



REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CRIMINAL APPEAL NO. 14 OF 2015

BETWEEN

JOEL OSTEEEN BOSSEAPPELLANT

AND

REPUBLICRESPONDENT

(Being an appeal from the original conviction and sentence of Hon.T. Obutu, SRM dated 10th December 2015 at the Chief Magistrates Court at Kisumu in Criminal Case No. 209 of 2012)

JUDGMENT

1. Before the Subordinate Court, the appellant, **JAMES OSTEEEN BOSSE**, faced a single count of stealing contrary to **section 268** as read with **section 275** of the *Penal Code (Chapter 63 of the Laws of Kenya)* as follows;

Between 23rd October, 2009 and 13th September 2010 at Covenant Home Organization Kisumu in Kisumu East District, JAMES OSTEEEN BOSSE stole cash Kshs 1,169,184 the property of Covenant Home Organization.

2. After trial, the appellant was convicted and sentenced to 12 months' imprisonment without the option of a fine. He now appeals against conviction and sentence as set out in the petition of appeal dated 13th February 2015. The thrust of the appeal according to the appellant's counsel, Mr. Ogonda is that the prosecution failed to prove its case beyond reasonable doubt particularly because it was grounded on circumstantial evidence. Ms. Osoro for the respondent submitted that the prosecution case was proved and the conviction and sentence were proper.

3. This being a first appeal, it is the duty of this court to subject the evidence on record to a fresh review and scrutiny and come to its own conclusions all the time bearing in mind that it did not see the witnesses testify as to form an opinion on their demeanour (see *Okeno v Republic [1972] EA 32*).

4. The prosecution case was that the appellant was left in charge of Covenant Home Organisation ("the Home") by Patricia Mileen (PW 1) who had to leave the country in October 2009 due to illness. She started receiving information that all was not well at the Home and when she returned in September 2010, she found the appellant had resigned and the home was in a bad state. She also found that a substantial sum of money had been embezzled. She told the court that the Board of Directors commissioned an audit report which disclosed that Kshs 1,169,184/- could not be accounted for.

5. Angeline Akinyi Danga (PW 2) testified that she worked at the Home and recalled that after PW1 left,

the appellant was the acting director. She would sign cheques and the appellant would collect money himself from the bank and pay workers. She told the court that the appellant resigned in September 2010. Tom Ongoro Osikuku (PW 3) was a Board member of the Home. He confirmed that the Board commissioned an audit and found that Kshs 1,169,184/- was unaccounted for. The auditor called by the Board, Charles Mumbo Owenga (PW 4) confirmed that he was instructed to conduct the audit and after going through the bank statements, vouchers and documents, he concluded that Kshs 1,169,184 had been missing as it was not supported by any documentation.

6. The investigating officer, Corporal Harrison Shuma (PW 5), told the court that he was given the audit report which showed that a total of Kshs 1,169,184 was not accounted for. After taking witness statements, he charged the appellant with stealing.

7. The appellant gave sworn testimony and called one witness. David Pierson (DW 1) testimony was that he was a director of the Home until December 2010 when he opted to resign because PW 1 had problems handing the Home accounts as her systems were prone to fraud. On his part the appellant denied stealing. He told the court the PW 1 approached him in 2009 to assist in restructuring the Home as it had some issues. He prepared a report which identified the problems. When PW 1 handed over to him he begun restructuring operations and decided to resign before PW 1 returned.

8. After reviewing the evidence, the trial magistrate held as follows:

I have looked at the constitution and I find that indeed the accused unprocedurally resigned but that is not the issue for determination before this court. From the evidence on record and more so the report from Owenga and associates the total funds received for the period in question (23/10/2009-13/09/2010) was Kshs 16,262,763. The total payments made was Kshs 16,168,963. The total of Kshs 1,169,184 could not be accounted for despite the accused being invited. The report by Owenga was never discredited during cross-examination. There was no separate audit report to discredit that of the prosecution. I was more disturbed that despite the accused having resigned, he continued withdrawing monies from the accounts of the complainant more specifically between 7/9/2012 and 12/9/2010. The withdrawals were never supported. The accused never denied the withdrawals in his defense nor did he account for them. For the above observations I do find that the prosecution has establishes their case as required by law and points out to the accused as the person who stole Kshs 1,169,184 belonging to the orphans. I sincerely see no malice on the part of the prosecution witnesses. The prosecution evidence was well corroborated and I am left with no doubt that the accused committed the offense. The accused is accordingly found guilty as charged

9. The charge facing the appellant is one of stealing which is defined by **section 268** of the **Penal Code** as follows;

(1) A person who fraudulently and without claim of right takes anything capable of being stolen, or fraudulently converts to the use of any person, other than the general or 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 amounts to the owner.*

10. In this case, the appellant was charged with the theft of money hence the definition found in (e) is applicable. In **R v Jones [1976] KLR 1**, the court held that:

[O]n a charge of theft it was necessary to prove a fraudulent taking or conversion without claim of right, and a person was deemed to have taken or converted money fraudulently if he did so without a claim of right and with intent to use it at his will, even if he intended afterwards to repay the money to the owner.

11. In this case, the key evidence against the appellant was the audit report which showed that after reconciliation accounts Kshs. 1,169,184/- was unaccounted for. The audit report prepared by PW 4 and relied upon by the prosecution stated as follows;

The unaccounted fund, Kshs. 1,169,184 is quite substantial amount whose accountability should be given necessary attention. There is therefore serious need for Mr James Bosse to properly hand over any vouchers/receipts that might still be in his possession and possibly give an explanation in regards to the fund.

12. Apart from the fact that the auditor's findings were ambivalent, to say that money was unaccounted for is wholly different from saying that money had been stolen by the appellant. The prosecution had to prove that each transaction over the period charged met the definition of stealing. The prosecution did not produce the primary evidence or establish that each payment made by the appellant during the applicable period was not authorized or if authorized, converted by the appellant for his own use. Without the supporting documentation for each transaction, the auditor's report is really an opinion and cannot by itself sustain a conviction for stealing.

13. I also agree with the appellant's counsel that the tenor of the learned trial magistrate's decision, which I have set out at para.8 above, also disclosed a grave misdirection. The trial magistrate shifted the burden of proof to the appellant by insisting that the appellant had to discredit the audit report or produce a separate report. It was the duty of the prosecution to prove that each of the payment made or withdrawal of money for the period charged amounted to stealing.

14. I would add that the prosecution case was undermined by the fact that the appellant faced a charge of stealing a large sum of money over a period of time. Each transaction that was not authorized ought to have constituted a different count. The omnibus nature of the charge ultimately made it difficult for the prosecution to make its case and for the appellant to mount a specific defence.

15. The prosecution evidence fell short of the standard required for conviction. This appeal is allowed and the conviction and sentence against the appellant are quashed.

DATED and DELIVERED at KISUMU this 21st day of July 2017.

D.S. MAJANJA

JUDGE

Mr Ogonda, Advocate for the appellant.

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