



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 260 OF 2018

GILBERT KENLICK MUTHAMIA MULWA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An Appeal arising out of the conviction and sentence of Hon. E. Kanyiri (SRM)

delivered on 20th November 2018 in Nairobi Criminal Case No.1211 of 2014)

JUDGMENT

The Appellant, Gilbert Kenlick Muthamia Mulwa, was charged with the offence of stealing by servant contrary to Section 281 of the Penal Code. The particulars of the offence were that on 1st March 2014 at Chandaria Industries Ltd within Nairobi, the Appellant being a servant of the said Mahesh Chandaria, stole Ksh.65,000/- being the property of Mahesh Chandaria. When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charge. After full trial, he was convicted as charged and sentenced to one (1) year probation. The Appellant was aggrieved by his conviction and sentence and has filed an appeal to this court.

In his petition for appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. He was of the view that the prosecution failed to prove their case to the required standard of proof beyond any reasonable doubt. He was aggrieved that the trial court failed to find that the prosecution's case was founded on mere suspicion incapable of sustaining a conviction. He took issue with his conviction stating that the same was based on circumstantial evidence that did not meet the required legal threshold. He faulted the trial magistrate for failing to appreciate that there was no link between him and the envelope alleged to contain the stolen money. In the premises, the Appellant urged this court to allow the appeal, quash his conviction and set aside the sentence that was imposed on him.

During the hearing of the appeal, this court heard oral submission from Mr. Mwalimu for the Appellant and Mr. Momanyi for the State. Mr. Mwalimu submitted that the prosecution failed to establish a direct link between the Appellant and the envelope that allegedly contained the stolen money. PW2 gave the Appellant a briefcase to take to his bedroom. The briefcase was alleged to contain an envelope with Ksh.65,000/-. The envelope was discovered missing two days later. A search was conducted in the Appellant's room. An empty envelope was recovered. Counsel for the Appellant averred that the employees were usually paid via cash kept in an envelope. It was therefore not strange for an envelope to be recovered from the Appellant's room. In addition, the search was conducted in the room in the Appellant's absence. He asserted that there was no evidence to confirm that the empty envelope contained any money.

Counsel for the Appellant further submitted that PW2 gave the Appellant the briefcase to take to his room on 28th February 2014. The envelope was discovered missing on 2nd March 2014. PW2 went to work on 1st March 2014 with the briefcase containing the money. It was his view that the Appellant was convicted based on mere suspicion which did not infer guilt. The Appellant came back to work on 3rd March 2014 after his off day. He was arrested two days later. He had worked for PW1 for close to fourteen (14) years. Counsel for the Appellant was of the view that the theft was pinned on the Appellant to create grounds to terminate his employment without paying him his terminal dues. He asserted that the envelope was planted in the Appellant's room. In the premises therefore, he urged this court to allow the Appellant's appeal. Mr. Momanyi for the State conceded the appeal. He averred that reasonable doubt had been raised as to the Appellant's guilt. He therefore urged this court to allow the Appellant's appeal.

The facts of the case according to the prosecution are as follows: PW2, Mahesh Chandaria was the complainant. PW1, Sobhina Mahesh Chandaria, was his wife. PW2 stated that he came home from work on 1st March 2014. He was carrying a briefcase which contained his documents as well as his wife's salary of Ksh.65,000/-. The money was in a brown envelope which indicated PW1's payroll number and the amount of money inside i.e. Ksh.65,000/-. When he got home, he was received by the Appellant who took the briefcase to his bedroom. The following day, PW1 asked him for money. When she checked the briefcase, she did not find the envelope containing the money. He asserted that the Appellant was the only person who came into contact with the briefcase when he carried it to the bedroom.

PW1 testified that the Appellant worked as a househelp at their house. On 1st March 2014, PW2 came to the house at around 12.30 p.m. He asked the Appellant to take a briefcase from his car to the bedroom. PW1 and PW2 left the house shortly after. They left the Appellant and Peninah (PW3) who was also a househelp cleaning the house. The following day, they discovered that the envelope which contained PW1's salary was missing from the briefcase. She stated that she searched the Appellant's room in the company of PW3 and PW4. The Appellant was not on duty. He was to report back to work the following Monday. She however stated that she had duplicate keys to his room which she used to gain entry. She recovered a crumpled envelope on the Appellant's bed. It was however empty. Her payroll number and amount "Ksh.65,000/-" were written on top of the envelope. On cross examination, PW1 stated that she paid her workers in a similar brown envelope which indicated the employee's payroll number and amount of money paid. She admitted that the Appellant did report back to work on Monday as agreed.

PW3, Penninah Khatenje, was a househelp at the complainant's house. She worked with the Appellant. She was on duty on 2nd March 2014. The Appellant was not at work since it was his off day. PW1 asked her whether anybody had entered her bedroom the previous day. Some money had been stolen from the room. She informed PW1 that the Appellant was in PW1's bedroom the previous day. PW1 searched the servants' quarters. She did not find the stolen money in PW3's room. She also searched the Appellant's room in the presence of PW3 and Peter (PW4). They recovered an enveloped written "Ksh.65,000/-" next to the Appellant's bed. On cross-examination, PW3 told the court that she did not see the Appellant carrying any envelope the previous day when they finished cleaning the house. She stated that she did not know whether the Appellant stole the complainant's money.

PW4, Peter Owaki, worked as a gardener at the complainant's house. He stated that he did not have access to the main house. On 2nd March 2014, PW1 informed her that some money had been stolen from her room. She asked him to accompany her as she searched the servants' quarters. During the search they recovered a brown envelope in the Appellant's room. It was found on his bed. The envelope was written "Ksh.65,000/-" on top.

This case was investigated by PW5, PC Mbuni Muthiani who was stationed at Ruaraka Police Station when the theft occurred. He stated that PW2 came to the police station on 5th March 2014. He was accompanied by the Appellant. PW2 claimed that the Appellant had stolen Ksh.65,000/- from his house. He gave PW5 an empty envelope written "Ksh.65,000/-" which he stated he had recovered from the Appellant's room. PW5 proceeded to arrest the Appellant. He visited the complainant's house and recorded witnesses' statements. He thereafter charged the Appellant with the present offences.

The Appellant was put on his defence. He told the court that he had worked for the complainant for close to four (14) years before the alleged theft. He stated that he received PW2 every day when he arrived home from work, and he would carry PW2's suitcase from the car and to his bedroom. When PW2 was leaving the house, he would again carry the suitcase from his bedroom to his car. The same thing happened on 1st March 2014. PW2 came home at around 4.00 pm. The Appellant stated that he carried PW2's suitcase from his car to his bedroom. PW1 and PW2 later left the house as they were attending a party. The Appellant and PW3 were left in the house. He stated that they were both in the kitchen. They afterwards locked the main house and went to their quarters. He left his house that night and came back the following night on Sunday at about 9.30 p.m. He found his room in a mess. He performed his duties as usual on Monday and Tuesday. On Wednesday (5th March 2014), the personnel manager requested to see him at around 2.00 p.m. He showed him an envelope that was allegedly recovered from his room. The personnel manager claimed that the envelope contained Ksh.65,000/- and that the same was stolen from the complainant's bedroom. He asked the Appellant to sign a document but the Appellant declined. PW1 told him that she would teach him a lesson. The Appellant denied stealing any money from the complainant.

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 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.

It is not disputed that the Appellant was employed by the complainant as a househelp. It is also not disputed that PW2 gave the Appellant his briefcase to carry from his car to his bedroom on the material day of 1st March 2014. PW2 alleged that the said briefcase contained, among other things, a brown envelope containing Ksh.65,000/- which he was to give to his wife (PW1) as her salary. He was given the money at work the previous day on 28th February 2014. The couple left the house on the evening of the material day of 1st March 2014. They left two employees at the house; the Appellant and PW3. When PW1 and PW2 checked the briefcase the following day on 2nd March 2014, they discovered that the money was missing.

The prosecution did not adduce any direct evidence to prove that the Appellant stole the money. The trial court relied on circumstantial evidence in arriving at its decision to convict the Appellant of the present charge. 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's the prosecution's case that when the Appellant and PW3 were left in the house that day, the Appellant stole money from the complainant's bedroom. PW1 testified that when she discovered that the money was missing, she conducted a search at the servants' quarters. She recovered a brown envelope from the Appellant's room which was alleged to be the same envelope that contained the

money that was in PW2's briefcase. It was instructive that the search was conducted in the Appellant's absence. PW1 had duplicate keys to the Appellant's room which she used to gain entry. PW3 and PW4 were present during the search. This court notes that the prosecution witnesses gave contradicting evidence as to where the envelope was recovered from. PW1 and PW4 claimed that the envelope was found on top of the Appellant's bed. However, PW3 told the court that the envelope was found next to the Appellant's bed. On cross-examination PW3 stated that:

“The envelope was found down next to the bed. She bent down and picked it up”.

The contradicting evidence by the prosecution witnesses diminishes credibility of the evidence that the envelope was recovered from the Appellant's room. PW3 who was with the Appellant in the house on the material day stated that she did not see the Appellant carry any envelope from the house and could not confirm if he was the one who stole the money. In addition, the Appellant was not alone in the house when the money was said to be stolen. PW3 was also in the house. It cannot be ruled out that the envelope was placed in the Appellant's room in his absence so as to connect him with the loss of the cash.

The Appellant had worked for the complainant's for over ten years prior to the alleged theft incident occurred. It was not unusual for the Appellant to carry PW2's briefcase. The evidence of PW2 corroborated the Appellant's assertion that he carried PW2's briefcase every day from his car to his bedroom when he arrived home from work. PW2 on cross-examination stated that he was given the envelope containing the money at work on Friday, 28th February 2014. It's evident that he left the house the following day on 1st March 2014 with the briefcase. On coming back, the Appellant carried his briefcase as usual to his room. The money was discovered missing on Sunday, 2nd March 2014. PW2 did not inform the court whether the envelope was still in his briefcase when he came back to the house on Saturday.

The above facts coupled with the fact that the Appellant came back to work the following day shed doubt as to whether the Appellant stole the money from the complainant's bedroom. The Appellant's behaviour was absolutely normal and did not point to a person who had a guilty conscience. In addition, the Appellant worked for two (2) days after the alleged theft before the complainant finally reported the incident to the police on 5th March 2014. This court is of the opinion that the Appellant's conviction cannot be based on mere suspicion. The Court of Appeal in Sawe vs Republic [2003] eKLR held, *inter alia* thus;

“Suspicion, however strong, cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt”

The circumstantial evidence in the present appeal was not sufficient to sustain the Appellant's conviction. There were other co-existing circumstances which weakened the inference of the Appellant's guilt. It was not ruled out by the prosecution that PW3 could have taken the money. In addition, PW2 was given the money at the office on Friday. He left the house with the briefcase on Saturday. PW2 did not confirm whether he still had the envelope in the suitcase when he came back to the house that Saturday. It's also interesting to note that PW2 did not give PW1 the money which was her salary on Saturday before leaving the house. In Parvin Singh Dhalay v Republic [1997] eKLR, the Court of Appeal stated as follows:

“For our part, we think that if there be other co-existing circumstances which would weaken or destroy the inference of guilt, then the case has not been proved beyond any reasonable doubt and an accused is entitled to an acquittal.”

Taking into consideration the totality of the evidence adduced, this court is unable, with certainty, to reach the conclusion that the conviction of the Appellant is beyond reproach. There are many gaps in the prosecution's case which cannot establish that the Appellant stole the money belonging to the complainant. The chain of events as narrated by the prosecution witnesses does not point to the Appellant as the only person who had the opportunity to steal the money. There were other people who had access to the complainant's house at the material time the money got lost. The Appellant denied any involvement in the theft. In the premises, the appeal lodged by the Appellant has merit. It is hereby allowed. The Appellant's conviction is quashed and the sentence set aside. The Appellant is acquitted of the charge against him. It is so ordered.

DATED AT NAIROBI THIS 8TH DAY OF OCTOBER 2019.

L. KIMARU

JUDGE