



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NOS.328 OF 2011 & 26 OF 2012 & 2 OF 2012

(AS CONSOLIDATED)

(An Appeal arising out of the conviction and sentence of Hon. C. W. Githua (Mrs.) – CM delivered on 24th October 2011 in Nairobi CM. CR. Case No.3099 of 2004)

SARAH AUMA NYADENGE.....1ST APPELLANT

DAVID TIMAYO MUTII.....2ND APPELLANT

JASON OLEKU KEKAYAYA.....3RD APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellants, Sarah Auma Nyadenge, David Timayo Mutii and Jason Oleku Kekayaya were charged with others with several offences under the **Penal Code**. They were charged with eight (8) counts of **stealing** contrary to **Section 275**. The particulars of the offence were that between 18th October 2004 and 15th December 2004, the Appellants jointly stole the sum of Kshs.22, 081,933.20 the properties of East African Portland Cement Company Limited, Kenya Commercial Bank Limited, Gil Oil Company Limited, National Oil Corporation of Kenya Limited, Eagle Outdoor Advertising Limited and Krystalline Salt Limited. The Appellants were further charged with two (2) counts of **attempting to steal** contrary to **Section 275** as read with **Section 389**. The particulars of the offence were that on 10th December 2004 at Kenya Commercial Bank, Kajiado Branch, jointly with others not before court, the Appellants attempted to steal the sum of Kshs.5,607,904.60 the property of Kenya Commercial Bank, Kajiado Branch. The other particulars were that on 15th December 2004, at Kenya Commercial Bank, Kajiado Branch, the Appellants jointly with others not before court attempted to steal the sum of Kshs.3,409,883.20, the property of Kenya Commercial Bank, Kajiado Branch. When the Appellants were arraigned before the trial magistrate's court, they pleaded not guilty to the charges. After full trial, the 1st Appellant was convicted of five (5) of the counts and sentenced to serve two (2) years imprisonment on each count. The sentences were ordered to run concurrently. The 2nd Appellant was convicted of six (6) of the counts. He was sentenced to serve two (2) years imprisonment on each of the counts. The sentences were ordered to run concurrently. The 3rd Appellant was convicted of three (3) of the counts and sentenced to serve two (2) years imprisonment on each count. The sentences were ordered to run concurrently. The Appellants were aggrieved by their respective conviction and sentence. They each filed a separate appeal to this court challenging the said conviction and sentence. The three separate appeals have been consolidated for the purpose of the hearing of this appeal.

The Appellants raised more or less similar grounds of appeal in their petitions of appeal. They were aggrieved that they had been convicted on the basis of weak, contradictory and inconsistent evidence of prosecution witnesses. They took issue with the fact that they had been convicted on the basis of a defective charge that ought not to have been admitted. The Appellants were aggrieved that the trial court put forward a speculative theory as a result of which the trial court reached the erroneous verdict that they were guilty as charged. The Appellants accused the trial court of failing to properly evaluate the evidence that was placed before the court, and instead of acquitting them, reached the erroneous finding that the prosecution had proved its case to the required standard of proof beyond any reasonable doubt. The Appellants were aggrieved that the trial court had selectively evaluated the evidence adduced before the court without taking into consideration the totality of the evidence adduced and thereby reached the erroneous determination that they were guilty as charged. The Appellants were of the view that the evidence adduced against them by the prosecution witnesses raised reasonable doubt that they had committed the offences that they were charged with. They were aggrieved that their respective defences had not been considered before the trial court reached the verdict that they were guilty as charged. They were finally aggrieved that the custodial sentences that they were sentenced to serve was harsh and excessive in the circumstances. In the premises therefore, the Appellants urged the court to allow their respective appeals, quash their convictions and set aside the sentences that were imposed on them.

Prior to the hearing of the appeal, counsel for the parties to the appeal filed written submission in support of their respective opposing positions. During the hearing of the appeal, Mr. Ochieng for the 1st and 2nd Appellants highlighted the written submission while Ms. Khafafa for the 3rd Appellant made further oral submission in support of the appeal. Learned counsel urged the court to find that the prosecution had failed to establish the respective charges against the Appellants to the required standard provided by the law. Ms. Aluda for the State opposed the appeal. She made oral submission urging the court to find that the prosecution had established the charges brought against the Appellants to the required standard of proof beyond any reasonable doubt.

This being a first appeal, it is the duty of this court to reconsider and to re-evaluate the evidence adduced so as to reach its own independent determination whether or not to uphold the conviction of the Appellants. As was held by the Court of Appeal in **Njoroge –Vs- Republic [1987] KLR 19 at P.22:**

“As this court has constantly explained, it is the duty of the first appellate court to remember that the parties to the court are entitled, as well as on the questions of facts as on questions of law, to demand a decision of the court of first appeal, and that court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions though it should always bear in mind that it has neither seen or heard the witnesses and to make due allowance in this respect (see Pandya v R [1957] EA 336, Ruwalla v R [1957] EA 570)”.

In the present appeal, the broad issue for determination by this court is whether the prosecution established the charges brought against the Appellants to the required standard of proof beyond any reasonable doubt.

This court has carefully considered the submission made by counsel for the Appellants and the response thereto made by the State. The court has re-evaluated the evidence adduced before the trial court as it is required to as the first appellate court. The Appellants argued that the convicting magistrate did not read the Appellants’ rights as provided under **Section 200(3)** of the **Criminal Procedure Code**. This section requires the magistrate taking over the proceedings from the previous magistrates who ceased to have jurisdiction to explain to the accused persons their right to either continue with the case or recall the witnesses who had earlier testified, for further cross-examination. This court has perused the proceedings of the trial court. The trial was conducted before three magistrates: Hon. L Mutende - PM (as she then was), Hon. G. Mutembei – CM and Hon. C. Githua – SPM (as she then was). The Appellants were represented by counsel throughout the trial. The proceedings reveal that whenever a succeeding magistrate took over the proceedings, the Appellants were informed of their right under **Section 200(3)** of the **Criminal Procedure Code**. On each occasion, the Appellants indicated to the court that they wished the proceedings to continue from where it had reached with the previous magistrate. The claim by the Appellants to the effect that their rights under **Section 200(3)** of the **Criminal Procedure Code** were breached is therefore not supported by the record of the trial court. That ground of appeal is disallowed.

As regard whether the prosecution established its case on the charges brought against the Appellants, upon re-evaluation of the evidence adduced, and also upon considering the submissions made by the Appellants in this appeal, this court holds as follows:

(1) The prosecution established to the required standard of proof beyond any reasonable doubt that cheques payable to the Commissioner of Value Added Tax (VAT) were diverted from its account and deposited in the account of Kajiado Town Council. These cheques were the following: Cheque No.104869 dated 30th November 2004 of the sum of Kshs.5,607,904.60. This cheque was paid by East African Portland Cement Company Limited. The second cheque was Cheque No.408399 dated 19th November 2004 of the sum of Kshs.1,737,547/-. This cheque was paid by Chrystalline Salt Limited. The third cheque was Cheque No.002710 dated 14th October 2004 for the sum of Kshs.3,903,543.40. The cheque was paid by Gill Oil Company Limited. The last cheque was Cheque No.900888 for the sum of Kshs.7,423,065/-. The cheque was paid by Eagle Outdoor Advertising Limited.

(2) The prosecution was able to establish that these cheques were received on behalf of the Commissioner of VAT by the 2nd Appellant Sarah Auma Nyadenge. At the time, the 2nd Appellant had been designated to receive cheques payable as withholding VAT from various companies. PW2 Robert Kila Malenya, a messenger employed by Gill Oil Company Limited testified that he delivered the cheque personally to the 2nd Appellant. The 2nd Appellant received the same. Evidence was laid by other witnesses which established that the said cheques were paid to the Commissioner of VAT, either directly or through its designated bank account.

(3) The prosecution established to the required standard of proof beyond any reasonable doubt that these four cheques were intercepted between the point of deposit and its clearance and substituted by cheques of a similar sum which had been drawn in favour of Kajiado Town Council.

(4) Evidence was adduced by Kenya Commercial Bank staff members who then worked at Kajiado Branch of the bank how the said cheques were deposited by employees of Kajiado Town Council. These bank employees included PW7 Peterson Muriuki Kamonde, PW8 Esther Mukuru Munyao, PW10 John Mwangi, PW11 Elijah Kibangendi Nyarangi, PW12 John Kamonye and PW18 Patrick Maina Wachira. These witnesses testified that Kajiado Town Council maintained four accounts at the bank. In the months of November and December 2004, the cheques in question were deposited in the accounts of the Kajiado Town Council. At the material time, the 2nd and 3rd Appellants were, respectively, the Town Clerk and the Treasurer of the Council. Evidence was led which established that the 2nd and 3rd Appellants were signatories of the accounts maintained by the Town Council at the bank. The 2nd and 3rd Appellants drew cheques of various amounts and withdrew money from the said accounts. In some instances, the 2nd Appellant was able to persuade the bank officials to allow him to withdraw cash from the said accounts even before the cheques had been cleared.

(5) The prosecution was able to establish that the 2nd and 3rd Appellants connived with whoever intercepted the cheques payable to the Commissioner of VAT and allowed the accounts of Kajiado Town Council at Kenya Commercial Bank, Kajiado Branch to be used as a conduit from which the said intercepted cheques could be diverted and funds withdrawn from the said accounts.

(6) The prosecution was able to establish to the required standard of proof that the manner in which the 2nd and 3rd Appellants withdrew the funds from the said accounts immediately after the said cheques had been deposited, clearly pointed to persons who had knowledge of the fraudulent activities that were being perpetrated through the said accounts. The evidence adduced by the prosecution witnesses including PW5 Christine Supasha Leina, an employee of the Town Council, established that the 2nd and 3rd Appellants withdrew the said funds for their own benefits and not for the benefit of the Town Council. This court reached this finding on the evidence that despite the fact that the 2nd and 3rd Appellants withdrew large sums from the bank, they failed to pay the salaries of the employees of the Town Council.

(7) The prosecution was able to establish that the 2nd and 3rd Appellants withdrew the said funds from the said accounts at Kenya Commercial Bank, Kajiado Branch with the clear knowledge that the cheques deposited did not represent either revenue received on behalf of the Town Council or funds received from Central Government for the running of the said local authority.

(8) The prosecution was able to establish that the mailbag used to carry the cheques from the Kajiado Branch of the Kenya Commercial Bank to its collecting point at Nairobi before being forwarded to the clearing house was tampered with and cheques with similar sums to those payable to the Commissioner of VAT substituted with the ones payable to Kajiado Town Council.

(9) The prosecution established to the required standard of proof that the diversions of the said cheques payable to the Commissioner of VAT could not have been possible if the same were not diverted at source. All the cheques that were diverted were received by the 1st Appellant. Documentary evidence produced established that the said cheques were received by the 1st Appellant before the sums appearing on the said cheques were reflected in the cheques that were deposited at Kenya Commercial Bank, Kajiado Branch as drawn in favour of Kajiado Town Council.

The evidence adduced by the Appellants in their defence did not dent the otherwise strong evidence that was adduced against them by the prosecution witnesses. The 1st Appellant in her defence denied stealing the money. She testified that she received the cheques as part of her duties in the course of her employment. She was one of the many employees who were authorized to receive the cheques. She denied that she had anything to do with the diversions of the cheques. On his part, the 2nd Appellant's defence was that he was framed with the charges due to political reasons. He accused his political enemies of falsely accusing him so as to enable them besmirch his name. He admitted that he withdrew the various sums of money from the Town Council's account in the course of his normal duties as the Chief Executive Officer of the Council. He denied being party to the scheme to defraud the funds in question. On his part, the 3rd Appellant told the court that his role at the material time was in the course of execution of his duty as the Council's Treasurer. He denied being part of the scheme that was hatched to defraud the Commissioner of VAT of the sums that were the subject of the charges that were laid against them.

It was clear to this court that the Appellants' defence other than being mere denial, did not at all dilute the strength of the prosecution's case that implicated them in the offences for which they were convicted. This court holds that it was not a coincidence that cheques which were paid to the 1st Appellant by companies paying the sums that they had withheld as VAT were intercepted and the exact sums appearing in the cheques were reflected in the cheques deposited at the same time at Kenya Commercial Bank, Kajiado Branch paid in favour of Kajiado Town Council where the 2nd and 3rd Appellants were signatories to the accounts. The pattern of withdrawals by the 2nd and 3rd Appellants clearly showed that the said Appellants were aware that the amounts deposited in the accounts of the Council at Kenya Commercial Bank, Kajiado Branch was not revenue or genuine transfer from the Central Government.

The upshot of the above reasons is that the appeal lodged by the Appellants lacks merit and is hereby dismissed. The appeal against conviction and sentence cannot be sustained in light of the strong culpatory, cogent and credible evidence that was adduced by the prosecution witnesses. The sentences imposed were legal. It is so ordered.

DATED AT NAIROBI THIS 12TH DAY OF JUNE 2018

L. KIMARU

JUDGE