to arrest a suspect who was alleged to have stolen money from her employer. He was provided with a photograph of the suspect. The suspect was the Appellant. He tracked the Appellant and arrested her at her father-in-law's homestead in Bungoma. She was afterwards transferred to Nairobi. PW11, CIP Alex Mwangera was a document examiner based at the CID headquarters in Nairobi. On 18th October 2012, he received various documents including cheques that were alleged to have been signed by the Appellant. He was however not provided with the specimen signature or handwriting of the suspect so as to make a comparison. After his examination, he concluded that the signatures on the documents were made by the same author.

This case was investigated by Inspector PW12, Jeffrey Kinya attached at the CID Headquarters in Nairobi. He stated that on 21st July 2010, PW1 reported that one of his employees had illegally withdrawn money from the company's bank accounts. The employee could not be traced. The said employee was the Appellant. He recorded statements from witnesses and obtained bank records for the said accounts. From his investigations, he confirmed that the Appellant was an employee of The 410 Bridge International. She was an authorized signatory of the organization's bank accounts. She presented four cheques which were drawn against the organization's bank accounts on 15th July 2010. The first cheque was presented by the Appellant at Commercial Bank of Africa International Life House Branch at 10.42 a.m. The second cheque was withdrawn at Standard Chartered Bank at 12.46 pm. The Appellant cashed in the third cheque at Commercial Bank of Africa Wabera Branch at 1.20 p.m. The final cheque was presented at Commercial Bank of Africa Upperhill Branch at 2.58 p.m. She afterwards went to the office and gave PW6 Ksh.188,075/-. The Appellant then disappeared. She was arrested four months later in Bungoma County.

The Appellant was put on her defence. She stated that she was employed as a Finance Business Administrator at The 410 Bridge International in 2007. The signatories to the organization's bank accounts were PW1, PW2, PW3 and herself. PW4 was listed as an Agent to the account. A minimum of two signatories were required to transact the account. She stated that the months of July and August were busy for the organization as they received teams and partner organizations from abroad, which came to the country to check on various projects the organization was involved in. On 13th July 2010, she had a meeting with her superior, PW1. They discussed about funds required to facilitate the hosting of the various visitors from USA. PW1 informed her that he would be in the office on 15th July 2010 to ensure the required funds were obtained. On 15th July 2010, PW1 came to the office, albeit briefly. He informed the Appellant to liaise with PW3 as a second signatory for the required funds.

Before a cheque was authorized, one was required to prepare payment vouchers for the required funds. She proceeded to prepare eight (8) payment vouchers. The vouchers were attached to cheques of amounts USD 77,450, Ksh.670,200/- (Cheque No.000846), Ksh.4,550,500/- (cheque No.00411), Ksh.2,012,000/- (cheque No.00277), Ksh.48,600/- (cheque No.000401), Ksh.60,300/- (cheque No.000401), Ksh.45,975/- (cheque No.000402) and lastly Ksh.33,200/- (cheque No.000404). She stated that the amount on the payment vouchers tallied with that stated on the cheques. The cheques were countersigned by PW3. She testified that the cheque leaves were presented by the prosecution as exhibits. However the payment vouchers presented by the prosecution were not the same vouchers she had prepared. She stated that the name of the person who prepared the vouchers appeared on the vouchers. She testified that she did not know anything about the vouchers presented by PW4. The same were not prepared or signed by her.

On 16th July 2015, the Appellant proceeded to the bank with the eight (8) cheque leaves to withdraw the funds. She told the court that the Commercial Bank of Africa Branch where the company's accounts were based could not avail her with all the funds as the total sum was huge. They referred her to various branches to withdraw the cash. When she got back to the office, she only found PW6. The rest of the staff had left for the day. She called PW1 and asked him for instructions on where to keep the money. PW1 told her to keep the funds in his office. She gave PW6 some of the cash with respect to requisitions that PW6 had prepared. She kept the rest of the money in PW1's office as instructed. It was not unusual to keep cash at the office. She locked up the office and left. She was the last to leave the office.

On Monday, 19th July 2010 she left the house and was on her way to the office. Before she got to the office, her househelp called her and informed her that her son was unwell. She rushed back home. She called PW1 and informed him of the situation. PW1 told her that she could take a few days off to tend her sick child. He however informed her that she could only take a maximum of 3 days. After that, the additional days would be treated as unpaid leave. She travelled upcountry to her mother in-law's home. On 3rd November 2010, three police officers came to her mother in-law's homestead and arrested her. The Appellant told the court that there existed a grudge between her and the country director (PW1) since she shed light on misappropriation of funds by PW1. She maintained that she was framed of the present offences. She denied stealing any funds from her employer.

As the first appellate court, it is the duty of this court to subject the evidence adduced before the trial court to fresh scrutiny and re-evaluation, before reaching its own independent determination whether or not to uphold the conviction and sentence of the Appellant. In doing so, this court is required to bear in mind that it neither saw nor heard the witnesses as they testified and cannot therefore make a comment regarding the demeanour of the witnesses (**See Okeno vs Republic [1972] EA 32**). In the present appeal, the issue for determination is whether the prosecution established the charges of **stealing by servant** contrary to **Section 281** of the **Penal Code** to the required standard of proof beyond any reasonable doubt. This court has re-evaluated the evidence adduced before the trial court. It has also considered the rival submission made by the parties to this appeal.

The undisputed facts of the case are that the Appellant was an employee of The 410 Bridge International. She was employed as a Finance Business Administrator. The Appellant was also one of the signatories of the organization's bank accounts. It is also not disputed that the Appellant withdrew the funds as particularized in the charge sheet. Evidence adduced by the prosecution established that the Appellant withdrew funds from three (3) different branches of Commercial Bank of Africa and from Standard Chartered Bank Moi Avenue Branch. The Appellant does not deny that she withdrew the said funds. The disputed facts are whether the Appellant had instructions to withdraw the said amount of money and whether she stored the same at the office after withdrawal.

Evidence adduced by the prosecution indicated that before a cheque was issued, one was required to forward the invoice to the Finance Department. Finance Department would then prepare a payment voucher. They would afterwards prepare a cheque which required a minimum of two signatories. The prosecution stated that the amount of money withdrawn by the Appellant on 16th July 2010 did not match the amounts indicated on the payment vouchers. The amounts withdrawn by the Appellant were inflated. However, evidence by PW4 established that the payment vouchers produced in court were not genuine. PW4 told the court that she prepared the payments vouchers after the Appellant had already withdrawn the money and the theft had been reported. She testified that PW1 instructed her to prepare the vouchers and backdate them to 15th July 2010 since the police needed vouchers to support the cheques produced in evidence. The payment vouchers were therefore not genuine. As such, this court is not in a position to determine whether the amounts withdrawn by the Appellant were authorized or not on the basis of payment voucher raised. The prosecution failed to prove that the amount of money withdrawn by the Appellant was in excess of what she was instructed to withdraw.

The next issue for determination is whether the Appellant deposited the money at the office after she withdrew the same. The trial court relied on circumstantial evidence in arriving at its decision to convict the Appellant of the present offences. In **Abanga alias Onyango v. Republic Cr. Appeal No.32 of 1990 (unreported)**, the Court of Appeal set out the principles to apply in order to determine whether circumstantial evidence adduced in a case is sufficient to sustain a conviction. It stated thus:

“It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests: (i) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established, (ii) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused; (iii) the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.”

In the present appeal, it is the prosecution's case that after withdrawing the money, the Appellant went back to the office. She gave PW6 Ksh.188,075/- which she had prepared in a requisition form. The Appellant however stole the rest of the money and disappeared. The Appellant withdrew the money on 16th July 2010. This was a Friday. The Appellant failed to show up at the office on Monday (19th July 2010). She disappeared for about four (4) months before she was arrested on 3rd November 2010 at her father-in-law's house in Bungoma. The investigating officer told the court that they were not able to trace the Appellant in the interim period for questioning. They were forced to put up the Appellant's photograph and particulars in print media as a wanted person. The investigating officer also obtained a warrant of arrest against the Appellant. They were finally able to trace her in Bungoma County where she was arrested.

The Appellant in her defence claims that after she withdrew the funds, she went back to the office. She contacted her superior PW1 who instructed her to keep the funds in his office. He also instructed her to give PW6 Ksh.188,075/- which she had put in a requisition form. She denied leaving the office with any money. She told the court that she kept the funds in PW1's office as she had instructed. She stated that it was not unusual for such an amount of funds to be kept at the office. The Appellant told the court that on her way to work on 19th July 2010, she got a phone call from her househelp who informed her that her son was unwell. She called PW1 and asked for a few days off to attend to her sick child. She took the child to her mother-in-law's house in Bungoma. She testified that on her way to Bungoma, she lost her bag and phone. That was the reason why she was unreachable.

This court agrees with the trial court that the Appellant's guilt was established by circumstantial evidence that was adduced by the prosecution against her. The prosecution did establish that the Appellant withdrew the funds. The cash was therefore in her possession. The Appellant was the last person to leave the office on the material day. The fact that the Appellant disappeared immediately after she withdrew the funds is a pointer to her criminal intent. The Appellant claims that she took a few days off to attend to her sick child. She however did not avail any medical documents in court to prove that her child was unwell for the stated period of time. She disappeared for four (4) months and failed to inform her employer of her whereabouts. The police had to obtain a warrant of arrest and put up the Appellant's photograph and particulars in print media as a wanted person since they were not able to trace her. If the Appellant was genuinely taking care of her son, then she would have no problem staying in contact with her employer.

There is clear evidence that there was an opportunity for the Appellant to commit the offence since she withdrew the said funds and was last seen on the same day the funds were withdrawn. She was the last person to leave the office. She disappeared immediately after commission of the offence. Her conduct is not consistent with that of an innocent person. The Court of Appeal in **Joseph Malowa vs Republic [1980] eKLR** citing the Ugandan case of **Terikabi vs Uganda [1975] EA 60** held that the conduct of an accused person escaping from the scene of crime was indicative of his guilt. **Section 119** of the **Evidence Act** provides that a court may presume the existence of any fact which it thinks likely to have happened having regard to, among other things, the common cause of natural events, human conduct in their relation to the facts of a particular case. In the present appeal, the conduct of the Appellant was suspicious and from the totality of the evidence on record, this court is convinced that the trial court was not misdirected in convicting the Appellant.

In the premises therefore, this court holds that the prosecution did prove to the required standard of proof the four (4) counts of **theft by servant** contrary to **Section 281** of the **Penal Code**. The appeal against conviction lacks merit and is hereby dismissed. As regard sentence, it was clear that the sentence imposed by the trial court fitted the crime. The complainant lost a colossal sum of approximately Ksh.13 million which has not been recovered. The Appellant has not made an offer to refund the said sum. Her appeal against sentence is similarly dismissed. It is so ordered.

DATED AT NAIROBI THIS 12TH DAY OF JUNE 2019

L. KIMARU

JUDGE