REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

CRIMINAL APPEAL NO.32 OF 2012

REPUBLIC …….APPELLANT

VERSUS

1. BENSON KIBET CHUMO ……..1ST RESPONDENT

2. ROBERT KIZITO KWENA ……2ND RESPONDENT

(An Appeal arising out of the judgment of C.MC.Cr. Case No.1488 of 2010 delivered by W.N. Nyarima SPM on 10th February 2012).

J U D G M E N T

1. The State is displeased by the decision of The Chief Magistrate sitting at Busia in which he acquitted Benson Kibet Chumo (**the 1st Respondent**) and Robert Kizito Kweno (**the 2nd Respondent**) of the offences of Stealing by Servant contrary to Section 281 (a) of The Penal Code and that of Conspiracy to Defraud contrary to Section 328 (a) of The Penal Code.
2. It had been alleged that on diverse dates between 1st October and 18th October 2010 the duo with others not before Court stole cash ksh.7,006,256.00(seven million six thousand two hundred and fifty six only) which had been entrusted to them by Post Bank Corporation of Kenya for normal daily service to customers. In the alternative charge, it was alleged that on diverse dates between 1st October and 18th October 2010 at Busia Post Bank within Busia township in Busia County within the Western region, jointly conspired to commit a felony namely stealing ksh.7,006,256/=(seven million six thousand two hundred and fifty six shillings) which had been entrusted to them by Post Bank Corporation of Kenya for normal service to customers.
3. After hearing a total of Ten (10) Prosecution witnesses, the Trial Court returned a verdict that there was no case made out sufficiently to require the accused persons to be put on their Defence on either of the two counts. The accused persons were acquitted under the provisions of Section 210 of The Criminal Procedure Code. The Learned Trial Magistrate reasoned and held that:-

I. **"That the evidence adduced does not accord with the particulars of the charges because Post Bank Corporation of Kenya is unknown and it distract (sic) from Kenya Post Office Savings Bank. The complaint was made by a wrong or different entity from the one disclosed by evidence. Worse still, the prosecutor has introduced Post Bank Savings Bank in the Matrix with fatal consequences to the prosecution's case.**
II. **Accused letter of appointment indicates that their employer is the Kenya Post Offices Savings Bank, NOT Post Bank Corporation of Kenya Nor Post Bank Savings Bank. Kenya Post Office Savings Bank is a creature of Statue and from the reason it must always be**

correctly cited.

III. **There is no evidence of asportation. The first accused however caused money to be sent to some people. PW1 (Josephat Kipkemei Kipyai) however told the court that he did not know the source of the money that was sent by Western Union nor the recipient. He is the one who transacted the money. On re-examination by the prosecutor, he stated that it was not the banks money. The money was sent in the names of Jimmy Carter Omondi to Lamech Ojango. Jimmy Carter Omondi (PW6) denied having sent any money via Western Union or Money gram transfer systems. He denounced the writings on the slips. There is no evidence that links the two accused to the slips. Evidence by PW1 completely absolves the accused persons."**

4. Against that decision the State raised the following 6 grounds of grievance and dissatisfaction:-

1. **"The learned trial Magistrate having failed to put the Respondent on his Defence grossly denied the prosecution an opportunity to further prove their case based on the weight of evidence by the persecution (sic) witnesses.**
2. **That in his ruling, the learned trial Magistrate based his findings on near non-essential matters leaving out credible testimony by PW1 – PW10 sufficient to convict.**
3. **The learned trial Magistrate erred both in law and fact by closing his eyes and mind to the provisions of section 214 of the criminal procedure code thereby causing a miscarriage of justice.**
4. **That further the learned trial Magistrate misdirected himself by deliberately avoiding to exercise the doctrine of judicial notice which in the circumstances was applicable.**
5. **The learned trial Magistrate erred in law by disregarding the evidence of PW3, an expert witness and in place chose to appear to take witness stand for the Defence.**
6. **That the ruling as it is, is full of contradictions which this Honourable court should correct by setting aside the same."**

5. Arguing the grounds on behalf of the State, Mr. Kelwon indicated that the State had abandoned Ground 1 of the Petition. For that reason, this Decision gives no regard to all the arguments taken up in respect to the alleged bias of the Trial Court against the Prosecution.
6. Arguing grounds 2 & 6 together Mr. Kelwon pointed out that the Learned Magistrate used a wrong test in reaching his decision. It was emphasized that under Section 211 of The Criminal Procedure Code the threshold to be met by the Prosecution at the close of its case is one of a Prima facie case. Criticism was also made on the Trial Magistrate's approach in determining the matter on the name of the complainant. The State thought the approach was contemptuous and cynical. This Court was urged to find that the Trial Court would have reached a different result if it had given proper regard and weight to the entire Prosecution case and in particular the evidence of PW3, PW9 and PW 12.
7. For grounds 3 & 4, the State conceded that there was a mistake in the charge sheet touching on the name of the Complainant Bank. From the record, the Complainant Bank ought to have been "The Kenya Post Office Savings Bank" and not "Post Bank Corporation of Kenya" as named in the Charge Sheet. The State Counsel cited Section 214 of The Criminal Procedure Code as the provision of the law that was available for use by the Trial Magistrate to correct this apparent error. The State argued that the Learned Magistrate failed in his duty of ensuring that justice was ultimately attained. At any rate, it was also submitted the Learned Magistrate should have taken Judicial notice of the proper name of the complainant.
8. Resisting the Appeal, Mr. Omondi for the 1st Respondent, asked this Court to agree with the conclusion arrived at by the Trial Court. Counsel sought to show the weaknesses is the evidence of PW3, PW9 and PW12 which had been heralded by the State as being probative of the accused guilt. It was argued for the Respondent that a theme running in the evidence by PW3 was that he did know how much, by whom and when the money was stolen. That infact there was no evidence to show that any money had been stolen at all. In support of this, it was pointed out that no official results of the National Audit Office had been released. That office is mandated to audit the accounts of The Kenya Post Office Savings Bank.
9. Counsel thought little of the evidence of PW9 and PW12. Emphasis was laid on the concession

by PW12 that he did not know how much money, if any, was lost.

10. The 1st Respondent submitted that a critical question identified and answered by the Trial Court was whether there was a competent Complainant. All the evidence showed that the Appellants were employees of "The Kenya Post Office Savings Bank" and not the named Complainant "Post Bank Corporation of Kenya." The latter did not exist and was fictitious. Counsel argued that setting out a wrong complainant in a Charge Sheet is not a defect that is curable under Section 214 of The Criminal Procedure Act. That at any rate that the provisions of that Section could not be available for use by the Court after the Prosecution had closed its case.
11. Counsel did not see how the matter could have been addressed by the Court taking Judicial notice of the correct name of the Complainant given the provisions of Section 60 of The Evidence Act. This Court was asked to find that under the provisions of the law, the names or identities of persons or institutions are not facts of which a Court can take Judicial notice.
12. Mr. Jumba appearing for the 2nd Respondent echoed the submissions made on behalf of the 1st Respondent. He pressed the issue about the name of the Complainant. That in the nature of the charges faced by the Respondents being a charge of Stealing by Servant, the identity of the master was critical. That in his view is where the Prosecution failed.
13. In the end, I was asked by the Appellants to dismiss the Appeal and agree with the findings of the Trial Court. This Court was asked not to give much regard to the finding of the Learned Magistrate that:-

"there is however no evidence that <u>proves beyond reasonable doubt</u> that they did not steal from their ambiguous employer so that they conspired against the ambiguous and unspecified employer." (underlining mine).

Counsel contended that the substance of the ruling showed that the Trial Magistrate applied the correct test, that is, whether the Prosecution had made out a prima facie case.

14. Although this is a first Appeal, this Court shall not as is ordinarily required of it in such an Appeal draw hard and fast conclusions of the evidence. The reason becomes apparent shortly.
15. There cannot be too much argument that the decision of the Learned Magistrate was substantially informed by the misnaming of the Complainant. Of the three reasons for reaching his decision two were driven by the defect in the name. That aspect was therefore pivotal. It must however be observed that as one Prosecution witness after another had pointed out the name of the Complainant was infact "The Kenya Post Office Savings Bank" and not "Post Bank Corporation of Kenya" as named in the charge sheet there was opportunity for the Court, before the close of the case for the Prosecution, to order for an alteration of the Charge Sheet to reflect the correct complainant. The opportunity to cure a defect in the substance of a charge is provided by Section 214 of The Criminal Procedure Code which reads:-

> **"214.(1) where, at any stage of a trial before the close of the case for the prosecution, it appears to the court that the charge is defective, either in substance or in form, the court may make such order for the alteration of the charge, either by way of amendment of the charge or by the substitution or addition of a new charge, as the court thinks necessary to meet the circumstances of the case:"**

16. Once the Prosecution case closed, the window given by Section 214 was shut. While it is easy to blame the Learned Magistrate for failing to either notice the defect or to cause the alteration of the charge, I would think it is also the duty of Prosecution and the Defence to draw the Courts attention to such defects. The Prosecution in particular must be extra vigilant to ensure that the charge is properly framed. Given that a Complainant virtually surrenders the conduct of his case to the Prosecutor, the Prosecutor bears a heavy responsibility of ensuring that all aspects of the Prosecution case are diligently and skillfully put forward. As for the Defence it may turn out to be a fruitless strategy to ride on a defect in the Charge Sheet because not all defects are fatal.
17. As I understand the decision, The Learned Magistrate was of the view that the defect of misnaming the Complainant was so fundamental and material that it was beyond cure. So did the error amount to an incurable defect? The law contemplates that there will be occasion when there

will be an error, omission or irregularity in a charge. And there will be errors, omissions or irregularities that will defeat a charge. However, whether such an error, omission or irregularity is incurable will depend on whether it occasions a failure of justice. This is the foundation of Section 382 of The Criminal Procedure Code which provides:-

> **"382. Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:**
>
> **Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings."**

Whilst the provisions of this Section are not applicable here, it is my view that it reveals the spirit in which errors, omissions or irregularities should be dealt with and that spirit pervades the entire stretch of criminal proceedings.

18. This Court has looked at the entire proceedings and finds that the Prosecution established that the Complainant was The Kenya Post Office Savings Bank. Also established is that at the time material to the happening of the alleged offences, the Respondents were employed by Kenya Post Office Savings Bank. The Trial magistrate made the following finding.

> **"Accused letter of appointment indicates that their employer is the Kenya Post Office Savings Bank, not Post Bank Corporation of Kenya nor Post Bank Savings Bank"**

The Learned Magistrate also found, and correctly from the evidence that the said Bank lost money and then held,

> **"…the two accused, being the persons at the helm of the banks Busia Branch of the bank may have acted inappropriately and caused the bank to lose money."**

The finding by the Learned Magistrate was that there was an actual Bank which lost money. Further that the accused persons <u>may</u> have been responsible for that loss. The error was that reference was made to name of non-existing Bank. Simply, the Complainant was not correctly named.

19. In determining whether this error defeats the charge this Court must give regard to whether the error is fundamental and whether it prejudiced the Defence. As a starting point there is a Constitutional underpinning that requires a charge to be concise, clear and unambiguous. Article 50(2) of The Constitution 2010 provides that one of the elements of the right to a fair trial is a right of the accused "**to be informed of the charge, with sufficient detail to answer it."** The Rules for framing of charges and information in Section 137 of The Criminal Procedure Code provides the framework for achieving this imperative.
20. It may be beyond debate that in a charge of Stealing by Servant the naming of the master is essential. Even Form 7 to the second schedule to the Criminal Procedure Code on forms of stating this offence does suggest this.

> **"PARTICULARS OF OFFENCE**
>
> **A.B., on the ……..day of ……19…….,in ……..District within the ……. Province <u>being clerk or servant to</u> <u>M.N.</u>, stole from the said <u>M.N.</u> ten yards of cloth."** (see the underlined)

21. On description of persons, Section 137 (d) provides:

> **"137. (d) the description or designation is a charge or information of the accused person, or of another person to whom reference is made therein, <u>shall be reasonably sufficient to identity him, without necessarily stating his correct name,</u> or his abode, style, degree or occupation; and if, owing to the name of the person not being known, or for any other reason, it is impracticable to give such a description or designation, a description or designation shall be given as is reasonably practicable in the circumstances, or the person may be described as "a person unknown",(**my emphasis**)**

Needless to say persons here include Corporate Persons (Section 3 of The Interpretation & General Persons Act)

22. In the Charge Sheet under discussion there is a name of the master although it has turned out to be an incorrect name. On the reading of the underlined part of Section 137 (d) such an error would quickly be overlooked as long as the description was reasonably sufficient to identify the actual Complainant. And it would not matter that the Complainant that is incorrectly named is a Statutory body. It is accepted that the misname "Post Bank Corporation of Kenya" does not belong to any known legal entity. But it does seem to be substantially different from the Complainant's correct name. It is my view that the Learned Magistrate could not use those provisions to overlook the error. He would have to look elsewhere.
23. This Court very much doubts that the submission by the State Counsel that the Learned Magistrate ought to have taken Judicial Notice of the Bank's correct name is helpful. The Court held that the Prosecution witnesses had, as a matter of fact, proved that the real Complainant was "The Kenya Post Office Savings Bank." That, according to the Trial Court, was a proved fact and the Court did not need to take Judicial Notice of it. The crux of the matter lies on whether the Learned Magistrate was correct in holding that the error in the naming of the Complainant in the Charge Sheet was an incurable defect.
24. The Prosecution evidence was that the accused persons were employees of "The Kenya Post Office Savings Bank" and that the Bank had lost money. Each of the Prosecution witnesses made an effort to establish a connection between the loss and the accused persons. When witness statements were provided to the accused persons before the commencement of hearing it must have become clear who the real complainant was. They would be under no illusion whatsoever that they were standing trial in respect of their employment to The Kenya Post Office Savings Bank and the loss of money incurred by the Bank at its Busia Branch on diverse dates between 1st October and 18th October 2010. It is little wonder that their engagement with the witnesses in cross-examination was robust. A substantial effort of the Defence was to disprove that the Bank lost money or if it did, then the accused persons bore no criminal liability for the loss. The attack by the Defence was substantially on the merit of the Prosecution case and not confined to the name of Complainant.
25. I listened keenly to the Respondents Counsel. At no time did they argue that the misnaming of the complainant embarrassed or prejudiced the Defence. I have to find that although the error in the charge sheet was not insignificant, it did not, in the circumstances of this case, occasion a failure of justice. I think, and so hold, that the Learned Magistrate erred in law in laying too much emphasis on the error and finding it to be a fatal defect.
26. My attention now turns to whether, aside from the name of the complainant, the Prosecution did not establish a prima facie case. Upon analysis of the evidence, the Learned Magistrate found that Kenya Post Office Savings Bank had lost some money. Without going into much detail, evidence of several Prosecution witnesses would support that finding. P.W 4, stated as follows:-

> **"I visited Busia Branch on 19th October 2010 and expected to find kshs 7,527,260/= but found sh.18,104/=."**

Whilst P.W.5, The Regional Compliance Unit Officer gave evidence of how he investigated the loss. He established that the Busia Branch of the Bank had on 18th October 2010 held sums beyond the allowed overnight limit. He then stated,

"On 21st October 2010 some of the money that was missing was 7,524,306/=. That was the shortage."

As for PW9, his duties as an Inspectorate Officer of the Bank's Western region included investigating fraud. He gave details of how he carried out a cash count at the Busia Branch on 21st October 2010 and concluded,

"Total cash in the safe was sh.18,104/=. The branch TAC account reed (sic) ksh.7,724,530/=. That morning they had issued out 500,000/= to the counters.Add physical cash and loss of ksh.7,006,256/=. That was the branch cash shortage."

27. It has to be remembered that at this stage of the proceedings the test to be applied by the Court was whether the Prosecution had established a prima facie case. Certainly there was discrepancy as to the exact amount said to be stolen. Whether that discrepancy would be significant enough to defeat the Prosecution case would have had to await a more detailed evaluation of the entire Prosecution case. However, for purposes of weighing whether a prima facie case had been established that discrepancy would not be a central issue because there was evidence that the Bank had indeed suffered some loss of money.
28. Then there was some evidence by the Prosecution that only two people had access to the Strong Room where the stolen money had been kept. These two were the Respondents herein. The 1st Respondent knew the combination to the lock while the 2nd Respondent held the key. There was no evidence of a break in. There was no evidence that the money had been removed from the Strong Room and given to the tellers to make out payments.
29. But, there was evidence that suggested that some money transfers said to have been paid out to one Lameck Samwel Ojango on 13th October 2010 and 14th October 2010 were fictitious and irregular. Three of the payments were said to have been requested by one Jimmy Carter Omondi. A Mr Jimmy Carter Omondi (PW6) testified and disowned the transactions. There was evidence by PW1 that the transactions said to belong to Mr Omondi were done at the behest and under direction of the 1st Respondent. Then there was evidence that in one of the transactions the sender was the 1st Respondent himself. This was on 13th October 2010 for a sum of ksh.499,800/= (Exhibit 22). Where these sums part of the money the Bank had lost?
30. The above evidence speaks to the possible responsibility of the two Respondents for the money lost by the Bank. For that reason, this Court reaches a decision that a case had been made out against the accused persons sufficiently to require them to make a Defence and an acquittal under Section 210 of the CPC was erroneous. That acquittal is hereby set aside.
31. This Court has deliberately relented from discussing the Prosecution evidence in any detail because its final order is that the Respondents should stand a retrial. A more detailed discussion of the evidence may colour the mind of the Court that will conduct the retrial and may thereby jeopardize the Prosecution or the Defence case.
32. The reason I order a retrial is that I am persuaded that the defect in the charge sheet should not have led to the automatic acquittal of the Respondents under Section 210 of The Criminal Procedure Code. In addition I have formed the opinion that on consideration of the evidence, both admitted and admissible, a holding that the Respondents have a case to answer may result. The Retrial shall be before a Magistrate other than the Trial Magistrate, Hon. W.N. Nyarima. As is always desirable in circumstances such as this, the Retrial must be commenced and finalized without delay.

F. TUIYOTT

J U D G E

DATED, SIGNED AND DELIVERED AT BUSIA THIS 12TH DAY OF MAY 2014.

IN THE PRESENCE OF:-

MUTAHI ……COURT CLERK

…….FOR APPELLANT

…….FOR 1ST RESPONDENT

…….FOR 2ND RESPONDENT