



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 28 OF 2012 CONSOLIDATED WITH
CRIMINAL APPEALS NO's 29, 30 AND 31 OF 2012

1. EVANS OBUYA NYATICHI 1ST APPELLANT
2. PAUL DEDAN OCHIENG 2ND APPELLANT
3. EVANS BOGONKO BOSIRE 3RD APPELLANT
4. THOMAS OBUOKO OKWAYO 4TH APPELLANT

VERSUS

REPUBLICRESPONDENT

(From original Conviction and Sentence in Criminal Case No. 3629 of 2009 of the Chief Magistrate's Court at Mombasa – Hon. Kizito- SRM)

JUDGMENT

The four (4) Appellants were Convicted for the offences of stealing by servant and Sentenced to various imprisonment terms.

On the first Count, all four appellants were jointly charged with stealing by servant contrary to section 281 of the Penal Code.

Particulars being that:-

“Between the 14th day of January, 2007 and 17th July, 2009 at Harambee Co-operative Savings and Credit Society Limited Mombasa branch in Mombasa County, being employees of the said society, jointly stole Ksh. 8,704,750/= the property of Harambee Co-operative Society which came into their possession by virtue of their employment”.

The first Appellant was also charged with the offences of stealing by servant in respect of Counts II and III. 2nd Appellant Paul Dedan Ochieng was also charged with stealing by servant contrary to section 281 of the Penal Code in respect of Counts IV and V.

The 3rd Appellant Evans Bokongo Bosire was also charged with the offence of stealing by servant contrary to section 281 of the Penal Code in respect of Counts VI and VII.

The 4th appellant was also charged with stealing by servant contrary to section 281 of the Penal Code in respect of Counts No. VIII, IX and X. They all pleaded not guilty to the charges and the case went to full hearing and determination and they were Convicted as charged.

Being aggrieved by the Conviction and Sentence they filed this appeal.

One of the grounds is that section 200 of the Criminal Procedure code was not complied with in that the case had substantially proceeded before Honourable Mutoka- Chief Magistrate. She had given the date for Judgment but on the date of Judgment Honourable Mutende – Senior Principal Magistrate (as she then was) did confirm that Honourable Mutoka – Chief Magistrate was on study leave. The file was later allocated to Honourable Kizito–Senior Resident Magistrate who proceeded to write and deliver a Judgment without complying with section 200(3) of the Criminal Procedure Code.

It is common ground that the Appellants did not deny having received the sums alleged from their employer but the main issue is whether they had authority to do so.

It is the contention of the Appellants that the 4th one had the authority to issue **“I.O.U.'S “I Owe You”** at the branch level and that this was confirmed by PW 1.

Further, it is submitted that PW 2 at page 19 line 13 – 15 of the proceedings had testified that the Branch Manager had the authority of issuing I.O.U.'S. That he contradicted himself at page 24 of the record of proceedings when stated that the authority to issue I.O.U'S was vested on the general and Finance Managers at the Headquarters.

It is the contention of the Appellants that they took the moneys lawfully and that they were in the process of repaying the same when they were arrested and charged with these offences. It is also submitted that the appellants were discriminately charged with these offences when other employees who had received I.O.U.S in a similar manner were allowed to make repayments.

This appeal is conceded on the following grounds;

1. **That there was no compliance with section 200 (3) of the Criminal Procedural Code.**
2. **There was contradiction as to whether the 4th Appellant had the authority to issue I.o.u's.**

That PW 1 at page 17 of the proceedings last paragraph did testify that the area manager had the authority of issuing I.o.u's. That PW 4 who was head of security did testify to the effect that the Branch manager could authorize the issuance of I.o.u's.

In his Judgment the learned trial magistrate at page 3 third paragraph did observe the following,

“From the evidence on record, it is not in dispute that the Accused persons were the employees of the Complainant at the time of the offence. It is also clear from the evidence of PW2, PW4 and PW5 that only the organization's General manager and Finance Manager had the authority of staff to issue I.o.u's to members of staff and or employees”.

Upon perusal of the record of proceedings at page 17 last paragraph while under cross examination PW 1 did state,

“I know you. It is not common. It is manager in charge Department who authorizes payment in Mombasa it was first Accused”.

At page 19 line 10 the Finance Manager (PW 2) had this to state,

“A debit voucher is a transactional document filed as evidence of a transaction in the bank and it is captured in the computer. The same is authorized by the Branch manager”.

The head of security at Harambee Sacco (PW 4) at page 31 line 24 did state as follows,

“In my statements I set out that the Finance and General Managers were the ones authorized to approve I.O.U except in far off stations where expenditure had to be incurred in furtherance of

society duties”.

It is noted that it was not clear as to the procedure of authorizing the issuance of I.O.U.'s there was contradiction by the prosecution Witnesses. There was no formal procedural documented policy or Financial regulation policy produced before the Court.

The Accused persons did not deny taking the money under the authorization of the Branch Manager Mombasa. All the necessary signatures were in place I.O.U.'s are repayable. There is no evidence to the effect that they had no intention of repaying the sums in question.

It is not in dispute that Honourable Kizito–Senior Resident Magistrate wrote and delivered a Judgment in a matter which was previously handled by Honourable Mutoka. He did not comply with section 200(3) of the Criminal Procedure Code which compliance was mandatory.

The upshot is that, I find the Conviction of the appellants was not safe. It was not proved beyond reasonable doubt. The appeal has merit and its rightly conceded.

The Conviction is quashed and the Sentence set aside. The Appellants are set at liberty unless otherwise lawfully held.

Judgment delivered dated and signed this **6th** day of **February, 2015.**

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M. MUYA

JUDGE

In open Court in the presence of :-

Mr. Jami for the State

The Appellants present

Absence of Appellants Counsel

M. MUYA – JUDGE

Court:

Surety documents to be released to the depositors/surety.

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M. MUYA

JUDGE

6TH FEBRUARY, 2015