REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERICHO

CRIMINAL APPEAL NO.25 OF 2013

(An appeal against original conviction and sentence of Sotik

SRM Criminal Case No.34 of 2005 – Hon. M. O. Okuche – Senior Resident Magistrate)

FILBERT KORIR - APPELLANT

VERSUS

REPUBLIC - RESPONDENT

RULING

On the 8th February 2013, Filbert Korir (hereinafter referred to as the Appellant) together with Richard Bett, Edward Koskei, Lilian Chelangat, Charles Keter, Benard Korir and Winnie Chemutai being the 2nd – 7th Accuseds respectively were found to have a case to answer to eleven counts of theft by servant contrary to Section 281 of the Penal Code by Hon. M. O. Okuche, learned Senior Resident Magistrate vide Sotik SRM Criminal Case Number 34 of 2005. Being dissatisfied with the aforesaid order, the appellant filed this appeal.

On appeal, the appellant put forward the following grounds in his petition:

1. The learned trial Magistrate erred in law and fact when he was bound to make a determination on the basis of law and the evidence before it whether a case has been made out sufficiently to warrant the 1st Accused being put on his defense to which failed to analyze the evidence on record hence arriving at a wrong finding.

2. The learned trial Magistrate made a wrong decision in law and fact when the facts could not support the charge on record.

3. The learned trial Magistrate erred in law and fact when he ignored totally the standard in the subordinate Court which is for the court to see whether a case has been made out against the accused sufficiently to require him to make a defense. That confers a discretion to the Court and it is this discretion which the Court has abused and improperly exercised its power.

4. That trial Magistrate erred in law and fact when he failed to interrogate the question whether there is a case to answer and found out that it depends on whether some evidence irrespective of its credibility or weight sufficient to put the accused on his defence.

5. The trial Magistrate erred in law and fact when making a finding of a mere scientilla of which this Honourable ought to examine and analyze.

6. The trial Magistrate erred both in law and fact from the evidence adduced builds no strong case as its all suspicion and mistrust falling short of the standard.

7. The Trial Magistrate erred in law and fact as the evidence adduced does not establish a prima facie case which the accused person can be called upon to defend.

8. The Trial Magistrate erred in law and fact that he intentionally and for reasons yet to disclosed that the Court record has no evidence of the Audited Accounts or the auditor as required by the law to audit the books and file the Audit report of the loss of funds and for sure the Court found out that no evidence was adduced in Court to existence of any financial loss or any evidence which link the Accused person with the offence before this Court and the Court failed to critically address this critical part of the evidence required by law of the Expert Report and its consistency with the innocence of the Accused Person.

9. The Trial Magistrate erred in law and fact when he failed to consider that the decision made by him that the accused person had a case to answer is one of law and by calling upon the Accused to defend himself when there is no prima facie case, amounts to an error of law on the part of the Court.

10. That the Trial Magistrate erred in law and fact when he completely ignored to address the inconsistencies in the evidence of all the prosecution witnesses cannot support the findings of a prima facie case against the Appellant and which does not support the charges here and was not taken into account in the interest of justice.

11. That the Learned Trial Magistrate did not direct himself correctly on error of law made by the Court which is prejudicial to the accused person and should be addressed by the Honourable Court.

12. That in all the circumstances of the case the findings and the ruling for the court is unsafe and unsatisfactory and should be set aside.
13. That the Court in making such a finding when there is no evidence amounts to shifting the onus of burden of proof which is supposed to repose on the prosecution throughout.

14. That the Trial Magistrate erred in law and fact not to have considered that it is not for the Accused to fill in the gaps left by the Prosecution and more so to call for the Auditor to inform the Court that no money was ever lost.

15. That there is no evidence at the close of the prosecution case which establishes a prima facie case against the Accused.

When the appeal came up for hearing, Mr. Mutai learned Senior Prosecution Counsel raised a preliminary objection against the appeal. The preliminary objection had to be disposed of first. Mr. Mutai was of the firm view the appellant does not have a right of appeal against the order placing them on their defence. Mr. Mutai further argued that the only appealable order is that of conviction under Section 347(1) a, of the Criminal Procedure Code. Mr. Nyaingiri learned advocate for the appellant was of the view that the appellant has a right of appeal under Article 162 (6) and (7) of the Constitution. It is said this Court should determine the question as to whether or not the order placing the appellant on his defence is valid.

I have carefully perused the recorded proceedings and it is apparent the appellant herein was tried on a charge of twelve counts of theft by servant contrary to Section 281 of the Penal Code. The aforesaid offences are alleged to have been committed on various occasions by the Appellant against Chepsoi Tea Growers Sacco (Bank) Ltd, the complainant herein and the employer of the Appellant. A total of eight (8) witnesses testified in support of the prosecution's case after which the prosecution closed its case albeit being forced to do so after they were denied an adjournment. The record shows that immediately after the prosecution closed its case, the trial magistrate gave orders to have the proceedings and fixed the case for mention. No reason were attached as to why the case should be mentioned but I will presume it

was meant to enable parties to make submissions under Section 210 of the Criminal Procedure Code before the trial court could rule whether or not to place the accused persons on their defence. After mentioning the case on four occasions thereafter the trial magistrate delivered his ruling whereof he formed the opinion that the prosecution had established a prima facie necessitating the appellant being placed on his defence to answer the case. There is no evidence on record indicating that the parties made submissions under Section 210 of the Criminal Procedure Code.

The question which has been posed to this court to answer is whether an accused person who has been placed on his defence has a right of appeal against such an order? A critical examination of Sections 347(1) and 348A of the Criminal Procedure Code would suggest that an appeal would only be filed where an order of conviction or acquittal has been made. In the appeal before this court the aforesaid orders have not been made. An order of acquittal or conviction is final in its nature whereas the order placing an accused on his defence is provisional in nature. An accused person's right to impugn such an order on appeal crystallizes after an order of conviction has been made. The law did not envisage such an order to be challenged immediately after it is pronounced but it was meant to await the pronouncement of the order of conviction. If the appellant was given a right of appeal one would imagine the delay it would cause to criminal trials. The subordinate courts would be forced to halt proceedings to await the outcome of the appeal in the High Court, the court of appeal and most probably the Supreme Court. That will go against Public Policy to expedite criminal trials. It may also negate the provisions of Article 50 (2) (e) of the Constitution which requires that trials must begin and conclude without unreasonable delay. There was a tense submission by Mr. Nyaingiri that if this court strikes out this appeal, the appellant will have been shut out from the temple of justice. With great respect, I do not think so. I have already stated that the law retained the appellant's right of appeal against the order complained of until the order of conviction has been pronounced.

For the above reasons, I agree with the submissions of Mr. Mutai that the Appellant has no right of appeal to challenge the order placing him on his defence before conviction. Consequently the preliminary objection is upheld. This appeal is found to be incompetent hence it is ordered struck out.

Dated, signed and delivered in open court this 4th day of July 2014.

J. K. SERGON

JUDGE

In the presence of:

- **M/S Nyaingiri for Appellant**
- **Miss. Kivali for Director of Public Prosecutions.**