



REPUBLIC OF KENYA

High Court at Machakos

Criminal Appeal 117 & 123 of 2010

1. JOSPHAT KISILU NZYUKO

2. DAUDI MUTUA.....APPELLANTS

VERSUS

REPUBLIC.....RESPONDENT

*(Being an appeal against the whole judgment and sentence of Ochieng P.M dated 4th June 2010 at Makindu Criminal Case No. 632 of 2008)*

JUDGEMENT

The 1st and 2nd Appellants, **Josphat Kisilu Nzyuko and Daudi Mutua**, respectively, were charged before the Principal Magistrate's Court at Makindu with the offence of stealing by agent contrary to Sec 283 (b) of the Penal Code together with one, **Joseph Mutuku Mulee** who was acquitted at the conclusion of the trial. the particulars of the charge were that on diverse dates between 7th and 8th January 2008 at Emali Chief's camp in Kibwezi District within Eastern Province jointly with others not before the court stole Kshs 1,744,950/= which had been entrusted to them by Fred Kyalo Ngumba for them to retain in safe custody. The appellants and co-accused denied the offences were soon thereafter tried.

The prosecution evidence in brief was that. PW1, **Stanely Musai Chelenzi**, the General Manager, Machakos Teachers Sacco on 7th January 2008, was paying teachers December salaries amounting to Kshs 2,800,000/- at their Emali branch. They made arrangements to transport the said money to Emali where the salaries were to be paid. He handed over the said Money to **Fredrick Kyalo Ngumba** after he executed the imprest form. He was later informed by the operations manager that a balance of Kshs 1,744,950/- had remained unpaid where upon he instructed the said balance to be taken to Emali chiefs camp for safe keeping. The next morning, he was informed that the money had gone missing. He nonetheless made arrangements to avail Kshs 1,000,000/- for the members to be paid. He later went to the Chief's camp to find out what happened to the money. Inspector IP Wambua informed him that he had seen the cash box that morning but it had gone missing.

PW2, **Steven Mutunga Musyoka** was on that material day the cashier on duty at Emali where he was paying the teachers. The money arrived at 9. a.m and was handed over to his supervisor, Mr. Gumba. He counted the money in the presence of the supervisor (PW3) and confirmed that it was indeed Kshs 2,800,000/-. He paid out Kshs 1,655,050/- and the closing balance was kshs 1,744,950/-. He counted the balance with PW3 who took the cash box to the AP camp. While they counted the money, Administration Police officers **Betty and Nzuki** were outside. PW3 carried the cash in his car accompanied by the 3 Administration Police officers. He was to pick up the money the following morning, but he only to find that the money was missing.

**Fredrick Kyalo Gumba** was PW2 supervisor, was on the material day at Emali in the company of PW2.

They waited for the money to be delivered and a total of kshs 2,800,000/- was delivered. The AP'S **Betty** and **Nzuki** were present. He counted the money together with PW2 which totalled of Kshs 2,800,000/-. PW2 started paying the money while he supervised him. When they closed the office he counted the balance which was Kshs 1,744,950/-. He checked the same in the computer and it tallied. He further checked the payment vouchers and they all tallied with the number of transactions. He packed the remaining cash into the cash box which belonged to the Masaku Teachers Sacco and locked it. He handed over the keys to PW2 and carried the cash box to his car and the security detail escorted him to the Chief's Administration Police camp for the safe keeping of the cash box. There were no problems encountered on the way to the camp. On arrival, he took the cash box into the office and found **Joseph Mutuku Mulee**, the appellants co- accused who instructed him to give the said cash box to the 2nd appellant who took the cash box to the strong room through the main door. The 2nd appellant requested the 1st appellant who had the key to the strong room to open for him, which he did. 2nd appellant entered the strong room with the cash box and he came out and locked it. The 1st appellant was there as well as the appellants co- accused. He eventually left the chiefs camp. He went back the next morning, found the co- accused and the 1st appellant who opened and entered the strong room and stayed therein for about five minutes and then came out to look for the 2nd appellant. They came back and asked him where exactly he had put the cash box in the strong room. He later informed him that the money was missing. He surveyed the room and did not see any signs of forced entry. AP Hassan who was guarding the place the whole night said he did not see the cash box. He reported the matter to CID Emali who referred him to Sultan Hamud police station. Surprisingly, there was no entry that was made in the OB when he handed over the cash box

PW4, **Betty Maweu**, Administration Police Officer had been detailed by the **D.O Florence Obura** to escort PW3 to the bank. She was to be accompanied by 1st appellant. After PW3 completed his duties she escorted him back to the chief's camp and left for home having completed her duties. The following morning she was informed of the missing money. She also surveyed the room and verified that there were no breakages on the roof and the door.

PW5, **APC Adan Hassan Ibrahim**, another administration police officer on the material day, he was on his way back from Sultan Hamud where he had gone to send money to his family when he met PW4, 1st and 2nd appellants. The 1st appellant instructed him to go off duty as he would be on duty at night. He duly reported to work at 7 p.m. The armory was closed though 2nd appellant had the keys as he was the one issuing fire arms. Two other AP'S came and informed him that they wanted to return their arms. He called the 1<sup>st</sup> appellant to come and received them which he did and locked the armory and went home. In the morning, the 1st appellant informed him that there was money missing, which he did not know about.

PW6, **Steven Lawendi**, was the one incharge of the investigations. He was informed of the money that was missing. He went to the camp and inspected the camp but did not see any forced entry, the roof was intact. He confiscated the key and the padlock. He handed over the investigations to CIP Owango, DCIO and **I.P Barasa**. He however, visited the 2nd appellant' home and conducted a search but he did not recover anything. He effected the arrests of 1st and 2nd appellants as well as the co-accused.

PW7, **C/P Linus Owango**, Chief Inspector of Police was instructed by the DCIO on 10th January 2008 to take over the investigations. He went to the scene and the 2nd appellant opened the armory for him. He noted that there was only one door to the armory, there were no windows though there was ventilation which was reinforced with metal bars. There was a metallic box which was locked, when it was unlocked, there were rifles inside. The roof was intact with no sign of breakage. He further established that when the cash box was taken to the camp no entry was made in the OB in regard to the money.

When appellants were put on their defence they opted to give sworn statements without calling any witnesses. The 1<sup>st</sup> appellant stated that he did not steal the money. He claimed that all the five officers based at the post had access to the keys so that any one of them could access the armory. He had been deployed to provide security at Kindu Hall Emali. He allowed APC Hassan to rest during the day as he was meant to be on duty that night. He and his colleagues provided security until 3 p.m. APC Hassan was paid kshs 200/- to guard the cash box at night. No handing over of the cash box was done. He did not see the cash in the box or handle the same. The cash box was transported from the bank to the post. The

cashier carried the cash box into the office. He stood outside with the 2<sup>nd</sup> appellant. He handed over his gun to **APC Betty** and went home. The 2<sup>nd</sup> appellant handed over the keys to him. At around 9 p.m he was in his house taking dinner when he was informed at 10 p.m that two AP'S from Nairobi wanted to keep their guns in the armory. He proceeded to the armory and opened for them. APC Hassan was present and he handed over the padlock to him to hold for him as he kept the guns. He recorded in the OB the keeping of the guns in the armory. He returned back home and in the morning APC Hassan called him to go hand back the guns to the AP's. He found the office securely locked. He opened it and handed over the guns back to the AP's. He officially reported on duty at 8 a.m and issued himself a gun. When the officials arrived, they realized that the cash box was missing. The 2<sup>nd</sup> appellant had allegedly put it in the gun safe. The theft was reported to his seniors and they were charged and arraigned in court. The duplicate key to the armory was lost in April 2007.

The 2<sup>nd</sup> appellant on his part stated that, he was not involved in the theft of the cash. On the material day he reported off duty and he handed over since he was to proceed home after getting permission. The deployment officer told him that an urgent matter had come up so he was to post pone his journey until the following day. He was assigned to provide security at KCB Emali branch together with APC Hassan. He was alone until Hassan joined him at 1 p.m Hassan talked to the Senior Sergeant who gave him permission to go back home. He worked until 3 p.m when the bank closed. He accompanied the Senior Sergeant and the cashier to the AP'S post. He had the keys to the armory and opened it; kept the cash box in the armory and the guns. He locked it and handed over the keys to the Senior Sergeant in the presence of the cashier, Senior Sergeant APC Betty and another officer. The Senior Sergeant told him he was free to travel. He went home changed clothes. The Senior Sergeant called him and asked him whether he would be back in time he answered in the affirmative. He thereafter left for his home and on returning the following day, he learnt of the missing cash box.

The learned Magistrate having carefully considered the evidence on record determined that the prosecution had failed to prove its case against **Joseph Mutuku Mulee** and acquitted him under Sec 215 of the Criminal Procedure Code for lack of sufficient evidence. However as for the appellants, he found that the prosecution had proved its case against them as required, convicted them and sentenced them to 4 years imprisonment each.

The appellants were aggrieved by the decision of the trial Court aforesaid and filed an appeal to this court through **Messrs Andrew Makundi & Co. Advocates** and **B.M Musau & Co. Advocates** respectively.

For the 1<sup>st</sup> appellant, he faulted his conviction on the grounds that:

- 1. "That the learned trial Magistrate erred both in law and facts when he failed to find and hold that there was no enough evidence on identification of the appellant and to connect him with the offence.***
- 2. That the learned trial magistrate erred in both law and facts when he failed to find and hold that the prosecution had failed to prove their case beyond reasonable doubt and instead he contradicted himself and misdirected himself when he made erroneous presumption and thereby wrongfully convicting the appellant.***
- 3. That the learned trial magistrate erred both in law and facts when he relied on weak circumstantial evidence to convict the appellant.***
- 4. That the learned trial magistrate erred both in law and facts when convicted the appellant against the weight of the evidence.***
- 5. That the learned trial magistrate erred both in law and facts when he entertained a defective charge and convicted the appellant on the same.***
- 6. That the magistrate erred both in law and facts by imposing an excess sentence which was excessive in the circumstances.***

**7. That the learned trial magistrate erred in law and fact by failing to find and hold that the appellants constitutional rights had been violated by being held beyond 24 hours after the arrest at the police station before being taken to the court of law.”**

The 2nd appellant grounds of appeal were that:

**1. “The learned magistrate erred in law and fact when he convicted the appellant on a charge that was defective and incompetent.**

**2. The learned magistrate erred in law and in fact when he misdirected himself on the applicable law and procedure.**

**3. The learned magistrate erred in law and fact when he failed to find that the prosecution case had not been proved beyond reasonable doubt.**

**4. The learned magistrate erred in law and fact when he failed to consider the appellant defence as against the prosecution case.**

**5. The learned magistrate erred in law and fact when he convicted the appellant on incredible, unreliable and contradictory evidence.**

**6. The sentence was manifestly excessive.”**

When the appeal came before me for plenary hearing on 11<sup>th</sup> June 2012, **Mr. Makundi** and **Mrs Kayugira** appeared for the 1<sup>st</sup> and 2<sup>nd</sup> appellant’s respectively. The State on the other hand was represented by **Mr. Mukofu** learned State Counsel. They all agreed to canvass the appeal by way of written submissions. Subsequently, they filed and exchanged written submissions which I have carefully read and considered along cited authorities.

Before venturing into consideration of the merits or lack of them of the appeal, I think it is necessary to set out what I consider to be the approach, function and duty of this court in connection with this appeal. An appeal from the subordinate court to this court is by way of a retrial and as this court and indeed the Court of Appeal has pointed out on various occasions, it is not bound necessarily to accept the findings of fact by the court below but must re-consider the evidence, re-evaluate it and come to its own conclusion, although always bearing in mind that it has not had the advantage of the trial court on seeing and hearing witnesses. I shall bear all these injunctions in mind as I consider this appeal. As stated in the case of **Ajode –vs- Republic Criminal Appeal No. 87 of 2004** by the Court of Appeal sitting at Kisumu:-

**“In law it is the duty of the first appellate court to weigh the same conflicting evidence and make its own inferences and conclusions but bearing in mind always that it has neither seen nor heard the witnesses and make allowance for that.”**

Firstly, I wish to point out that there is no doubt as to the fact that there was a cash box, PW2, PW3, PW4, 1<sup>st</sup> Appellant, 2<sup>nd</sup> appellant and all testified to having either seen or been in possession of the cash box. It is also common ground that in the cash box there was Kshs 1,744,950/- which was the balance of the total amount of Kshs 2,800,000/-, paid out to the teachers on the material day. All witnesses testified that the said cash box was carried safely to the AP’s camp and **Joseph Mutuku Mulee** ordered the same to be kept in the armory for safe keeping until the next day. The evidence of PW2 attests to this fact, he counted the money in the presence of the supervisor and confirmed that it was indeed Kshs 2,800,000/=. He paid out a total of Kshs 1,655,050/= and the closing balance was Kshs 1,744,950/=. PW3 further collaborated the evidence tendered by PW1 stating that a total of Kshs 2,800,000/- was delivered. He counted the money together with PW2 which was a total of Kshs 2,800,000/-. PW2 started paying the money while PW3 supervised him. When they closed the office he counted the balance which was Kshs 1,744,950/=. He checked the same in the computer and it tallied. He further checked the payment vouchers and they tallied with the number of transactions. He packed the cash into the cash box which belonged to the Masaku Teachers Sacco and locked it. He handed over the keys to PW2 and carried the

cash box to his car and the security detail escorted him to the chief's camp for the safe keeping of the cash box. On this evidence there is no doubt at all the cash box which was delivered to the AP had the amount aforesaid.

Secondly, it is prudent to note that the cash box went missing from the armory yet there were no signs of forced entry. It can therefore be surmised that the person who stole the cash box had access to the armory one way or another and it must have been through the door. From the evidence on record, it is clear that the only mode of entry into the armory was through the door. There was no window and the only other openings were the metal bars that served as ventilators in the room. The person(s) who stole the cash box therefore must have unlocked the padlock using a key. Indeed, the co-accused testified and confirmed that a spare key to the armory got lost sometime in April 2011. He further stated that no measures were undertaken to address the lost spare key. They did not bother or attempt to change the padlock even after they were not able to recover the lost key. This lost key could consequently have been at the disposal of any officer at the camp or indeed any other 3<sup>rd</sup> party. This could mean that whoever had the lost key could have easily accessed the armory just as the 1<sup>st</sup> appellant would have.

Furthermore, it was the evidence of the co-accused and the 1<sup>st</sup> appellant that other officers at the camp had access to the keys to the armory. The padlock used to lock the armory is tri-circle padlock which was produced as an exhibit. The co-accused in his testimony stated that the 1<sup>st</sup> appellant was in charge of armory and was assisted by the 2<sup>nd</sup> appellant, **APC Hassan** and **APC Wahome**, but they would only take charge in the event the 1<sup>st</sup> appellant was away from the post. In such a case there was handing over which included keys to the armory. This clearly indicates that either of these officers could have had a duplicate key to the armory.

Fourthly, PW5 was the officer who guarded the armory that night. It was his duty to safeguard the armory amongst other places in the camp. He should have been vigilant enough to ensure that no person entered the armory. It was his testimony though that the only person who accessed the armory that night was the 1<sup>st</sup> appellant whom he called to come open the armory for AP'S from Nairobi to keep their guns. The co-accused testified that 1<sup>st</sup> appellant was the one in charge of the armory. However, in the event that the 1<sup>st</sup> appellant is away from the post, then either PW5, 2<sup>nd</sup> appellant or one APC Wahome would take charge including handling the armory keys. Either of these officers could have duplicated the key when they were in possession of it. It is therefore imperative to note that PW5 being one of the officers who handled the said key was on duty that material night and he did not see anyone access the armory. Could it be then that he had a spare key to the armory which he used to access the armory and take the cash box? Could it also be that either of the other officers who handled the key in the 1<sup>st</sup> appellant's absence, had accessed the armory that night and taken the cash box? These questions cast serious doubts in the prosecution case.

Fifthly, the rule about circumstantial evidence is that it must be seen as to be explainable only upon the hypothesis of the accused's guilt and incompatible with any other relevant explanation.

In the case of **M'Riungu –VS- Republic [1983] KLR 455**, the court of appeal held *inter alia* that:-

***“5. Corroboration need not be direct evidence that the accused committed the crime. It is sufficient if it is merely circumstantial evidence of his connection with the crime. In other words it must be evidence which implicated him that is which confirms in some material particular not only the evidence that the crime has been committed but also that the prisoner committed.”***

It is quite apparent from the evidence adduced, that no one saw anyone carrying the cash box from the armory. PW6, who was guarding the armory that night, only put the 1<sup>st</sup> appellant on the scene when he called him to open the armory for the AP's to put their guns. He informed the Court that he was not aware there was a cash box in the armory as he was off duty that day having been instructed by the 1<sup>st</sup> appellant to take the morning off as he would be on the night duty. None of the officers informed him to take extra caution as far the armory is concerned considering there was a cash box therein, which in any case was not necessary as he was entrusted with the responsibility of guarding the camp as a whole. On the

evidence on record, I think PW5 knows much more with regard to what went on with regard to the cash box that night. That cash box was lost at night whilst on duty. If it is not him who stole the same then he must have seen whoever did it.

In circumstantial evidence, in order to justify the inference of guilt, the incriminating facts must be incompatible with the innocence of the accused person or the guilt of any other person and incapable of explanation upon any other reasonable hypothesis than that of his guilt. In this case, considering the spare key was lost in April 2011, other inferences can be drawn as to the circumstances surrounding the disappearance of the cash box, any other officer or indeed third party in the possession of the lost spare key could have been responsible for the theft. According to the evidence on record 2<sup>nd</sup> appellant herein sought permission to travel home which he was granted, however he was informed by the deployment officer that an urgent matter had come up and he was forced to postpone his journey to the next day. On the material day he was granted by the 1<sup>st</sup> appellant permission to travel which he did. The mere fact that the 2<sup>nd</sup> appellant asked to leave camp does not necessarily incriminate him of this crime. PW 6, testified that he searched the 2<sup>nd</sup> appellants house and did not find any cash box or anything that would have linked the 2<sup>nd</sup> appellant to the crime.

PW3 testified that the 2<sup>nd</sup> appellant was handed over the keys by the 1<sup>st</sup> appellant to open the armory and keep the cash box. He entered therein put the cash box and came out empty handed where he handed back the keys to the 1<sup>st</sup> appellant in his presence, at no point did the 2<sup>nd</sup> appellant handle the keys again as far as the evidence on record shows. According to PW5, while guarding the camp the whole night he did not see the 2<sup>nd</sup> appellant at all neither did he see him open the armory. As such the 2<sup>nd</sup> appellant cannot be said to have stolen the cash box when the whole time the cash box could have been stolen he was away from the camp. Again PW5 did not see the 1<sup>st</sup> appellant carry away the cash box when he came to open the armory for the police officers from Nairobi to keep their rifles.

The other issue to be addressed; is whose responsibility it was to enter the receipt of the cash box in the OB. The duty officer was tasked with that responsibility. According to the co - accused he was on duty on the material day. It was therefore upon him to enter the said cash box in the OB. The appellants were therefore not on duty and could not be held accountable as far as failure to enter the receipt of the cash box in the OB is concerned.

I wish now to consider whether the Charge Sheet was defective. It coined thus:

***“Stealing by agent contrary to Sec 283 (b) of the Penal Code. The particulars of the charge were that “on diverse days dates between 7th and 8th January 2008 at Emali Chief's camp in Kibwezi District within Eastern Province jointly with others not before the court stole Kshs 1,744,950/= which had been entrusted to them by Fred Kyalo Ngumba for them to retain it in safe custody”***

Section to 283 of Penal Code provides *inter alia*; If the thing stolen is any of the things following, that is to say -

**(b) property which has been entrusted to the offender either alone or jointly with any other person for him to retain in safe custody or to apply, pay or deliver for any purpose or to any person the same or any part thereof or any proceeds thereof;**

**(c) property which has been received by the offender either alone or jointly with any other person for or on account of any other person;**

The appellants herein were entrusted with the cash box by Machakos teachers Sacco through **Fred Kyalo Ngumba** to retain it in safe custody. They both together with the co - accused received the cash box and went ahead to keep it in the armory. I find therefore that the charges as preferred against the appellant fall within the above parameter and are in no way defective. The particulars of the charge were well laid out to address the contents of the offence. I do not therefore disagree with the 2<sup>nd</sup> appellant that the Charge was defective or incompetent in any way. The appellants were entrusted with the custody of the cash box

and the money inside it; they breached the said trust giving rise to the offence.

The 1<sup>st</sup> appellant cannot raise the breach of his constitutional right of being arraigned in court before the expiry of 24 hours at this juncture. He should have raised that issue in the Lower Court where the Magistrate would have dealt with it then. In any event, the remedy no longer lies in his acquittal but in a suit for damages against those who illegally detained him.

However, in consideration of all the evidence on record as outlined above, I find that the appellants cannot be said to have stolen the cash box conclusively as there were loop holes or gaps in the prosecution case. In the circumstances, I find that the prosecution failed to prove their case beyond reasonable doubt against the appellants.

As a result I find that the appeal has merit. I allow it, quash the conviction and set aside sentences imposed.

The appellants should be set at liberty forthwith unless otherwise lawfully held.

**DATED, at MACHAKOS this 28<sup>TH</sup> SEPTEMBER 2012**

**ASIKE- MAKHANDIA**

**JUDGE**

**DATED, SIGNED and DELIVERED at MACHAKOS, this 5<sup>TH</sup> day of OCTOBER 2012.**

**GEORGE DULU**

**JUDGE**