



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL NO. 75 OF 2011

KENNEDY D'ZOUSA APPELLANT

VERSUS

REPUBLIC RESPONDENT

(Being an appeal against the original conviction and sentence of P.N. Areri – RM in Criminal Case No. 377 of 2010 delivered on 16/5/2011 at Kakamega.)

JUDGMENT

1. **Kennedy D'Zousa** was charged with the offence of Stealing by Agent contrary to Section 283(b) of the Penal Code. The particulars of the offences were that:-

“KENNEDY D'SOUZA:- On the diverse dates between 1st November, 2007 and 8th March, 2008 at Kakamega Central District within Western Province, stole 1851 copies of Standard Newspapers valued at Ksh. 55,906/= which had been entrusted to him by Standard Group for him Kennedy D'Souza to sell and remit the proceeds.”

2. He denied the charges and the prosecution availed 3 witnesses in support of the charges. They were **JAVAN OMULANYA (PW1)** who was the Assistant Distribution Officer in-charge of Kakamega Area, **ROBERT NG'ETICH (PW2)** who was the Branch Accountant in-charge of Nyanza and Western regions. **PW3** was the Investigating Officer **No. 48936 P.C. Michael Kiprono**. When placed on his defence, the Appellant herein informed the trial Court that he was surprised to be so charged because there was no single moment when he had been informed by the complainant of any deficit in his remittances on account of any newspaper supplied and sold. He blamed it on some of the Complainant's officers at the Kakamega office who wanted his contract terminated.
3. He was eventually found guilty, convicted and sentenced to a fine of Ksh. 20,000/= and in default to serve 1 year imprisonment. The trial Court further directed that the complainant was to recover the money from the Appellant pursuant to the provisions of Section 170 of the Criminal Procedure Code.
4. On being dissatisfied with both the conviction and sentence, the Appellant preferred an appeal which he submitted to be meritorious and urged this Court to allow the same. The State opposed the appeal.
5. I am reminded of my duty as the first appellate Court and as was so held in the case of **Okemo vs. R (1977) EALR 32** and further in the Court of Appeal case of **Mark Oiruri Mose vs. R (2013)eKLR** that this Court is duty bound to revisit the evidence tendered before the trial court

- afresh, evaluate it, analyse it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and give allowance for that.
6. One of the key ingredients of the offence the Appellant faced was proof of theft. The Learned Magistrate rightly defined what stealing is pursuant to Section 268 of the Penal Code and rightly directed his mind to the provisions of Section 283(b) of the Penal Code upon which the charge was based on.
 7. Going by the charge, the prosecution was duty-bound to adduce evidence in confirmation that the Complainant delivered the newspapers to the Appellant out of which 1851 pieces remained unaccounted for. In explaining the process towards the delivery of the newspapers to the Appellant, PW1 stated as follows:-

“ I make the orders and the van supplies with a delivery direct to the agent. The agents do not sign the delivery. The delivery book is to ensure that the orders I make are delivered to the correct agent. I have not carried a delivery book for the period relevant to the accused. I did not personally deliver any papers to the accused. I know the people who delivered the papers from the duty roaster. The drivers are so many. I require time to print the duty roaster.”

..... I don't have the names in court. The papers were delivered to the agents. Approximately 1500 copies were stolen. What is clear is the outstanding debt. They were newspapers and magazines. The Daily Standard, the Standard on Sunday and the Saturday Standard I do not know what number was the Daily Standard, the Saturday Standard on the Sunday Standard were supplied to the accused. The agents makes monthly payments in the Kakamega office The accused made payments to the cashier at the Kakamega office for every transaction. The cashier was Mr. Josphat LagatThe accused had a contract with the company I have not seen the contract I do not know when the agency startedI do not know why it took long to charge the accused. I know the accused still sells our products.” (emphasis added).

PW2 had the following to say:-

“ ...I do not do the actual supplies to the agents

....I never dealt with the accused person in this caseThe strip list is prepared at Nairobi by the people who dispatch the copies. Agents do not sign any deliveriesExhibit 4it is an audited report. It does not show the accused was given 1851 copies. He was supplied with the Daily Standard, Saturday Standard and Sunday Standard. Exhibit 4 does not show the copies of Daily Standard, Saturday Standard and Sunday Standard I did not personally record a statement with the police

.....”

8. That was the evidence in proof that the Appellant was supplied with the newspapers in issue. The evidence revealed that PW1 used to receive orders from the Agents and would communicate the said orders to Nairobi. The people concerned with the preparation of the orders would so prepare and dispatch the same directly to the agents. On delivery of the newspapers to the agents, the agents used not to acknowledge receipt at all neither did they sign the delivery notes. The agents however would remit the proceeds of the sale to the Kakamega office thereafter. Both PW1 and PW2 stated that they were not aware of the number of copies of the newspapers which were delivered to the Appellant herei who was one of their Agents stationed at Amalemba. They only relied on their records to prepare the audit report which revealed that the Appellant had a deficit translated to 1851 copies. PW1 estimated the copies at 1500.

9. Apart from PW1 who used to prepare the orders at Kakamega and relay the same to Nairobi, there was no evidence on how the orders were prepared and dispatched in Nairobi. What is clear is that the deliveries to the agents were done by vans. This Court is not aware if the ones who prepared the dispatches at Nairobi are the drivers who delivered them to the agents or different people.

Further it is not clear if the copies actually dispatched at Nairobi were eventually delivered to the agent since the agent neither used to sign the delivery notes nor acknowledged receipt in any way whatsoever. PW1 and PW2 could not therefore state with certainty what the various drivers allegedly delivered to the agents including the Appellant herein. The newspapers may have been delivered as dispatched from Nairobi or not. There was no requirement for the delivery notes to be signed or the receipt of the newspapers acknowledged by the agents. This Court notes that even the delivery notes and the strip lists were not produced in evidence.

10. On the evidence before Court, one can not say with certainty that the Appellant was supplied with the number of newspapers as alleged in the charge sheet as there is no evidence in confirmation of the deliveries. The record again remains silent on the process from the delivery of the papers to the Appellant upto the payment by the agent into the Kakamega office. Did the Cashier use to undertake any reconciliations on the receipt of the money from the agent. If so, how were the said reconciliations done? It is possible that the deficits complained of could have been occasioned by the cashiers? Why did it take so long to find out the deficiencies and charge the Appellant? The questions seem to be unending!

11. Of equal importance was the fact that the Audit Report produced as Exhibit 4 could not confirm the make-up of the alleged 1851 copies. Both PW1 and PW2 did not know how many papers were even supplied to the Appellant. It appears that when PW2 discovered the deficit to be amounting to Kshs. 55,906/= he commuted that amount to the approximate number of copies. But, the question which still lingers in the mind of this Court is how the number of copies was arrived at given that the three newspapers had different prices.

12. A look at the judgment reveals that the learned Magistrate did not address his mind to this crucial aspect of the actual deliveries of the newspapers allegedly made to the Appellant and how the deficit came up. Had he so addressed his mind, I have no doubt that he would most likely have come to a different conclusion. I therefore respectfully disagree with his finding that the charge was proved as laid before Court. I find that the charge was now proved as the prosecution fell short of proving that the Appellant was supplied with 1851 copies of Standard Newspapers to sell and remit the proceeds to the complainant. I wish to add that had the police conducted adequate investigations, probably they would have connected the Appellant with the commission of the offence, but the evidence as adduced left a lot of doubts which makes it unsafe to sustain any conviction.

13. Having found that the prosecution failed to prove the charge of Stealing by Agent contrary to Section 283(b) of the Penal Code, this appeal succeeds. The conviction is hereby quashed and the sentence set-aside. As the Appellant paid the fine on 16/05/2011, the same shall be repaid forthwith.

Orders accordingly.

DELIVERED, DATED and SIGNED this 16th day of July, 2015

A. C. MRIMA

JUDGE