



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MURANG'A**

**CRIMINAL APPEAL NO. 51 OF 2015**

**BETWEEN**

**KIRUMBA NORMAN THUO.....APPELLANT.**

**AND**

**REPUBLIC.....RESPONDENT.**

*(An appeal from the original conviction and sentence in the Principal Magistrate's Court at Kangema Cr. Case No. 84 of 2015 delivered by Hon. Kagoni E.M.,SRM on 15<sup>TH</sup> May, 2015).*

**JUDGEMENT**

1. The Appellant was charged with two counts of Stealing by Clerk C/S Section 281. The particulars were that on diverse dates between 6/12/12 and 5/1/2015 at Gakera sub-location Kangema, Sub County in Murang'a County being a clerk of Aspendos Dairy Ltd stole 609,101.30/= and Ksh 341,013/= respectively the property of Aspendos Dairy Ltd which came to his possession by virtue of being in employment. He was found guilty and convicted accordingly. In count I he was sentenced to a fine of Ksh 1,000,000/ in default serve 5 years imprisonment and in Count II to a fine of Ksh 500,000/= in default serve 4 years imprisonment.

2. The Appellant was dissatisfied with both the conviction and sentence as a result of which he has preferred that instant appeal. The appeal has been preferred on the grounds that the magistrate erred in law and fact when he admitted incriminating evidence without ascertaining how it was obtained, that the charge sheet was defective for want of duplicity and that that case was not proved beyond a reasonable doubt.

**Summary of evidence.**

3. The prosecution called a total of four witnesses. **PW1, John Njire Maina** was the Managing Director and owner of Aspendos Dairy Co Ltd. He testified that he was informed by Esther Mukami Njeri, his former employer that they had been stealing from his company with the Appellant. The said informant had been arrested for stealing from her employer .She wanted the charges withdrawn. PW1 testified that he had detected the theft over a period of time. The said Esther gave an account of theft by herself, the accused and one Grace Nyambura who were data entry clerks.PW1 testified that the Appellant was a data controller and that farmers who supplied milk to the company had their own numbers. Esther informed him that they used codes of farmers who had ceased to supply milk.

4. Examples given to him were numbers GF1200, GJ1250, KD150 NC20& HE100. PW1 went to investigate and discovered that GF1200 which belonged to Esther Wanjiru Maina had been changed to read James Thuo Maina. Esther Wanjiru's Account No 6902-xx-xxxx Muramati had been changed to the Appellant's account number 0080xxxxx.GJ 1250 belonging to the late Mwangi Thairu's Account No 6903-xx-xxxx changed to account No. 0080xxxx.

5. PW1 reported the matter to Kangema Police Station. The Appellant went underground after Esther and Grace were arrested and he switched off his phone and did not report to work. His father came to the office to request PW1 to have the matter resolved. He was instructed to produce the Appellant who turned up to apologize. He had written two apology letters which were marked as exhibits 15 (a) and (b) respectively. The police were called and he was arrested and charged.

6. PW1 allegedly owned two companies which included Njiire Maina Investment Ltd and Aspendos Dairy Ltd (the complainant herein). He relied on an affidavit dated adduced as exhibit 4 as proof of the same. He referred to the certificate of incorporation of Njiire Maina Investment Ltd (exhibit 2) issued on 26/7/2007.

7. The Appellant joined Aspendos Dairy Co. Ltd on 6/4/2020 as per the Employee Form adduced as exhibit 3. A salary payment schedule for A/C No. 005-8056-04739 at Murata Farmers Sacco was produced in this regard. He was paid a net of Ksh. 12,000/..The documents were marked as Exhibit 5 (a-c).

8. Bank statements for Unaitas Sacco were marked as exhibit 6 being evidence of deposit of Ksh 609,101.30/= between 5/1/13 and 5/1/15 .The Statements from Family Bank Kiriaini Branch A/c No. 0080xxxxx were also adduced in evidence being evidence of deposit of Ksh 341,013.00/=.

9. The case for the prosecution was that the Appellant had used numbers of dormant suppliers to divert cash. Examples were GJ1250 which belonged to the late Mwangi Thairu,GF1200 Esther Wanjiku Maina. It was stated that the payments were diverted and paid through the account of the Appellant.

10. Further evidence on cross examination was that the Appellant had worked from January 2010 and received money into the account which was meant for farmers. Both the accountant and PW1 approved the payments. PW1 stated that the Appellant's salary was paid through Murata Sacco Account, an account into which he paid the monies belonging to farmers through manipulation of the system. He added that farmers were paid directly upon supply of milk yet the Appellant was not one of them. He was responsible for computation of the milk delivered to the company.

11. **PW2, Evans Kyalo Mwema** was called to give evidence on the bank statements that came from Unaitas Sacco Ltd. He was the credit officer of Kangema branch. He referred to the bank statement for A/c No. 0080xxxxx and the orders of the court dated 18/2/15 marked as exhibit 8. The bank statement allegedly belonged to the Appellant and was for the period between 1/1/12 and 20/2/15. It showed where the money came from. His evidence was that farmers were paid monthly and that the complainant prepared payment schedule and cheques which were paid through Njiire company.

12. **PW3,Gideon Kirui Kipkorir** was the relationship officer of Family Bank at the Kangema Branch. His evidence related to bank statement for A/c No. 0080xxxxx issued by the Kiriaini Branch for the period 1/1/14-19/2/15 belonging to the Appellant.The witness testified that the complainant customers were paid through the bank. The bank received cheques from the complainant company together with a list indicating the names of customers. The list was then used to effect payment. The statement was dated 3/2/13. In cross examination, the witness conceded to the fact that the statement did not have a signature, stamp or letterhead. Further that exhibit 2 had a letter head but it was not dated or signed.

13. **PW4, Isaiah Kirimi** was the investigating officer. His evidence was that he gathered from his investigations that the accused was using dormant statements and accounts while disguising himself as a farmer to pay himself. He gave examples of GJ1250 as account of the late Mwangi Thairu whom he had confirmed from his relatives that he was deceased and a death certificate obtained (See exhibit 4). The records indicated that the account was still active and money ended up in the Appellant's account. In this case the Appellant replaced the deceased person's account and replaced it with his A/C 008xxxxx at Unaitas Sacco Ltd. Other examples given were KD150 belonging to Peter Mwangi which the Appellant changed to read Peter Thuo Mwangi.

14. PW4 also obtained a sample of a Farmer's card which was given to farmers ( See Exh 6 : S.NO1618), adding that the cards could not be shared. He also displayed Exhibit 7: SNO 23071 as a sample of a milk journal of records of the milk delivered to the factory. He stated that the same was filled by the drivers who collected the milk.

15. PW4 obtained bank statements of the Appellant's accounts at Unaitas Sacco ltd and Family Bank into which Ksh 609,101,030/= and Ksh. 341.013/ were paid respectively. A Schedule for November, 2014 payments was produced as exhibit 10 which is what raised alarm. The witness conceded that the statements from Family Bank did not show the source of the money (unlike statements from Unaitas). He clarified that the detail indicated as "...payments for month..." implied that it was for supply of milk.

16. After the close of the prosecution case, the court ruled that the prosecution had proved a prima facie case and that therefore the Appellant had a case to answer. He was accordingly put on his defence. He gave an unsworn testimony and did not call any witnesses. He admitted that he worked for the complainant. He stated that on 13/2/15 he was at home and was summoned to report to work by PW1. He arrived and after being informed of the theft, they had a brief discussion after which the police came and arrested him. His defence before court was that he was a dairy farmer who supplied milk to Maina Njiire Ltd. He did not forge nay number. That Lucy Kimani and Damaris Wangoi issued the numbers. He stated that he had been selling the milk since November 2012 to January 2015 and was paid lawfully like other farmers. The money was deposited by Hellen Njoki and that the accounts were audited by Antony Maina yet no theft had been detected.

### **Analysis and determination**

17. In its judgment the trial court found that the Appellant received monies into his account for supply of milk which he did not. The court also ruled that the Appellant had confessed to committing the offence through the apology letters he wrote to his employers. I have accordingly isolated three main issues for determination, namely whether the apology letters amounted to a confession and if so, whether they could be admitted in evidence, whether the charge sheet was defective for want of duplicity and whether the prosecution proved its case beyond a reasonable doubt.

18. As regards the first issue for determination, immediately the Appellant learnt that he was being sought by the police, he went underground. His father subsequently approached the Managing Director of the complainant company and requested him to have the matter settled out of court. PW1 then asked him (father) to ask the Appellant to present himself in the office. It was then that he was requested to write apology letters. The letters were adduced in evidence as exhibits 15(a) and (b) respectively. They were dated 10th February, 2015.

19. I have read through the letters which give a graphic account of how the theft was orchestrated. His statement was that he used to increase the amount of milk on a daily basis by 100 kilograms. He would then inform one Esther Mukami Njeri of the same who in turn would post payments into his account in Family Bank which payment would be apportioned on a 50:50 basis.

20. He further stated that Esther would also on her part do the same but make payments into accounts of her sister Stella Muthoni Njeru and mother Julietta Meru Njeru. In total between January and December, 2014, he had made transactions of over KSH. 1,000,000/.

21. The Appellant further incriminated one Grace Nyambura whom he said allocated some of the milk in the month of December, 2014. In the letters, he apologized for the theft and promised to pay back the loss.

22. In placing reliance for the conviction on the letters, the learned magistrate delivered himself thus;

***“Based therefore on the evidence of PW2 as to where the deposits came from, the contents of exhibit 1 and the two apology letters the accused person wrote to PW1 admitting the theft I am satisfied that the prosecution has proved its case beyond a reasonable doubt as require by the law.”***

23. The learned magistrate made a similar finding with respect to count II thus:

***“Based therefore on the evidence of PW3 and PW4 as to where the deposits came from, the contents of exhibit 10, exhibit 2 and the two apology letters the accused person wrote to PW1 admitting the theft I am satisfied that the prosecution has proved its case with respect to count II beyond a reasonable doubt as required by the law.”***

24. Based on the above finding, it is clear that the trial court treated the apology letters as an admission to committing the offences. Such admissions in law are regarded as confessions. It is trite that the rules governing confessions are well set out in the Evidence Act as ***Evidence (Out of Court Confessions) Rules, 2009***. Under Rule 4 it is clear that if an accused wishes to make a confession the police officer recording the statement must ensure that several precautions are taken namely;

***“(1)Where an accused person intimates to the police that he wishes to make a confession, the recording officer shall take charge of the accused person and shall ensure that the accused person -***

***(a) Has stated his preferred language of communication;***

***(b) Is provided with an interpreter free of charge where he does not speak either Kiswahili or English;***

***(c) Is not subjected to any form of coercion, duress, threat, torture or any other form of cruel, inhuman or degrading treatment or punishment;***

***(d) Is informed of his right to have legal representation of his own choice;***

***(e) Is not deprived of food, water or sleep;***

***(f) Has his duration, including date and time of arrest and detention in police custody, established and recorded;***

***(g) Has his medical complaint, if any, adequately addressed;***

***(h) Is availed appropriate communication facilities; and***

***(i) Communicates with the third party nominated by him under paragraph (3) prior to the caution to be recorded under rule 5.***

***(2) The recording officer shall not record a confession from any accused person who complains to him of being a victim of torture or whose physical appearance shows signs of physical injuries including open wounds, body swelling, or shows extraordinary fatigue or any other indicators that would suggest that the accused person has been tortured.***

***(3) The recording officer shall ask the accused person to nominate a third party who shall be present during the duration of the confession session, and upon the appearance of the third party, the recording officer shall record the third party’s particulars and relationship to the accused person.”***

25. The officer must also caution the accused person pursuant to Rule 5, more particularly that whatever he admits shall be used in evidence against him. A certificate must also be signed by the recording officer as provided in Rule 9.

26. More importantly is that the Evidence Act at Section 25A provides for qualifications of persons who can record confessions. The same reads as follows;

***(1) “A confession or any admission of a fact tending to the proof of guilt made by an accused person is not admissible and shall not be proved as against such person unless it is made in court before a judge, a magistrate or before a police officer (other than the investigating officer), being an officer not below the rank of Inspector of Police, and a third party of the person’s choice.***

***(2) The Attorney-General shall in consultation with the Law Society of Kenya, Kenya National Commission on Human Rights and other suitable bodies make rules governing the making of a confession in all instances where the confession is not made in court.”***

27. No doubt the learned trial magistrate failed to have regard to the law when he purported to rely on the apology letters as admissions of the guilt of the Appellant. The least he would have done was to request that the Appellant be escorted before a person qualified under the law

to record a confession after which the process of admission into evidence would have followed. The failure to follow this crucial step ultimately meant that the two apology letters could not be considered as admission of guilt. They were inadmissible in evidence. They could not at all have formed a basis for the conviction of the Appellant.

28. As regards proof of the case, the Appellant is said to have stolen Ksh. 609,101.30 and Ksh. 341,013.00 the property of Aspendos Dairy Limited. The case for the prosecution as observed above is that the Appellant would purport to effect payments for farmers who had ceased the delivery of milk to the complainant but divert the payments into his personal accounts held both at Unaitas Sacco and Family Bank Limited. A few examples of such scenarios is enunciated in the summary of the evidence earlier in this judgment. What however came out very clearly is that in count I the monies were gotten from Njiire Dairy Limited and not Aspendos Dairy Limited. This was discerned from the financial statements from Murata Sacco adduced as exhibit 4.

29. It is trite law that proof of a case must be beyond a reasonable doubt. Further, a charge must be supported by the evidence adduced. In this case, it was incumbent upon the prosecution to establish the nexus of the monies stolen and the respective complainants. In an attempt to establish that both Aspendos and Njiire dairy Limited were owned by one person, an affidavit (exhibit 14) sworn by PW1, the Managing Director was adduced. Again, it is trite that *bona fide* ownership of a company can only be demonstrated by way of a CR12 Form as well as a Certificate of Incorporation. Neither of the two was adduced leading the court to make a safe conclusion that it was not established that the money stolen in count II belonged to the complainant named in the charge sheet. As submitted by counsel for the Appellant, the two companies were distinct persons with distinct identities and none could be deemed to belong to the other.

30. That aside, I entirely concur with the learned counsel for the Appellant that the prosecution failed to link the numbers that were purportedly assigned to the non-existent farmers with the complainant company. It was not just enough to mention that this or that number belonged to a particular farmer. What was also crucial was to link those numbers to the company. The prosecution through PW1 did not attempt to establish this burden. The net effect of this omission is that it could not be conclusively stated that the Appellant would exchange the details of the numbers with his own thereby effect payments into his account.

31. On this note, I have in mind that bank statements that were adduced showed payments made into the Appellant's account. However, the prosecution was under a duty to establish that indeed the payments were sourced from the altered payments of the non-existent farmers. This burden was not discharged.

32. The Appellant was further convicted on the basis that it was established that he could not explain the source of a bulk of monies in his respective accounts. To demonstrate this, PW2 from Unaitas Sacco, Kangema Branch produced a statement of account from the Appellant's account showing the various deposits. The same was marked as exhibit I. PW3 of Family Bank on the other hand produced exhibits 2 and 3 being an account statement of the Appellant and a summary thereof respectively. Exhibit 1 was not signed by the witness. In a similar manner, PW3 confirmed that the bank statements were not signed or stamped.

33. Needless to state is that the three exhibits were computer printer outs. Before their admission into evidence, compliance with Section 106 of the Evince Act was mandatory. The maker of the documents was required to affirm the manner in which they were produced from the respective machines and make a certificate in that regard. It is laughable that PW3 could state that a letter head sufficed for a signature. It is trite that letter heads can easily be forged. I conclude that the prosecution failed to discharge the burden that indeed the Appellant diverted any money meant for the complainant into his account. I hold that the learned trial magistrate erred in admitting the bank statements as evidence.

34. Finally, it was the Appellant's submission that the charge sheet was defective for want of duplicity. He argued that the same offence was charge in more than one count. This, he said, was because the events in both counts related to the same period of between 6<sup>th</sup> December, 2014 and 5<sup>th</sup> January, 2015. Further that the facts of the charges were committed within the same transactions. He argued that the two charges should have been condensed into one count.

35. A charge is said to be bad for duplicity when it contains more than one offence in a single count. As stated in Archbold Criminal Pleading, Evidence and Practice, 2010 at page 9,

***“The indictment must be double; that is to say, no one count of indictment should charge the defendant with having committed two or more separate offences.***

***The question of whether a count breaches the general rule against duplicity is a question relating to the form of the count, not the underlying evidence... thus, thus if the particulars set out in the count allege only one offence, the fact that the evidence at trial may reveal more than one offence does not make the count bad for duplicity”***

36. The instant case represents the latter scenario explained by Archbold. It was a case in which the prosecution ought to have charged the two counts under different complainants. Evidence disclosed that the monies were stolen from two different sources and therefore charging the offences in two counts was the right thing to do. The error in failing to name two different complainants does not necessarily represent a defect in duplicity. I do not therefore think that the charge was defective for want of duplicity.

37. In sum, I find that the prosecution failed to discharge their burden of proving that the Appellant was culpable in both counts. His conviction was not safe. I accordingly quash the conviction, set aside the sentence and order that he be forthwith set free unless otherwise lawfully held.

38. Although the Appellant has succeeded in the appeal, it is necessary that I underscore the fact that the learned trial magistrate imposed an illegal sentence. Both offences were charged under Section 281 of the Penal Code which upon conviction an accused is liable to imprisonment for seven years where a court decides to impose a fine as an alternative to a custodial sentence, the default sentence must accord with Section 28(2) of the Penal Code unless the law charging specifically provides otherwise. In that case, the default sentence ought

not to have exceeded twelve months.

**Dated and Delivered at Murang'a This 11<sup>th</sup> day of September,2019.**

**G.W.NGENYE-MACHARIA**

**JUDGE**

**In the presence of:**

1. *Miss Mbuvi b/b for Mr. Ngaywa for the Appellant.*
2. *Mr. Mutinda for the Respondent.*