



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CRIMINAL APPEAL NO. 60B OF 2016

(CORAM: R. E. ABURILI - J.)

REPUBLIC.....APPELLANT

VERSUS

PAUL ODIWUOR ONYANGO.....RESPONDENT

(Being an appeal against conviction and sentence on Judgment delivered

on 30/4/2018 at Siaya PM's Court vide Cr. Case No. 824 of 2013, before Hon. J.O. Ongondo, PM)

JUDGMENT

1. The Respondent **PAUL ODIWUOR ONYANGO** was charged with the offence of stealing by servant contrary to Section 281 of the Penal Code that between 1st January 2012 and 5th August 2013 at SMEP DEPOSIT TAKING MICROFINANCE SIAYA TOWN BRANCH in Siaya County. He is alleged to have stolen Kshs 2,476,843/= which came into his possession by virtue of his employment.

2. After the full trial which was conducted by Hon. Wandere and concluded by Hon Ongondo, PM, he was acquitted under section 215 of the Criminal Procedure Code.

3. Dissatisfied with the said acquittal, the Prosecution filed this appeal setting out the following grounds of appeal:

1. The learned trial magistrate erred in law and in fact by disregarding an avalanche of evidence of the prosecution witnesses as regard theft of Kshs 2,776,843.

2. The learned trial magistrate erred in law by holding that the evidence adduced in court was inconsistent with the charge sheet yet such errors are curable under section 382 of the Criminal Procedure Code

3. The learned trial magistrate erred in law by failing to assess whether the defence raised by the respondent clearly removed him from the scene vis avis the evidence of the prosecution witnesses who came out clear that the accused was the one handling the transactions.

4. The learned trial magistrate erred in law by failing to assess whether the defence raised.

4. The appellant urged the court to set aside the acquittal order and convict the respondent of the charges as framed in the trial court.

5. This being a first appeal, this court is obliged to reassess the entire evidence before the trial court and arrive at its own independent conclusion bearing in mind that I neither saw nor heard witnesses testify.

6. In determining this appeal, this Court is alive to the principles laid down in **Okeno Vs. Republic [1972] E.A. 32** that an Appellant on a first appeal is entitled to expect the evidence as a whole to be subjected to a fresh and exhaustive examination (**see also Pandya Versus Republic [1957] E.A. 336**) and that the first Appellate Court must itself weigh conflicting evidence and draw its own conclusions.

7. Further in **Shantilal M. Ruwala versus Republic [1957] East Africa 570** it was held that it is not the function of a first Appellate Court merely to scrutinize the evidence to see if there was some evidence to support the Lower Court's findings and conclusions. Rather, it must make its own findings and draw its own conclusions, only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses as they testified. (**See Peters Versus Sunday Post [1958] East Africa 424.**)

8. Revisiting evidence adduced in the trial court, the Prosecution's case was that the Respondent was employed as a Business Development Officer with the role of recruiting customers, disbursing loans and follow up on loan repayment. He was employed in 2011 and resigned in 2013.

9. According to PW1, **Grace Kasaya Galla**, the Complainant's Regional Team Leader, Nyanza the complainant was engaged in lending and receiving deposits from customers. That the Respondent had not been performing well so he had been called and warned of his poor performance in August 2013 wherein the Respondent was discovered to have had huge arrears. He tendered his resignation in the presence of PW1 on 5th August 2013. The Respondent had a personal loan of Kshs. 14,242/= at the time of resignation which monies he was told to arrange on how to settle. At the same time, the Branch Manager Peter Omollo had resigned. PW1 then summoned officials of groups to come and state any areas held by the Respondent. An audit was carried out from information received and a report was prepared by one Waweru indicating that the Respondent had defrauded a total of Kshs. 2,476,843.

10. The complainant also got a statement from Safaricom which showed that the amount received by the respondent was 2,711,270. According to PW1 the respondent was not authorized to receive money directly from customers. The customers were to deposit the money in the complainant's account through paybill Number 777001. After the auditors carried out their work, the respondent was sought after and arrested and charged.

11. In cross examination, the witness reiterated her evidence in chief and stated that the respondent never gave a handing over report on his resignation

12. **PW2 Gilbert Ochieng Oduor** was introduced to the complainant organization through the respondent by Dennis Ojadi . He brought on board a group comprising ten people who opened an account and started depositing savings. After meeting the qualifications for a loan, he was given a loan of kshs 20,000 and he started repaying monthly through the mobile phone of the field officer the respondent herein from January to June until they were informed that they ought not to have been sending money through mobile number.

13. PW2 was the chairman of another group Amuka self help group which saved money with the complainant SmeP which monies were sent to the respondent via his mpesa safaricom number 0728208644. He testified that the respondent never gave them any bank account number or paybill number for depositing the money.

14. PW3, PW4, PW5 and PW6 all testified that they were members of the various groups which collected money and paid to the Respondent through MPESA.

15. **PW7, Patrick Ndungu**, testified that he was an internal auditor with SMEP. He audited the Siaya Branch accounts between 30/9/2013 to 7/11/2013. He completed the audit and made a report dated May, 2014. In the report, the objectives are listed as: -

1. To investigate Paul Onyango's former portfolio
2. To assess the extent of fraud if any and ascertain other cases of malpractices.
3. To determine the lapses in the business control environment.

16. In the executive summary, the author of the report has indicated: -

"Paul committed fraud at the Satellite amounting to Ksh. 2,611,270/= which is summarized below" and gave a breakdown. He stated that the audit revealed that the customers were paying money through unauthorized means of Mpesa account No 0718208644 instead of depositing in the SMEP accounts at KCB or Cooperative Bank of Kenya. Further that they also used to pay to the respondent cash money

17. **PW8, Lewis Nyegei**, Operations Manager at SMEP, Kisumu testified that he was given some receipts by the audit team to verify if the same had been presented to his office for reconciliation. All receipts issued to customers were to be presented to him to reconcile to ensure what was indicated in the receipts was the same as what is in the bank. He indicated that receipted amounts of up to Kshs. 435,931/= were not presented for posting by the Credit Officer in Siaya. Other monies collected from customers to bank for them but not receipted Kshs 1,284,462, money disbursed to non members of a group Kshs 147, 500, money sent to respondent's mobile phone Kshs 67,000 and value of repossessed items used by customers as security for the loans advanced were Kshs 165,300. Total amount Kshs 2,711,270 which could not be accounted for.

18. In cross examination, he stated that in audit, all parties must be consulted and that he carried out audit after the respondent had left the organization. He also stated that it was the Branch Manager one Peter Omollo who was to send the receipts to him for reconciliation.

19. **PW9, Sgt Patrick Malumasa**, the Investigating Officer stated that he charged the Respondent following the audit report on the missing monies owed to the complainant.

20. On being placed on his defence, the Respondent gave sworn testimony. He denied the offence. He stated that he was arraigned after resigning on allegations which he had nothing to do with. He stated that one Peter Omollo who was the Branch Manager in Siaya and in a position to state if the monies he collected from clients and any repossessions were surrendered to the office was not called to testify. He also stated that the said Branch Manager was responsible for the items repossessed from customers for defaulting to repay the loans advanced to them.

21. He further stated that he was not given the opportunity to respond to the Audit report as required in law. In addition, the Respondent

admitted that he received cash by MPESA but contended that the monies were surrendered to the Manager in Siaya Branch and only the Branch Manager who received the amounts and the repossessed items would clear the air on these allegations.

22. In support of this appeal, the appellant through Senior Principal Prosecution Counsel Mr. Okachi submitted orally. The respondent through Mr. Okello Advocate relied fully on his grounds of opposition filed on 23/5/2019 and that he did not wish to submit, Mr. Okachi, SPPC submitted relying on the court record and highlighted that the trial court erred in acquitting the Respondent of the offence of stealing by Servant yet there was overwhelming evidence adduced against him beyond reasonable doubt. Further, that the Prosecution's case was watertight and left no doubt as to the guilt of the Respondent, accused who was placed at the center of the crime.

23. Counsel asserted that the Respondent applied for employment to a Micro-finance Enterprise - Small & Micro Enterprise Programme SMEP which was received on 15/5/2010 (Ex 5). That he was offered employment vide a letter dated 8/6/2011. He was confirmed on 9/3/2012 as a permanent employee. He was given a Code of Conduct (pg 127). That the respondent violated the rules and started operating outside the guiding principles and defrauded unsuspecting members of the sister organizations of SMEP.

24. It was further submitted that the internal audit report at pg 163 revealed how fraudulent transactions were done by the Respondent. Counsel submitted that the Respondent defrauded Kshs. 2,398,470 although the charge sheet shows Kshs. 2,476,843 and submitted that despite the discrepancy in the two figures, this was a minor error that could be corrected by an amendment through the court's own motion.

25. Counsel submitted that each and every fraudulent transaction consisted of an offence on its own but that that would have meant voluminous several charge sheets.

26. It was submitted that the respondent used his own mobile phone to transact company business. This was 071828644 instead of allowing customers to deposit money in KCB and Cooperative Bank which led to loss of money. Further, that the Respondent also issued customers with receipts of SMEP for monies he received personally yet the money was not deposited in SMEP's account.

27. In counsel's view, the respondent was in authority, responsible for recovering money from depositors. That the respondent abused his position by impounding the customer's properties, sold them and appropriated the money to himself. That the Respondent's signature on the receipts were proved by the handwriting expert - pg (185). Counsel maintained that the Respondent was at the center of defrauding SMEP and its customers. That the prosecution proved its case against him beyond reasonable doubt hence he should have been convicted. He prayed that the acquittal be set aside and the Respondent be convicted for offence and sentence meted out accordingly.

DETERMINATION

28. I have carefully considered this appeal. What is in dispute is whether the Prosecution adduced evidence connecting the Respondent to the theft of the monies as per the charge sheet, and to the standard required in criminal cases.

29. The Prosecution relied on documents to show that the respondent received monies through MPESA, from customers contrary to the instructions of the employer. They also produced some documents to show that the customer's items were repossessed for defaulting on loan repayments but that the respondent never accounted for the proceeds of money.

30. Therefore what was available was indirect or circumstantial evidence against the respondent. In **Benson Limantes & Another Vs. Republic CRA 102 & 103 of 2002**, the Court of Appeal stated that: -

“In order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of guilt.”

31. Thus suspicion, however strong, cannot suffice to infer guilt. In **Joan C. Chebichii Sawe V R. Cr App 2/2002**, the Court of Appeal stated:

“The suspicion may be strong but this is a game with clear and settled rules of engagement. The prosecution must prove the case against the accused beyond any reasonable doubt. As this court made it clear in Mary Wanjiku Gichira V R Cr. App 17/1998, suspicion, however strong cannot provide a basis for inferring guilty which must be proved by evidence.”

32. The Respondent conceded in his defence that he was employed by the complainant on 13.6.2011 at Siaya Branch as Credit Officer II before he was promoted. His job entailed recommitting and training new clients and assessing their credit worthiness. He worked until 5th August 2015 when he resigned without any disciplinary grounds. He learnt that the complainant was about to declare all staff redundant. In Siaya, he worked with 4 other people **including Peter Omondi, the Branch Manager** whose duties were overall performance of branch supervision, analysing documents, approval of loans before disbursement, sending documents to Kisumu and was the custodian of all repossessed items.

33. Further, that when he resigned, he submitted his report and was paid Kshs. 53,000/= as his benefits.

34. He also claimed that he was never invited to answer to any of the audit queries yet he worked upto and including the time audit.

35. He conceded that he used to receive customer's money by MPESA due to vast area of operation and that some had no banking facilities but that when he left there was no complainant.

36. On repossessed items, he admitted recovering TV upon recommendation by the group's committee but stated that he handed over

everything to the Branch Manager who did not testify.

37. With such evidence coming from the defence, the prosecution was required to dislodge such evidence by calling the Branch Manager to state his role and whether as was stated by the Respondent, the Branch Manager was the one responsible for feeding the figures into the system and whether the Respondent handed over the money or repossessed items to him or not, after receiving it from customers since none of the customers stated that they were given a paybill number or bank accounts where they could deposit the monies.

38. Section 143 of the Evidence Act which provides that:

“No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact.”

39. All that the prosecution is required to do is to call such a number of witnesses as it thinks is sufficient to prove its case. However, with the glaring doubt in the present case, the evidence of the said Branch manager was not an option. He would have shed light to the court on whether indeed the Respondent handed over the money collected from customers to him. The absence of his evidence definitely rendered a fatal blow to the prosecution’s case.

40. The law is clear that where important prosecution witnesses are not called to testify, the court is in law entitled to draw an inference that the evidence of those important witnesses would have been adverse to the prosecution case. See the case of ***Bukenya & Others -vs- Uganda [1972] EA 549***. Although the prosecution is not obliged to call in my humble view, failure to call the Branch Manager Peter Omondi was a fatal omission and the court is inclined to infer that had he been called, he would have given adverse evidence to the prosecution.

41. This is so because the respondent even stated that it was the Branch Manager who took (repossessed) the plough and gave it to his relative to use. There was no contrary evidence adduced by the prosecution witnesses to dislodge this allegation by the Respondent accused.

42. In addition, the prosecution did not explain why the auditor did not interview the respondent during the audit yet the respondent was still in the complainant’s employment and service during the said audit, to explain any discrepancies or the shortages identified by the auditor.

43. I am in agreement with the trial court that the respondent should have been interviewed before the audit report was filed and submitted to the police because he was a person of interest and as he was not the overall boss in Siaya, he may have had an explanation to give before the charges were filed against him.

44. In my humble view, therefore, the prosecution did not discharge the burden of proof beyond reasonable doubt that the respondent stole from his master. Proof beyond reasonable doubt was explained by ***Lord Denning J in Miller V Minister for Pensions (1947) A.C*** that: -

“It need not reach certainty, but it must carry a high degree of probability, proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence, “of course, it is possible,” the case is proved beyond reasonable doubt, but nothing short of that will suffice.”

45. In ***Walter V R (1969)*** Lord Diplock explained reasonable doubt as that quality and kind of doubt which when you are dealing with matters of importance in your own affair, you may allow to influence you one way or the other. It can also be said that it is a doubt that can be given or assigned reason as opposed to speculation.

46. The prosecution was expected to present convincing and credible evidence beyond reasonable doubt that the respondent stole his employer’s money or property entrusted to him by virtue of his employment.

47. In this case, however, there is reasonable doubt created in my mind as there was no contrary evidence to that of the Respondent that he received the money and property but handed it over to the Branch Manager who was not called as a witness for the prosecution.

48. There is also reasonable doubt as to why the respondent was never questioned on his role in the disappearance of the money yet he was still in employment of the complainant at the time that the audit was carried out and concluded.

49. ***Black’s Law Dictionary, 8th Edition*** defines stealing as: ***“to take (personal property) illegally with the intent to keep it unlawfully.”***

50. In my humble view, the defence by the respondent displaced the evidence adduced by prosecution witnesses as there was no evidence that conclusively established that the respondent after receiving the monies or properties of his employer, kept it unlawfully. The respondent resigned and was cleared and paid his dues. There is no reason why the employer did not withhold the dues for the respondent until after verifying whether the respondent owed the employer any monies.

51. The prosecution claimed that the respondent collected monies using his mobile phone without authority and they even produced the statements of his mobile phone. The respondent did not deny receiving monies through his mobile phone but he explained that this was due to wide coverage as some customers had no access to banks. There was no contrary evidence.

52. The prosecution on the other hand did not adduce evidence to show that after receiving the said money, the respondent failed to surrender it through his branch manager who was the overall supervisor and who was never called to testify on the operations at the Siaya Branch.

53. There was also no evidence that the respondent sold and converted money being proceeds of sale of the repossessed properties belonging to some customers.

54. It is therefore not correct for the prosecution to claim that the charge was dismissed on account of discrepancy in figures of the audit report and the Safaricom statement.

55. It is true that such discrepancy could have been cured through an amendment on the court's own motion where there is proof of the actual amount lost compared to the amount stated in the charge sheet. However, in the instant case, I find and hold that there were several gaps in the prosecution's evidence which created doubt as to whether the respondent stole the money as charged or as presented in court by the prosecution witnesses.

56. For the above reasons, I find and hold that the prosecution did not prove their case beyond reasonable doubt against the respondent and therefore the trial magistrate did not err in acquitting the respondent.

57. I find this appeal not merited. The same is dismissed. I uphold the judgment of the trial court acquitting the respondent of all the charges.

Dated, signed and delivered in open court at Siaya this 2nd day of October 2019.

R.E. ABURILI

JUDGE

In the presence of:

Mr. Okachi SPPC for the Appellant State

Mr. Okello Advocate for the Respondent

CA: Brenda and Modestar