



REPUBLIC OF KENYA

IN THE HIGH COURT

AT KISUMU

CRIMINAL APPEAL NO. 27 OF 2016

BETWEEN

ISAIAH OGADA NYAMUNDHE.....APPELLANT

AND

REPUBLIC.....RESPONDENT

*(Being an appeal from the original conviction and sentence of Hon.*

*A. Odawo, RM dated 25<sup>th</sup> August 2016 at the Chief Magistrate's*

*Court at Kisumu in Criminal Case No. 531 of 2013)*

### JUDGMENT

1. In the subordinate court, the appellant, **ISAIAH OGADA NYAMUNDHE** was charged with the offence of stealing by servant contrary to **section 281** of the *Penal Code (Chapter 63 of the Laws of Kenya)*. The particulars of the charge were that on diverse dates between 18<sup>th</sup> December 2012 and 3<sup>rd</sup> March 2013 at Faulu Kenya Limited, Kisumu City, Kisumu County jointly with others not before the court, being a servant to Faulu Kenya Limited as a branch operations and service supervisor stole Kshs. 177,800/- the property of Faulu Kenya Limited which came into his possession by virtue of his employment.

2. After pleading not guilty, the trial proceeded apace with the prosecution calling 5 witnesses and the appellant giving unsworn testimony. The appellant was convicted and sentenced to two years' imprisonment. He now appeals against the conviction and sentence. Before I consider the arguments in detail, it would be appropriate at this stage to recall the duty of the first appellate court: it is to reconsider and to re-evaluate the evidence adduced before the trial court to reach its own independent determination whether to uphold the conviction of the appellant (see *Njoroge v Republic [1987] KLR 19, 22*).

3. The evidence before the trial court was as follows. The appellant was at the material time a supervisor at the Kisumu Branch of Faulu Bank ("the Bank"). While the Bank had satellite branches in the region, it did not carry out banking services hence any banking had to be done at the nearest Kenya Commercial Bank ("KCB") branch. After banking money with KCB, the customer was issued with deposit slips in duplicate. One copy was retained by KCB and a second copy was given to the customer who forwarded it to the Bank's satellite branch to confirm that the deposit had been made.

4. The principal prosecution witness, Keddy Jaspert Kanyarota (PW 2), the Security and Investigation Officer of the Bank, testified that their agents in the satellite branches would send the deposit slips to the Kisumu Branch accompanied by General Transaction Forms (“GT Forms”) which contained customer details. The GT Forms would be received at the Kisumu branch where the tellers would input the transactions in individual customer accounts. PW 2 told the court that they started receiving complaints from customers that their deposits were not reflecting in their respective accounts. He also retrieved GT Forms (Exhibit No. 1) whose entries did not relate to any other forms or to real customers. PW 2 stated that the GT Forms were forged. PW 2 retrieved some deposit slips acted upon by the cashiers but found that some had been destroyed. He produced 4 deposit slips (Exhibit No. 2) which he claimed showed that money was channeled to the following 3 different accounts.

- EWK– A/C 10191328847
- BA and ZM – A/C 10191364762
- NZL – A/C 10191372595

He confirmed that the total loss incurred was Kshs. 177,800/- and that the accused had forged documents.

5. Alfred Onyango Otieno (PW 1), the secretary of Okungu Self Help Group, told the court that the Group was one of the Bank’s customers and had deposited money with KCB on several occasions. On 6<sup>th</sup> November 2013, he was called to the Bank and introduced to PW 2 who told him that the money he had been depositing was not in the group account. He testified that he had not been aware of the issue and when pressed in cross-examination, he stated that he did not know how much of the money he had deposited was not reflected in the account. The secretary of Yagas Self Help Group, Usenge, Mary Atieno Oloo (PW 3), told the court she was summoned to the Bank office at Bondo on 9<sup>th</sup> November 2011 where she was asked about depositing some money. She testified that she deposited Kshs. 400/- on 7<sup>th</sup> September 2012 at KCB and took the deposit slip to the Bank. In cross-examination, she told the court that her group had not lost any money.

6. The document examiner, Inspector Michira Ndege (PW 4), testified that he was instructed to examine the GT Forms (Exhibit No. 1) and the Cash deposit slips (Exhibit No. 2) to ascertain whether the handwriting on the documents in question belonged to the appellant. He compared the handwriting on the documents and compared it with the specimen signatures and concluded that the handwriting was by the same author.

7. Corporal Fred Hussein (PW 5), an officer with the Banking Fraud Unit, testified that he arrested and charged the appellant and after receiving a complaint from the Bank that he had misappropriated Kshs. 177,800/-. In cross-examination, he admitted that he did not have any statement from any witness to show that money had been stolen. In his view, the GT Forms filled by the appellant, were sufficient to show that money had been stolen. He also confirmed that he did not have corresponding statements from each client to show that money wasn’t banked as shown in the GT Forms or statements from KCB showing that money was banked or that the appellant withdrew money. He also told the court that he was not given a breakdown of how the sum of Kshs. 177,800/- was arrived at.

8. In his unsworn statement, the appellant told the court that he filled all the GT Forms that were produced except one which form was filled by another customer service officer. He stated that he would get all the data including the customers details to fill in from tracker forms from the Satellite offices. After filling in the forms, he would give the forms to the tellers to input the information as he did not have any rights to input the data. He denied that any money came into his possession as he only received deposit slips, GT Forms, account opening forms and tracking forms from the satellite offices. He told the court that he had no access to the customer’s accounts once money had been deposited and it is only the customer who would withdraw it. He further stated that once the tellers updated the customers’ accounts, the deposit slips were taken to the registry which was under control of the Branch manager.

9. The trial magistrate examined the evidence and held that the main issue for determination was whether

the appellant stole the money entrusted to the bank by customers. The court concluded that the act of filing the GT forms without authority of the Bank constituted diverting money hence the offence was established. The trial magistrate concluded that;

*It does not matter that the actual physical monies did not come into possession of the Accused. The fact that the used documentation to divert funds was fraudulent. It does not matter that that actual customers were not presented as prosecution witnesses, the complainant herein is the custodian institution, which had the responsibility to safeguard the interest of its customers.*

10. The appellant's appeal is grounded on the petition of appeal dated 2<sup>nd</sup> September 2016. Although the petition of appeal is argumentative and prolix, the thrust of the appeal is that the prosecution failed to prove the ingredients of the offence of stealing defined in **section 281** of the **Penal Code**. The appellant contended that there was no proof that there was actual loss of money by the complainant of anyone else or otherwise proof actual taking possession or movement or conversion of the money allegedly stolen by the appellant from the complainant.

11. The respondent opposed the appeal and submitted that the conviction and sentence were sound. Ms Osoro, counsel for the respondent, contended that PW 2 testified that it is the appellant who would confirm the deposits by filling the GT Forms and since it turned out to be forgeries, the offence of stealing was proved as the appellant diverted the money he was charged with stealing.

12. **The question in this appeal is whether the prosecution proved that the appellant stole Kshs. 177,800/- beyond reasonable doubt. Section 268 of the Penal Code defines stealing as follows:**

***268(1) A person who fraudulently and without any claim takes anything capable of being stolen, or fraudulently converts to the use of any person, other than the general/special owner thereof, any property, is said to steal that thing or property.***

***(2) A person who takes anything capable of being stolen or who converts any property is deemed to do so fraudulently if he does so with any of the following intents, that is to say—***

***(a) an intent permanently to deprive the general or special owner of the thing of it;***

***(b) an intent to use the thing as a pledge or security;***

***(c) an intent to part with it on a condition as to its return which the person taking or converting it may be unable to perform;***

***(d) an intent to deal with it in such a manner that it cannot be returned in the condition in which it was at the time of the taking or conversion;***

***(e) in the case of money, an intent to use it at the will of the person who takes or converts it, although he may intend afterwards to repay the amount to the owner; and "special owner" includes any person who has any charge or lien upon the thing in question, or any right arising from or dependent upon holding possession of the thing in question.***

***(3) When a thing stolen is converted, it is immaterial whether it is taken for the purpose of conversion, or whether it is at the time of the conversion in the possession of the person who converts it; and it is also immaterial that the person who converts the thing in question is the holder of a power of attorney for the disposition of it, or is otherwise authorized to dispose of it.***

***(4) When a thing converted has been lost by the owner and found by the person who converts it, the conversion is not deemed to be fraudulent if at the time of the conversion the person taking or converting the thing does not know who is the owner, and believes on reasonable grounds that the owner cannot be discovered.***

**(5) A person shall not be deemed to take a thing unless he moves the thing or causes it to move.**

**13. Under section 281 of the Penal Code, “If the offender is a clerk or servant, and the thing stolen is the property of his employer, or came into the possession of the offender on account of his employer, he is liable to imprisonment for seven years.”**

14. To secure a conviction, the prosecution had to establish the *mens rea* of the offence, that is the fraudulent intent as defined in **section 268(2)(e)** of the *Penal Code* that is the intent to, “***an intent to use it at the will of the person who takes or converts it.***” It also had to establish the *actus reus*, that is, “***taking “or “conversion.”***”

15. Having reviewed the evidence, I am satisfied that the prosecution failed to establish that the appellant took or converted the sum of Kshs. 177,800/-. The prosecution relied on the GT Forms filled by the appellant but these forms without more could not establish that the appellant took or converted the money. As counsel for the appellant pointed out, the prosecution did not prove that certain customers made deposits in KCB accounts which deposits were not reflected in their respective accounts. In fact, PW 1 and PW 3 testified that they did not lose any money. The other customers, whose money was allegedly stolen, were never called nor were their accounts produced to show that the money they deposited had been stolen.

16. It was the burden of the prosecution to show how the appellant stole Kshs. 177,800/-. Although PW 2 told the court that this sum was the extent of the loss, he could not point out how this sum was arrived at. On his part, PW 5 admitted in cross-examination that PW 2 did not give a breakdown of how the figure was arrived at. It was not related or pin-pointed to any customer’s account. In other words, the prosecution did not show how the GT Forms admittedly filled by the appellant were used to “*take*” or “*convert*” the money. The trial magistrate did not consider this aspect of the evidence as it was the primary duty of the prosecution to establish how the amount charged was arrived at.

17. I have also examined the exhibits. The GT Forms show names of customers, account numbers and amounts allegedly deposited. No effort was made to connect these names and amounts to either deposits made in KCB and to the individual customer accounts. Likewise, the deposit slips produced do not support the prosecution case. 3 of the slips were in the name of the appellant showing that he had withdrawn Kshs. 750 on 6<sup>th</sup> May 2013, Kshs. 1,000/- on 25<sup>th</sup> July 2013 and Kshs. 2,000/- on 3<sup>rd</sup> August 2013 from an account bearing his name. This amount is not only a far cry from the Kshs. 177,800/- but not connected to the any theft. The prosecution did not relate fourth slip in the name of ZM showing a withdrawal of Kshs, 5,900/- on 15<sup>th</sup> May 2013 to its case. Moreover, the deposit slips did not relate to the 3 accounts referenced by PW 2 (see para. 4 above).

18. The failure to produce the deposit slips or evidence from KCB, in the form of statements, that the money was deposited in the Bank account and the failure to produce the statements of the customers’ accounts at the Bank to establish that the money was stolen by the appellant all raise a reasonable doubt. It was incumbent upon the prosecution to adduce cogent evidence irresistibly pointing to the offence of stealing by a clerk by proving that the amounts in question were received by the appellant during employment and that he never entered the amount in the books as required and that he stole it. In substance, the prosecution case was a basket full of water and could not sustain a conviction.

19. The appeal is allowed. The conviction and sentence are quashed. The appellant is set free unless otherwise lawfully held.

**DATED and DELIVERED at KISUMU this 19<sup>th</sup> day of January 2017.**

**D. S. MAJANJA**

**JUDGE**

Mr Ragot instructed by Otieno Ragot and Company Advocates for the appellant.

Ms Osoro, Prosecution Counsel, instructed by the Office of the Director of Public Prosecutions for the respondent.