REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYAMIRA

CRIMINAL APPEAL NO. 42 OF 2018

PETER NYAKONI.....APPELLANT

=VRS=

REPUBLIC.....RESPONDENT

[Being an Appeal from the Conviction and Sentence of Hon. B. M. Kimtai - SRM Keroka dated the 18th day of October 2018 in the Keroka Senior Resident Magistrate's Court Criminal Case No. 410 of 2015]

JUDGEMENT

The appellant alongside two others was charged with the offence of Stealing contrary to Section 268 (1) as read with Section 275 of the Penal Code.

The particulars of the charge are that on the diverse dates between 5th September, 2013 and 28th February 2015 at Borabu Sub-county within Nyamira County, jointly stole cash Kshs. 3,287,680/= the property of Borabu Farmers Sacco.

Pw1 in his evidence informed the court that the appellant was the ICT Manager at Vision Point Sacco which was formerly known as Borabu Farmers Sacco. That an audit was conducted and it was noted that the appellant had transferred funds from M-pesa to himself to a tune of Kshs. 3,287,680/=. The official contact that the appellant had given at his place of work was 0728691326 and this is the line that he used to transfer funds to himself. He further told the court that the appellant being the ICT Manager would give out the PIN for agent number to Pw2. Pw2 would then give a summary of transactions she had done and the appellant would generate a report from Safaricom and give it to the accountant for reconciliation. They realized that the appellant would edit the report generated from Safaricom and delete the transactions that would include transfer of funds to his official contact. He further informed the court that only the appellant had a password to the computer ICT programs and he was the only person who could transfer the monies to the other computer outlets. He further told the court that money was lost from 5th September 2013 to 28th February 2015 and that the appellant used to do transactions after 5pm which was the close of business. He did not authorize these transactions that led to the loss of the money.

Pw2 informed the court that she reported directly to the appellant. At the close of business every day, she would hand over the mobile phone that she used to carry out the M-pesa transactions to the appellant. The appellant is the one who issued her with the password/PIN to the mobile phone and she was instructed by the appellant not to change the same. She further told the court that at the end of each working day, she would summarise all transactions and record them in the float movement summary schedule (PEXH 10) and hand over the same to the appellant and a computer generated M-pesa transaction for the day,

Pw3 informed the court that he conducted an audit on all the M-pesa tills and discovered that millions of shillings had been lost from till No. 421003 from Nyansiongo head office. He used the computer generated M-pesa summary, M-pesa agent book and M-pesa float summary to audit the M-pesa till No 421003 from Nyansiongo Office Branch. The said till was being manned by the appellant. He noted that money had been siphoned out through the till amounting to Kshs. 3,287,862/=. He corroborated Pw1 and Pw2 by stating that only the appellant knew the PIN numbers for all the M-pesa mobile phones. He further stated that all the transactions done after 5pm were not authorized by Pw1 and that the transactions that were done after 5pm that were authorized by Pw1 were not included as part of the lost money.

Pw5 confirmed that indeed money was lost at Vision Point Sacco after conducting an audit. He noted huge differences between Vision Point Sacco documents and Safaricom documents that is, there were differences between the total float available and the actual float requested. He confirmed that money that the Sacco lost fraudulently was Kshs 3,287,860/= and produced the audit report as PEXH1. During cross-examination, he clarified that during audit, they noted that the bulk of the money was sent to the appellant's official mobile phone contact, which was registered in the name of the appellant's wife, who had been charged as accused two. He also stated that it was the appellant who controlled the M-pesa system and he was therefore capable of manipulating the accounts.

In his defense, the appellant admitted that he indeed was employed at Vision Point Sacco and that he was in charge of the ICT Department.

He admitted that the contact that he had given at the time of employment did indeed belong to his wife who had been charged as accused two. He admitted that he used the said mobile phone number for all transactions he engaged in within the company and never changed it throughout the period of engagement. This was his known official contact and he was therefore in control of that line at any given time. He claimed that the transactions he had done after 5pm were authorized by Pw1, yet Pw1 in his evidence denied authorizing those transactions. His defence was a mere afterthought and therefore not sufficient to rebut the prosecution case.

After evaluating the evidence by both sides the trial magistrate found that out of the Kshs. 3,287,680/= in the charge sheet the prosecution had proved beyond reasonable doubt that the appellant had stolen a sum of Kshs. 705,400/= from the complainant. The appellant was convicted and sentenced to a fine of Kshs. 300,000/= or three (3) years imprisonment. The appellant was aggrieved by the conviction and sentence and therefore preferred this appeal. The appeal is premised on grounds that: -

> **"1. The learned trial magistrate erred in fact and in law in finding and/or holding that the Appellant was guilty of the offences charged when the prosecution had not established guilt beyond the required standard of proof.**
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> **2. The learned trial magistrate erred in law and fact in analysing and/or evaluating the Respondent's evidence separately, forming a considered opinion/impression thereof and then laying the burden of disproving and/or dispelling the premediated impression upon the Appellant contrary to the established principle in criminal law, which casts the burden of proof upon the Respondent.**
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> **3. The Trial Magistrate Convicted the Appellant on entirely wrongly principles and conclusions without addressing himself on whether or not the ingredients of the offence the Appellant was accused of had been Proven beyond reasonable doubt.**
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> **4. The learned trial magistrate erred in law and fact in making a finding that the prosecution had established guilt against the Appellant to the required standard of beyond any reasonable doubt when the Respondent's evidence was riddled with massive contradictions that could not sustain a conviction.**
>
> **5. The sentence meted against the Appellant was very harsh and excessive in the circumstances."**

An appeal is in the nature of a retrial and as the first appellate court I have reconsidered and evaluated the evidence in the trial court so as to arrive at my own independent conclusion. I have done so bearing in mind that I did not see or hear the witnesses giving evidence and made provision for that **(see Okeno Vs Republic [1972] EA 22)**. I have also considered the written submissions by both sides carefully.

Section 268 (i) of the Penal Code defines the offence of stealing as follows: -

> **"268 (1) A person who fraudulently and without claim of right takes anything capable of being stolen, or fraudulently converts to the use of any person, other than the general or special owner thereof, any property, is said to steal that thing or property."**

The issue for determination therefore is whether the appellant fraudulently and without colour of right took money or fraudulently converted money belonging to the complainant to the use of any other person. In this case there is evidence that sums of money totalling to Kshs. 705,000/= or thereabouts were electronically transferred from the complainant's accounts to a telephone no 0728691326 through M-pesa. There was evidence from the prosecution and an admission by the appellant that the mobile subscriber of this telephone number was his wife Nancy Kwamboka Nyabika who was jointly charged with him as the second accused. The appellant admitted that this was the number he provided to the complainant in his employment records. In his defence, he also stated that whereas the number was registered in his wife's name it was under his control. To quote him: -

> **"……the phone number I provided on employment is 0728691326. It was registered in name (sic) Nancy Kwamboka who was my wife. I gave her number as a contact person on employment since I did not have the (sic) phone. I was handling the number at all times. The same number was in my business card. Nancy did not benefit at all from transactions using that number."**

If I understand him well, that phone was always in his possession. The prosecution adduced evidence that the appellant who was the complainant's ICT Manager was the one who controlled the M-pesa business of the complainant transacted through various tellers. One of the tellers (Pw3) testified that at the end of the day she would remit the mobile phone she was using to the appellant for safe custody together with records of all the transactions she had undertaken that day. The appellant would return the phone to her the next morning. This routine would be repeated every day. The court heard that the appellant undertook the impugned transactions at the close of business meaning after 5pm. Indeed, all the transactions to his number 0728691326 were after 5pm. For instance, on 8th August 2014 at 17.41pm Kshs. 65,200/= was sent to Nancy Kwamboka who admittedly is his wife and the subscriber of his telephone number. On 12th August 2014 at 17.29pm Kshs. 70,000/= transferred was again sent to that number. Of the impugned transactions only the one for 16th September 2014 was done before 5pm. It is however instructive that it was done at 16:56pm. The prosecution's evidence was that these transactions were not authorized by the complainant. Pw1, the complainant's Chief Executive Officer testified that only those transactions that were sanctioned by his office were to be done after office hours. His evidence that M-pesa transactions were only done between 9am and 5pm save for Saturday when it was up to 1pm was corroborated by Cecilia Kwamboka (Pw2), a teller, and Evans Ndubi Onduko (Pw3), the complainant's Operations Manager and Accountant.

The Operations Manager (Pw3) stated: -

> **"According to our office rules, M-pesa transactions start at 9.00am and end at 5.00pm. any transaction done after 5.00pm**

must be authorized by the CEO. No report was made of transactions done after 5.00pm until we discovered when doing the audit. All money last (sic) was for transactions done after 5.00pm which was not authorized by the CEO."

The court also heard that the money was siphoned from till No. 421003 for Nyansiongo Head Office. Pw2 a teller at that branch testified that apart from her the only other person who had the PIN for the phone used for M-pesa was the appellant. The appellant while conceding that he used to send money to his wife's number after office hours, stated that the transactions were sanctioned by the Chief Executive Officer (Pw1). He contended that the complainant did not lose any money and stated that whatever monies were sent to this number were meant to pay suppliers since he doubled up as the in-charge of Procurement of Information Technology. He did not however tender proof of any such procurement or payment or even authorization to transact after 5pm by the Chief Executive Officer. These were facts within his special knowledge and **Section 111 (1) of the Evidence Act** required him to bring evidence to prove the same. I have applied my mind to the two provisos to **Section 111 (1) of the Evidence Act** and the provisions of **Section 111 (2) of the Evidence Act**. There is nothing in the evidence given by the prosecution that such circumstances exist as would give rise to the inference that the appellant had the sanction of the Chief Executive Officer to act as he did or that he used the monies he sent to his own number to pay suppliers. To the contrary, evidence was given that the appellant would after sending money to himself delete or erase the transactions in that regard using his desktop (computer). This is indeed what raised the red flag as the complainant's records did not match those of the service provider, Safaricom. The transactions were seen on the Safaricom statements but not in the complainant's own system. This is indicative of a person whose intention was to defraud. Indeed, the appellant's conduct when confronted with the accusations by the complainant was an apology and a plea to refund the money as was proved through the evidence of the handwriting expert.

It is my finding that the evidence against the appellant though it did not prove the entire sum stated in the charge sheet was overwhelming and that the charge of stealing was proved beyond reasonable doubt.

On the sentence, my finding is that for someone who is suspected to have stolen much more than the Kshs. 705,000/= that was proved, a sentence of Kshs. 300,000/= fine or three (3) years imprisonment was very lenient, slap on the wrist so to speak. However as there is no cross appeal and no notice of enhancement of sentence was issued, I shall not disturb the sentence save to state that under **Section 28 (2)** the default sentence should have been imprisonment for twelve (12) months but not three (3) years. The appeal is dismissed and should he not have paid the fine he shall do so or be taken into custody to serve twelve (12) months imprisonment in default. It is so ordered.

Signed, dated and delivered in Nyamira this 11th day of July 2019.

E. N. MAINA

JUDGE