



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.588 OF 2009

(An Appeal arising out of the conviction and sentence of G.C. MUTEMBEI - CM delivered on 18th December 2009 in Nairobi CM. CR. Case No.724 of 2007)

ROSEMARY WAMUYU GICHUKI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant, Rosemary Wamuyu Gichuki, was charged with another (who was however acquitted by the trial court) with the five (5) counts of **stealing by servant** contrary to **Section 281** of the **Penal Code**. The particulars of the offence were that on diverse dates between 5th October and 23rd December 2006 and between 4th January and 23rd February 2007, the Appellant being an employee of PC World Limited stole from the said firm a sum total of Kshs.1,737,291/- which came in her possession by virtue of her employment. The Appellant was further charged with one (1) count of **forgery** contrary to **Section 349** of the **Penal Code**. The particulars of the offence were that on diverse dates between 5th October 2006 and 23rd February 2007 at Westlands in Nairobi County, the Appellant, jointly with others not before court, with the intent to defraud, forged a certain rubber stamp of Fidelity Commercial Bank Limited purporting it to pass as a genuine rubber stamp of the said Fidelity Commercial Bank Limited. When the Appellant was arraigned before the trial magistrate's court, she pleaded not guilty to the charge. After full trial, she was found guilty as charged of all the counts. In respect of the five theft counts, she was fined Kshs.400,000/- or in default she was to serve 12 months imprisonment. In respect of the forgery charge, she was fined Kshs.50,000/- or in default she was to serve six months imprisonment. The Appellant was aggrieved by her conviction and sentence. She has filed an appeal to this court challenging her conviction and sentence.

In her petition of appeal, the Appellant raised several grounds of appeal challenging her conviction and sentence. The said grounds may be summarized thus: She was aggrieved that she had been convicted on the basis of a defective charge sheet. She took issue with the fact that she had been convicted on the basis of insufficient, inconsistent, flimsy and biased evidence of prosecution witnesses. She faulted the trial magistrate for failing to properly evaluate the totality of the evidence adduced before the trial court before reaching the verdict finding her guilty as charged. She was aggrieved that she had been convicted on the basis of evidence that was not properly investigated and after the trial court had shifted the burden of proof. The Appellant was of the view that the trial court had sentenced her to serve a sentence that did not fit the severity of the offence. She was of the view that the sentence that was meted to her was harsh and excessive. In the premises therefore, the Appellant urged the court to allow the appeal, quash the

conviction and set aside the sentence that was imposed on her.

During the hearing of the appeal, this court heard oral rival submission made by Mrs. Gulenywa for the Appellant and by Mr. Kabaka for the State. Ms. Gulenywa submitted that the charge sheet upon which the Appellant was convicted was defective in that it improperly stated the amount that was allegedly stolen and further that it implied that the Appellant was the only one who handled the cash yet there were others who were authorized to handle the said cash. In particular, she submitted that the Appellant was not the only employee who was authorized to deposit the cash in the bank. There were other employees who deposited the cash as was evidenced by the deposit slips which were produced in evidence by the prosecution. She specifically referred to exhibits numbers 26, 34, 35, 36 and 37. The deposits in the specific slips were made by one Sherab who was sacked by the employer before the Appellant's arrest. Learned counsel submitted that insofar as the charge sheet did not reflect the persons who actually deposited the said sums, then she could not be found guilty of the same. The Appellant submitted that the evidence adduced against the Appellant was discriminatory and biased in that other persons who deposited the amount in the bank on behalf of the employer were not charged with the Appellant.

She took issue with the fact that the trial court had not considered the hierarchy at her place of employment which clearly showed that the Appellant was not authorized to deposit the money in question. In particular, she took issue with the fact that what she explained in her defence was not taken into consideration by the court. The Appellant submitted that the evidence adduced by the prosecution was contradictory in the sense that no explanation was forthcoming from the employer while it took a long time for the alleged theft to be discovered yet reconciliations were frequently done. She submitted that on the basis of the evidence that was adduced by the prosecution witnesses, it was clear that no case was established against her to warrant her conviction of the said theft. She urged the court to re-evaluate the evidence and reach an appropriate decision finding the Appellant not guilty as charged. She also urged the court to review the sentence that was imposed on her, as in her view, the sentence was unjustified and excessive.

Mr. Kabaka for the State opposed the appeal. He submitted that the prosecution had established to the required standard of proof that indeed the Appellant stole money that was entrusted to her by her employer in her capacity as an employee. He explained that it was the Appellant's duty to deposit the daily proceeds of sale at the employer's bank account at Fidelity Bank. Instead of depositing the monies, the Appellant forged deposit slips and had the same stamped using a forged rubber stamp purportedly belonging to the bank. This went on for some time before the employer discovered the loss. The Banking Fraud Unit were called to investigate the case. They were able to establish that indeed the Appellant stole the sum in question. Learned counsel submitted that the prosecution did establish to the required standard of proof that the Appellant prepared the deposit slips, had the same stamped using a forged rubber stamp and did not actually deposit the sums appearing in the deposit slips in the bank. She converted the said sum. In the premises therefore, he urged the court to dismiss the appeal and uphold the conviction and sentence of the Appellant.

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 Appellant. 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, Ruwala v R [1957] EA 570)”.

In the present appeal, the issue for determination by this court is whether the prosecution adduced sufficient evidence to support the conviction of the Appellant on the charges that were brought against her to the required standard of proof.

The Appellant raised several grounds challenging her conviction. The grounds of appeal fall in three broad areas: The first broad area is whether the charges brought against her were defective. Counsel for the Appellant argued that the fact that other persons filled the deposit slips other than the Appellant meant that the charges brought against the Appellant in respect of the particular deposit slips were defective. On its part, the prosecution was of the view that the charges brought against the Appellant were proper. This court has carefully re-evaluated the evidence adduced before the trial court in light of the submission made on this appeal. PW4 Emmanuel Kenga, a document examiner based at CID Headquarters testified that he examined the deposit slips that were referred to him being exhibits No.1 to 59 and formed the opinion that the said deposit slips were prepared by the Appellant whose handwriting he had taken specimens of. He had no doubt that it was the Appellant who prepared the deposit slips that were used to steal the money from the employer. The Appellant did not succeed in her challenge of this evidence on cross-examination. This court finds, as the trial court did find, that it was the Appellant who prepared the particular deposit slips which she used to steal the money from her employer. Her claim to the effect that someone else filled the said deposit slips is not supported by evidence. That ground of appeal fails.

The second broad ground of appeal is whether the prosecution adduced sufficient inculpatory evidence to establish the Appellant's guilt to the required standard of proof beyond any reasonable doubt. The prosecution was able to establish the following: That the Appellant was employed by PC World Limited as a Debt Collector and Credit Controller. Among her duties was to deposit in the bank the daily sales collection. During the specific period, the Appellant performed these duties. She filled the deposit slips and deposited the money at Fidelity Commercial Bank Limited. Instead of depositing the said sums, the prosecution was able to prove that the Appellant used a forged stamp of the said Fidelity Commercial Bank with a view to duping her employer that she had deposited the said sum. The discrepancy was discovered when the employer changed the accounting system. That was when the deposit slips in question were retrieved. It was established that the amounts in the questioned deposit slips had in fact not been deposited in the bank.

The employer lost the amount reflected in the said deposit slips. The only person who had access to the money was the Appellant. Although the Appellant argued that other persons in the company may have stolen the money, the evidence adduced by the prosecution witnesses pointed to no one other than the Appellant as the person who had the opportunity to perpetrate the theft. This court therefore finds that the prosecution did establish to the required standard of proof beyond any reasonable doubt that it was the Appellant who stole the sums in question by purporting to have deposited the same in the bank while in actual fact no such deposits were made. The Appellant's protestation of innocence cannot dent the otherwise strong, cogent, consistent and credible evidence that was adduced against her by the prosecution witnesses.

On sentence, the Appellant complained that the sentence that meted to her by the trial court was harsh and excessive. This court agrees with her in one aspect of the sentence. The fines that were imposed by the trial court were harsh and excessive. This court will set aside and substitute the fines imposed with one consolidated fine of Kshs.400,000/- or in default the Appellant shall serve one (1) year imprisonment.

The upshot of the above reasons is that the appeal lodged by the Appellant, other than on sentence, lacks merit and is hereby dismissed. It is so ordered.

DATED AT NAIROBI THIS 7TH DAY OF FEBRUARY 2017

L. KIMARU

JUDGE