



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA**

Criminal Appeal 81 of 1999

(From the original conviction and sentence in criminal case No. 443 of 1998 of the Chief Magistrate's Court at Mombasa).

WILLIAM MWAKANONGO SOWA APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant was convicted for the offence of stealing by Servant contrary to Section 281 of the Penal Code and was sentenced to serve 10 months imprisonment on 25.2.99. Soon after on 12.3.99 he filed a Petition of Appeal through his Advocates challenging the conviction but not the sentence. The Appellant had already served the sentence when this Appeal was argued.

The Appellant was a Clerical Officer with the Moi Airport Taxi SACCO. As such clerk it was alleged that the Sacco funds were collected, recorded, secured and banked by him on behalf of the Sacco. Between 14.11.96 and 30.6.97, it was alleged that some Ksh.658, 410 came into his possession but was never accounted for, hence the charge laid that he stole the amount.

The Learned Senior Principal Magistrate found as proved beyonddoubt that the Appellant was such employee. He further believed the evidence of the seven Prosecution Witnesses called to prove the charge and in particular the Auditor commissioned by the Sacco to investigate the Accounts of the Sacco, who testified as PW 6, David Gachanja. He delivered himself on such evidence as follows:-

"Mr. Gachanja who did audit told the court that he covered the period November 1996 to September 1997. He found out that the amount collected was Ksh, 1,318,000/-. Kshs.557,850 /- was booked. There were voucher payments of Kshs.318, 530/-. He also noted fictitious overpayment of Ksh.241,190/-. He found the accused could not account for Kshs.650,410/-.

Accused did not explain anything about the above figure since he is the one who was collecting cash and this money could not be seen then obvious he misappropriated it. He must have stolen it".

A finding of guilty was made.

The grounds of Appeal laid and argued by the Appellant's Counsel Mr. Gakuhi are these:-

1. That the learned trial Magistrate erred in law and fact in convicting the Appellant against the weight of evidence.

2. That the learned trial Magistrate erred in law and fact in failing to find that there was no evidence to connect the Appellant with the alleged theft.
3. That the Learned trial Magistrate erred in law and fact in failing to find that the audit report (Exhibit 3) covered the period up to 3rd September, 1997 whereas the Appellant had stopped working in April 1997.
4. The learned trial Magistrate erred in law and fact in failing to find that whereas the Appellant was charged with the theft of Shs.656,410/- the investigating officer in his evidence stated that the amount stated was Shs.83, 410/-.
5. The learned trial Magistrate erred in law in failing to require the Appellant to plead to the charge that was amended on 2.7.98. He further erred in amending the charge without any application for the same by the prosecutor.
6. The learned trial Magistrate erred in law and fact in convicting the Appellant on the basis of an incomprehensive and inconclusive report of the auditor.
7. The learned trial Magistrate erred in law infinding that "since he (the Appellant) is the one who was collecting the cash and this money could not be seen then obvious he misappropriated it." He combined grounds 1,2,4,6 and 7 and argued them together, and argued grounds 3 and 5 separately.

In essence, Mr. Gakuhi submitted that the learned trial Magistrate wholly relied on the evidence of the Auditor and ignored other prosecution evidence. Such evidence shows that the Executive Committee through PW 1 found some 500,000/- missing upon checking some documents. In the same breath, the same witnesses said the money collected by the Appellant was Shs.145,650. The Treasurer of the Sacco also testified as PW 2 and said he did not notice anything wrong upon checking the books. He had worked with the Appellant for 3 years. The Chairman was also called as PW 3 and said the Treasurer could authorise the Appellant to use Sacco money. It was his evidence that the Audit report showed a shortage of Shs. 683,110/- which is different from the one in the charge sheet.

Another society Chairman testified as PW 4 and said he was the one who had stopped the Appellant from working on 15.9.97. But he was not involved in the investigations on the missing funds nor did he know anything about the Audit which was done.

Then there was the Secretary of the Sacco PW 5 who handled all correspondence until January, 1998. He did not know if the whole audit was done or how much was stolen, if any, by the Appellant.

In view of such evidence by all those Sacco officials Mr. Gakuhi submitted it was doubtful that the case was proved to the standard required in law.

As for grounds 3 he submitted that the period covered by the Audit report given by PW 6 was 1.11.96 to 3.9.97 but the charge sheet shows the period as 14.11.96 to 30.6.97. The period between 1.7.97 and 3.9.97 is therefore irrelevant to the charge.

There was no evidence to show the amount lost within that period, if any. The Accounts, books relied on to compile the report were not produced and particularly cash vouchers. The Auditor further found that the shortage was Shs.442,220 but added some 241,190 which he called unauthorised payments which no other witness in the Committee had referred to. The investigating officer PW 7 did not receive a report on unauthorised payments but of stolen money. There were therefore no unauthorised payments by the Appellant.

Finally, Mr. Gakuhi submitted on Ground 5 that the charge was amended on 2.7.98 on application by the prosecution. They substituted the figure of 656,460/- with 658,410/-. That was after three prosecution witnesses had testified. But after the application was allowed the Appellant was not asked to plead afresh to the amended charge as by law required. In his submission therefore S.214 Criminal Procedure Code was flouted and all the proceedings thereafter were a nullity.

Senior State Counsel Mrs. Mwangi defended the assessment of the evidence and the conclusions reached by the learned Senior Principal Magistrate. In her submissions, the evidence of the members of the Sacco Committee, past and present as represented by PW 1, PW 2, PW 3, PW 4 and PW 5 was considered in that they all testified that the Sacco offices were locked up for non-payment of rent which action triggered off an Audit inspection authorised by the General Body of Members. That some of those witnesses talked about different figures does not detract from the fact that there was prima facie evidence of misappropriation of Sacco funds whose exact amount could only be ascertained through an Audit. PW 6 was the expert and his evidence was therefore correctly relied upon. That the Auditor covered a period of Audit in excess of that stated in the Charge Sheet did not cause any prejudice to the Appellant who was still in employment throughout the period covered by the Auditor.

As for the amendment of the Charge Sheet there was nothing substantial about the amendment since only the figure was varied slightly. There was therefore no failure of justice in omitting to take a second plea from the Appellant. The omission was curable under S. 382 of the Criminal Procedure Code.

I have carefully re-evaluated the evidence as I am bound to do on a first Appeal. I have also considered the submissions of both Counsels.

First the technical objections raised under grounds 5 and 3.

It is correct as pointed out by learned Counsel Mr. Gakuhi that the court has the power to alter the charge by amending or substituting a new charge if from the nature of the evidence tendered and before closure of the prosecution case, it is found defective in form or in substance. That is the wording of S.214 of the Criminal Procedure Code. It is only done if the court thinks it is necessary to meet the circumstances of the case. There are provisos to that section that the Accused person shall be called upon to plead to the altered charge and may at his discretion demand the recall of witnesses for cross-examination. That was not done in this case. The submission made is that all proceedings thereafter between 2.7.98 and 25.2.99 when 5 more witnesses testified and judgment was delivered were a nullity and the consequential order would be a retrial.

The alteration made in this case was the substitution of a figure with another, between them a difference of Shs.1,950/-. It was made on application by the prosecution in open court and in the presence of the Appellant. No objection was raised then or at any stage thereafter. The omission to require him to plead afresh to the amendment must therefore be weighed against the provisions of S.382 of the Criminal Procedure Code which saves such irregularities if they do not occasion a failure of justice. I am of the view that it did not since the Appellant had all along denied involvement in the crime whatever figures were thrown at him. That ground of Appeal fails.

Ground 3 also covers variance between the charge and the evidence. It relates to the period stated in the Charge Sheet and the period covered in the Audit report. The specific complaint is that the period covered was up to 3.9.97 whereas the Appellant had stopped working in April 1997. But there is no evidence that the Appellant stopped working in April 1997. The prosecution evidence through PW 4 is that he was ordered to stop working on 15.9.97 to await a decision of a General Meeting of the Sacco members. He himself stated in evidence that he was stopped from working on 11.9.97.

The period covered by the Audit report did therefore cover the period within which the Appellant was engaged in his duties as the Sacco Clerk. There is no merit in the complaint.

As for the other grounds which were argued as one, I agree with Mrs. Mwangi that the evidence of the Sacco officials who testified was considered. That the officials' evidence or actual figures varied did not detract from their evidence which was consistent, that the Sacco offices were locked up due to non-payment of rent and a casual check on the available books and other accountable documents showed a possible misappropriation of the Sacco funds. They all pointed at the Appellant as the person responsible for collection, recording and banking of the funds. They further confirmed a general meeting having been held to resolve the crisis and a resolution being made for the appointment of an Auditor. The Auditor's was expert evidence and I do not fault the learned trial Magistrate for accepting his opinion. The Auditor

may only be faulted for including in the amounts misappropriated, the figure of Shs.241, 190/- which he termed as unauthorised payments. There was no evidence of unauthorised payments from the Treasurer. PW 2, who according to the Chairman PW 3 had that authority. I see no merit in those grounds of Appeal also.

The upshot is that the Appeal is dismissed in its entirety.

Dated at Mombasa this 26th day of November 1999.

P.N. WAKI

JUDGE