



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT HOMA BAY

CRIMINAL APPEAL NO.48 OF 2017

BETWEEN

MARUKUS OGOLLA BWAI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in Criminal Case No.89 of 2017 at the PM's Court at Magunga - Hon. J.C. Bii, RM dated 17th October, 2017)

JUDGMENT

[1] The appellant, **MARUKUS OGOLLA BWAI**, was convicted and sentenced to three years imprisonment by the Resident Magistrate at Magunga for theft by agent, contrary to **Section 283 (b)** of the **Penal Code**.

It was alleged that on the 18th May 2016, at Seka Sub Location, Suba – Homa Bay County, the accused being an agent of St. Anna Ochiro self Help Group, stole Kshs.73,775/= the property of the said group which had been entrusted to him to deliver to Kenya commercial bank, Sori Branch Account No.1171231954.

[2] Being aggrieved by the conviction and sentence, the appellant preferred eight (8) grounds of appeal contained in the memorandum of petition of appeal filed herein on 31st October 2017. His main complaint was essentially that he was convicted and sentenced against the weight of the evidence adduced. His other vital complaints were that his conviction was based on uncorroborated evidenced and that the trial court failed to record the language used.

[3] The appellant therefore urged this court to allow the appeal by quashing the conviction and setting aside the sentence. He appeared in person at the hearing of the appeal and relied on his written submissions in support of his case.

The learned Prosecution Counsel, **MR. OLUOCH**, opposed the appeal on behalf of the state/respondent. He orally submitted with regard to ground two of the appeal that the court record showed that there was a competent prosecutor called Mwangi.

[4] With regard to ground four, the learned Prosecution Counsel

submitted that there was no legal requirement for corroboration in an offence of theft by agent and in any event, various documents produced in court offered corroboration to the complainant's evidence.

On language i.e. ground six of the appeal, the learned Prosecution Counsel submitted that the language used was clearly indicated in the record. That, during his defence, the appellant decided to keep quiet.

Learned Prosecution Counsel, contended that the appellant was properly convicted and sentenced and therefore, his appeal lacks merit and ought to be dismissed.

[5] Having given due consideration to the grounds of appeal in the light of the rival submissions by both the appellant and the respondent and taking into account that the duty of this court was to re-visit the evidence and draw its own conclusion bearing in mind that the trial court had the advantage of seeing and hearing the witnesses, it is the opinion of this court that the evidence led by the prosecution through **HANNINGTON ONDERY OLENCHA (PW1)**, **JOSEPH OGUNGA MAGAKA (PW2)** and **JANE AKINYI AROGO (PW3)**, clearly

established without dispute that the appellant was the appointed treasurer of the complainant Self Help group and thus, the custodian of the group's money for purposes of banking.

[6] The evidence further established that in his capacity as the treasurer of the group, the appellant received a sum of Kshs.103, 775/= being the amount collected at a meeting held by the group's committee members at the appellant's homestead on 15th May 2016. It was thereafter agreed as a matter of course that the amount was to be deposited by the appellant in the group's bank account. However, only a sum of Kshs.30, 000/= was deposited on the 18th May 2015.

[7] These facts were not at all or substantially disputed by the appellant. They proved without any doubt that indeed a sum of Kshs.103, 775/= belonging to the group was handed to and received by the appellant for purposes of banking it in its entirety but only Kshs.30, 000/= was banked.

The balance of Kshs.73, 775/= was unaccounted thereby implying that the appellant converted it into his own use and thus bringing him into conflict with the law.

[8] The excuses by the appellant that the unaccounted amount was stolen from him was never established and his empty promises of refunding the amount clearly demonstrated his guilty mind. The material ingredients of **Section 283 (b)** of the **Penal Code** was thus fully proved against the appellant such that he could not herein complain that his conviction by the trial court was against the weight of the evidence. On the contrary, the evidence against him was not only weighty but also credible enough to justify the conviction which was proper and lawful.

[9] Under the same **section 283 (b)** of the **Penal code**, a person found guilty of the offence is liable to imprisonment for seven (7) years.

The appellant received a lenient sentence of three (3) years which was lawful and is hereby sustained.

As to ground two and six of the appeal relating to competence of the prosecuting officer and the language used in court, the record of the trial court invalidates the complaints.

[10] In sum, this appeal is devoid of merit. It must and is hereby dismissed.

J.R. KARANJAH

JUDGE

18.10.2018

[Delivered and signed this **18th** day of **October, 2018**].