



**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CRIMINAL APPEAL NO.62 OF 2014**

**KENNEDY OGET.....APPELLANT**

**=VERSUS=**

**REPUBLIC.....RESPONDENT**

**(An appeal from original conviction and sentence in Naivasha Chief Magistrate's**

**Criminal Case No.1914 of 2012 by Hon. E. Riany Resident Magistrate ,Naivasha**

**dated 12<sup>th</sup> March, 2013).**

**JUDGMENT**

The appellant, Kennedy Ogeto, was charged that on diverse dates between 29th March and 14th May, 2011, at Maasai Mara Sopa Lodge in Naivasha District within Nakuru County, he stole Kshs. 503, 853/= the property of M/S Maasai Sopa Lodge which came to his possession by virtue of his employment contrary to section 281 of the Penal Code.

Upon trial, the appellant was found guilty of the offence and upon conviction, sentenced to three (3) years imprisonment.

Aggrieved by the conviction and sentence, the appellant filed the appeal herein on seven (7) grounds which can be summarized as follows:-

- 1. That the judgment of the learned trial Magistrate does not conform with the requirements of Sections 169(1) and 197(2) of the Criminal Procedure Code;**
- 2. That his conviction was based on materials which were not produced in court as exhibits;**
- 3. That the charge he faced was defective;**
- 4. That the evidence tendered in court was incapable of forming the basis of his conviction;  
and**
- 5. That the sentence was unfair and excessive.**

In arguing the appeal learned counsel for the appellant, Mr. Mwangi, submitted that the appellant was not accorded a fair trial; that the trial magistrate was biased against the appellant and that she (the trial magistrate) conducted proceedings which offended the provisions of section 197 of the Criminal

Procedure Code and the judgment also offends section 169(1) of the Criminal Procedure Code. In this regard, Mr. Mwangi argued that the audit report that the magistrate relied on to convict the appellant was prepared without involvement of the appellant; that most of the documents relied on to convict the appellant were marked for identification but not produced in court and that the trial magistrate shifted the burden of proof to the appellant.

Counsel also argued that the investigating officer (P.W.6) did not conduct any investigations after he took over from the initial investigating officer and that all what he did was to arrest the appellant and charge him with the offence herein.

Concerning the documents relied on to convict the appellant, Mr. Mwangi Contended that the appellant was not the sole author of the documents availed to court as there were many cashiers and managers working at the complainant's cash office. Further that the documents were not authentic as they lacked letter heads, company seal (were not stamped) and that others were not appropriately signed.

As for the sentence imposed by the trial magistrate, Mr. Mwangi submitted that, since the appellant was a first offender, the custodial sentence of three years in jail was harsh and excessive.

Learned counsel for the State, Mr. Chirchir, conceded the appeal. In so doing, he agreed with Mr. Mwangi's submission that the appellant was convicted on the basis of documents, some of which were not produced in court. He pointed out that only exhibits 1-5 were produced by the investigating officer (P.W.6) yet the trial magistrate proceeded as if all the documents had been produced in court. He also pointed out that the trial magistrate remarked at page 13 of her judgment that all exhibits were produced and that she had analyzed those documents.

Counsel also pointed out that all documents relied on were photocopies. He wondered why that was so yet none of the prosecution witnesses gave evidence as to the whereabouts of the original documents. Like counsel for the appellant, he faulted the trial magistrate for having shifted the burden of proof to the appellant by asserting that the appellant had the custody of the original documents. He also agreed with Mr. Mwangi's submission that the trial magistrate failed to comply with section 169 of the Criminal Procedure Code.

In view of the foregoing this court was urged to allow the appeal.

This being a first appeal, it is my duty to re-evaluate the evidence adduced during trial in order to arrive at my own independent conclusion, bearing in mind that I neither saw nor heard the witnesses testify. See **Okeno v. Republic** (1972) E.A 32.

The evidence adduced before the trial court and which led to the judgment appealed from was to the effect that on 13th March, 2011, the complainant's operations manager one, Ludigard Ogoti Oundo (P.W.2) handed over the management of the complainant's branch office (Sopa lodge) to her assistant, one Alex Ng'ang'a and proceeded on leave. When she returned from leave, she went through the company's books of account and discovered that the account's department had carried out some payments without any supporting documentation. As a result, the complainant had lost about Kshs. 247,000/=.

After she informed the complainant's director of that fact, the director requested for external audit report which revealed fraudulent payments of over 505 853/=.

The trial magistrate heard that at the time the fraudulent payments were made the appellant was in charge of the complainant's account's department.

Upon cross examination, it emerged that the documents relied on in forming the opinion herein and the preparation of the audit report neither had the letter head of the complainant nor a seal (stamp) capable of linking them to the company. It also emerged that P.W.2 was not the author or maker of the documents she relied on and that the entries in those documents were made by several workers of the complainant, were photocopies and had several cancellations and alterations, some of which were not countersigned.

The court heard that the cash book (PEX 2) was signed by the appellant and Alex Ng'ang'a (the then manager in-charge) and that the manager in charge signed the documents to authenticate the entries therein.

Asked to explain why the documents relied on were photocopies, P.W.2 informed the court that the originals were with the accounts department.

On his part, the complainant's front office manager, Peter Ngei Musili (P.W.1) informed the court that there were discrepancies between Cash Summaries (PEX 1) and Cash book (PEX 2); that whereas the cashbook had entries for payment of tips on 20th March, 3rd and 11th April, 2011 (of Kshs. 5,000/=, 9,000/=, and 11,000/=), the cash summaries did not bear that fact out.

On cross-examination, P.W.1 admitted that he was not the author of the cash summaries. He told the court that the cash summaries were filled by several employees of the complainant and that the cash book was prepared and signed by the appellant and countersigned by the complainant's in charge, (Alex Ng'ang'a).

Like P.W.2, he conceded that the cash book entries had several cancellations and alterations which were not countersigned and that he was not the person who had the custody of the documents before court (the cash summaries and the cash book).

James Njogu Mucheru (P.W.3) who worked as a cashier/receptionist at the complainant's company informed the trial magistrate that he was interrogated by C.I.D officers over entries he had made on cash summaries on 3rd, 4th and 11th April, 2011 which did not tally with the accounts. Like P.W.1 and 2, his testimony was to the effect that the cash book reflected payments in form of tips which were not paid. For instance, whereas no tips were paid on 17th and 30th April, 2011, the cash book had entries of paid tips. He asserted that he used to take receipts and cash to the front office manager to check and countersign and then take the books to the appellant who could not receive the cash without the books.

Martin Gatuma (P.W. 4) also informed the trial magistrate that he was interrogated by C.I.D officers over entries in the cash book which showed that he had received a tip of Kshs. 15,000/=. He denied having received the said tip but just like his colleagues (P.W.1, P.W.3) admitted that the cash summaries had alterations.

James Maina (an accountant) who testified as P.W.5 informed the court that the firm he worked for (Tily Meralis) was instructed by the complainant to carry out an audit at Sopa lodge where a fraud had allegedly occurred between March and June, 2011.

Upon obtaining the necessary documents to conduct the audit namely, the bills, receipts, daily cash book, daily summaries of cash, petty cash vouchers and invoices, they conducted their audit. The audit revealed that some funds which were withdrawn for petty cash could not be accounted for. For instance, on 3rd, and 23rd April, 2011 Kshs. 17,500/= and 15,000/= respectively could not be accounted for. Their audit revealed that a total of Kshs.505,853/= could not be accounted for.

P.W.5 further informed the court that when an audit issue arises, (as was the case herein), the first thing to be done, if possible, was to call the concerned person to explain. That if its not possible to call that person, the person in charge (junior or senior) is called to explain. However, in this case, the court heard that the auditors did not involve the appellant in the audit because the complainant declined to avail him arguing that since it was a fraud they could not call him.

Although P.W.5 claimed that in preparing the audit report they relied on daily cash sales and captain orders (bills), he admitted that some of the documents they relied on were not prepared by the appellant and that, even though they had doubts about the entries contained in the petty cash book, they still accounted for the Kshs.283,403/= allegedly unaccounted for from it.

P.W.6, PC Geoffrey Nyerere arrested the appellant, after he took over the investigation of the case from Senior Sergeant Murunga who had been transferred to Tana Delta Commission. He arrested the appellant

and charged him with the offence herein. He produced the documents handed over to him; namely cash books and receipts etc as PEX 1-5.

Put on his defence, the appellant admitted that he was the complainant's accountant at the material time. He informed the court that his duty was to prepare daily cash book showing revenue and expenditure of the hotel. The trial court heard that he did so on the basis of cash summaries prepared by receptionists/cashiers.

He admitted that the cash book and the cash summaries produced in court resembled the one he prepared. However, he denied having been the maker or signatory to the cash book produced in court. In that regard, he contended that whereas the cash book he prepared and kept was original, the one produced in court was a photocopy. Further, that no explanation was given why photocopies and not the original documents were produced.

He contended that it was not difficult for the complainant to avail the original cash book because it was prepared in duplicate with one of the originals being kept by the complainant's in charge, also a signatory thereof. It was the appellant's case that if the cash book he had prepared was availed in court, he would have demonstrated that there were no discrepancies in the cash book as alleged.

The appellant also contended that some documents identified for production (M.F.I 8-24) were not produced in court and that no explanation was given for the failure to produce them in court.

As concerns the audit report, he argued that it was not conclusive as the auditor did not have the opening and closing balance of the petty cash book.

In view of the foregoing and given the fact that he was not given an opportunity to account for the alleged discrepancies in the audit report, he contended that the case was meant to fix him.

Upon review of the evidence adduced before the lower court, I find, as a fact:-

1. That the cash summaries and the cash book produced in court had alterations some of which were not countersigned (that fact is borne out in the testimonies of P.W.1, 2 and P.W.4);
2. That the cash summaries produced in court were prepared by several employees of the complainant, some of whom were not availed to testify;
3. That the entries contained in the cash book had been approved by the complainant's in charge one, Alex Ng'ang'a;
4. That the complainant's in charge was not called to testify.
5. That the appellant was not called by the complainant to explain the discrepancies in the complainant's books of account;
6. That some of the documents relied on in preparation of the audit report produced by P.W.5 were not produced as exhibits to wit, M.F.I 8-24; and
7. that the documents produced in court were photocopies and that none of the prosecution witnesses explained where the originals were.

From the grounds of appeal herein, the submissions in respect thereof and the foregoing observations concerning the evidence adduced before the lower court, the main question for determination is whether the evidence presented before the lower court sufficed to prove the charge which the appellant faced beyond reasonable doubt.

With regard to this question, it is not in dispute that the documents produced in the lower court were

photocopies and that there was no explanation on the whereabouts of the original documents. It is also not in dispute that some of the documents had cancellations or alterations which were not accounted for. It is also clear that the appellant was not the sole signatory to the impugned cash book; the complainant's in charge also signed it as a way of vouching the entries contained therein. That notwithstanding, the complainant's in charge was not called as a witness to explain the circumstances under which he vouched the entries in the impugned cash book, if indeed they were not correct.

In my view, since the appellant denied that he was a signatory of the cash book produced in court and denied having knowledge of the person who had signed it, and further given the fact that some of the entries in the cash book had been altered, it was necessary to call the complainant's in charge to clarify the entries contained in the documents produced in court, the issue of the signatures and at least explain why the original cashbook could not be availed in court. In **Bukenya and Others v. Uganda** (1972) E.A 549 it was held:-

**“The prosecution must make available all witnesses necessary to establish the truth, even if their evidence may be inconsistent;...where the evidence called is barely adequate, the court may infer that the evidence of the uncalled witness would have tended to be adverse to the prosecution.”**

Without the testimony of the complainant's in charge, the trial magistrate ought to have inferred that if he was called he might have given evidence adverse to the prosecution case.

It also appears that some of the documents relied on in preparation of the audit report were not produced in court. See the testimony of P.W.5 where some documents were marked for identification (M.F.1 8-24) but never produced in court. The court can also infer that had the documents been produced they may have been adverse to the prosecution case.

Apparently, the audit herein was not conducted in accordance with the applicable procedures. This is so because P.W.5 admitted that when an audit question arises, the first thing to do, is to call the person concerned to explain and that when it is not possible to do so his junior or senior is called to explain. In the circumstances of this case, the court was informed that the appellant was not called to explain the alleged audit queries, not because he could not be found, but because the complainant felt it was not necessary to do so. It is noteworthy that the audit report does not reveal which officer of the complainant was called to explain the alleged discrepancies. Bearing in mind that serious omission, the audit report herein can neither be said to have been conducted in accordance with the applicable procedure nor to have been fair.

I must point out that the trial fell into grave error when it relied on an incomplete document that is the auditor's report which was supported by only some documents that were produced in court while others M.F.I 8-25 were not produced in evidence.

On whether the evidence adduced sufficed to prove the charge the appellant faced, I can do no better than adopt the observation of my sister H.A Omondi J., in **Daniel Kagori Njuguna & 2 Others v. Republic Nakuru HCRA No.102 of 2011 (2012) e KLR** where faced with a similar case she held:-

**“Then there were the control sheets referred to in the evidence of P.W.1 as having been used to compare with the entries in the receipts at each collection, yet these were not produced – and despite this the trial magistrate accepted the version presented by the prosecution witnesses – certainly this was prejudicial to the appellants, without having sight of the control sheets, it is not clear how the trial magistrate simply accepted the word of the witnesses to support the allegations.**

**Granted there were discrepancies in the documents and the hand writing expert even attributed some of the writings in those documents to the appellants, yet this did not constitute an act of stealing as defined under section 268 of the Penal Code – in fact the evidence leaned more towards fraud. The conviction on a charge of stealing was unsafe.**

**The upshot is that the appeal is properly conceded; the conviction was unsafe and is quashed. The sentence is set aside. The appellants shall be set at liberty forthwith unless otherwise lawfully held.”**

I do find that the appeal was properly conceded, the conviction is unsound and unsafe and is hereby quashed, sentence set aside and the appellant is set at liberty forthwith unless otherwise lawfully held.

**DATED and DELIVERED this 1<sup>st</sup> day of October, 2014.**

**R.P.V. WENDOH**

**JUDGE**

**PRESENT:**

Mr. Mwangi for the appellant

Mr. Chirchir for the State

Kennedy – Court Assistant