



REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Gicheru, Lakha J.J.A. & Bosire, Ag. J.A.)

CRIMINAL APPEAL NO. 170 OF 1988

BETWEEN

PATRICK MKONJI MTAMBO.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from a conviction and sentence of the High Court of Kenya

at Nairobi (Aragon & Mbaluto, J.J.) dated 6th October, 1988

in

H.C.CR. APPEAL NOS. 436, 444, 445, 473 & 431 OF 1987)

JUDGMENT OF THE COURT:

The appellant who at the material time was the Officer-in-Charge of G.K. Prison, Kakamega was with John Mukaya Mukangai who was the second accused person in the Principal Magistrate's Court at Kisumu jointly charged before that court with twelve counts of stealing by persons employed in the public service contrary to section 280 of the Penal Code. These twelve counts respectively involved the theft of K.Shs. 3,300/- on 2nd December, 1981; K.Shs. 3,349/- and K.Shs. 3,287/- on 7th December, 1981; K.Shs. 3,382/-, K.Shs. 3,122/-, K.Shs. 3,364/- and K.Shs. 3,312/- on 9th December, 1981; K.Shs. 3,523/- on 14th December, 1981; K.Shs. 3,480/- on 18th December, 1981; K.Shs. 3,880/-, K.Shs. 2,500/- and K.Shs. 3,800/- on 23rd March, 1982 the property of the Kenya Government which came into their possession by virtue of their employment. These sums of money were respectively reflected in Payment Voucher numbers 0175, 0172, 0173, 0171, 0175, 0177, 0180, 0180, 0190, 0303, 0311 and 0314 all of which were authorised for payment by the appellant who also acknowledged receipt of the respective sums of money reflected on each of these vouchers by signing on the appropriate space on the reverse of each of them. On the first nine counts, one Dishon Omutelema Mhala who was the third accused person in the court of first instance was also jointly charged with the appellant and the second accused person. The appellant and his coaccused persons were tried and convicted for the offences related to the theft of the sums of money set out above and each of them was sentenced to three years imprisonment on each of the counts with which they were each respectively charged with the prison sentences being ordered to run concurrently. The appellant's first appeal to the superior court against conviction and sentence was on 6th October, 1988 dismissed with that court holding that there was more than ample evidence before the trial court on which the appellant was properly convicted on each of the twelve counts referred to above and

that the sentence of three years imprisonment on each count being less than half of the maximum of seven years imprisonment for the offence of stealing by a person employed in the public service could not, in the circumstances of the case before learned trial magistrate, merit any complaint by the appellant.

According to a repudiated extra-judicial statement under inquiry made to Chief Inspector Benson Ngatia Wanjau (P.W.29) by the second accused person on the morning of 21st November, 1982 which was admitted in evidence in the court of first instance after a trial within a trial, the second accused person admitted having been a Prison Warder attached to G.K. Prison, Kakamega from 1978 to July, 1982 when he resigned from Prison Services. He had been employed in the Prison Services in 1975. At Kakamega G.K. Prison he was attached to the Accounts Office and his duties were to prepare payment vouchers of all accounts including travelling and subsistence allowances. As relates to the latter where relevant to the present appeal, the procedure was that the officers who had travelled on escort duties would submit to him bus tickets in respect of their transport together with their cash sale receipts for their subsistence and accommodation with their respective names written at the back of the tickets and receipts. The second accused would then make appropriate entries as per the said tickets and receipts in the Transport - Cash Payment Schedule to which the tickets and the receipts would be attached and the officers claiming reimbursement of their transport, subsistence and accommodation expenses would sign against their respective names on the Schedule. The second accused person would then prepare a payment voucher, F.O. 20, on which he would attach the Transport - Cash Payment Schedule with its annexed bus tickets and cash sale receipts for subsistence and accommodation. The payment voucher would be prepared in the name of the Officer-in-Charge of G.K. Prison, Kakamega as the payee who would also authorise the payment of the money reflected thereon after verifying the entries made on the Transport - Cash Payment Schedule and being satisfied of their correctness. He would also sign at the back of the payment voucher as the receiving officer. The payment voucher would then be taken to the District Commissioner's office, Kakamega for examination and thereafter to the District Cashier at the said office for payment. The normal procedure was that the Officer-in-Charge G.K. Prison, Kakamega would collect the money from the District Cashier but in the case the subject-matter of the present appeal, the second accused person collected the money once the appellant had signed at the back of the payment voucher as having received it. On receiving the money, the second accused person handed it over to the appellant who then called in the third accused person to pay the claiming officers.

In this appeal, the payment vouchers and the Transport- Cash Payment Schedules were prepared by the second accused person and according to him, the names of the Prison Officers indicated on the said Schedules as having travelled on escort duties from G.K. Prison, Kakamega were not genuine. The bus tickets attached thereto were also not genuine. According to the second accused person, the appellant had suggested that names of the staff officers at G.K. Prison, Kakamega be obtained to prepare the Transport - Cash Payment Schedules showing them to have travelled on escort duties outside Kakamega when in fact they had not done so. The third accused person would then sign as the paying officer and he or the second accused person would put fictitious signatures against the payees the effect of it all being that the money reflected on the payment voucher and received by the appellant would still remain with him. Depending on how many vouchers had been cashed at the District Commissioner's Office, Kakamega, the second accused person would be given more or less a sum of K.Shs. 500/- by the appellant. The third accused person would also be given some money by the appellant for his contribution in this exercise.

Some of the Prison Officers purported to have travelled on escort duties whose names were recorded on the Transport - Cash Payment Schedules annexed to the twelve payment vouchers set out earlier in this judgment were not in the establishment of G.K. Prison, Kakamega at the material time and those who were in the establishment of that Prison denied having claimed and received the money reflected on the said Schedules besides disclaiming their respective purported signatures on those Schedules purportedly acknowledging receipt of the money reflected thereon. The Duty Roster for the material dates also confirmed that these Prison Officers never went on escort duties outside G.K. Prison, Kakamega. The Document Examiner, Mackenzie Mweu (P.W.10), confirmed that the handwriting on the twelve payment vouchers was that of the second accused person just as he had admitted in his statement under inquiry and the signatures of the person authorising and receiving payment of the money reflected on each of the twelve payment vouchers were those of the appellant. The signatures of the paying officer and of the witness to the payment of the money reflected on the Transport - Cash Payment Schedules attached to the

first nine payment vouchers set out earlier in this judgment were respectively those of the third accused person and the second accused person just as the latter had admitted in his statement under inquiry. None of the twelve, payment vouchers was posted in the Kakamega G.K. Prison's Cash Book but they had been entered in the Kakamega District Commissioner's Cash Book. They were also not entered in the Kakamega G.K. Prison's Vote Book for travelling and subsistence with the result that expenditure on this vote in respect of these payment vouchers was not apparent.

The foregoing factors corroborated in material particulars the second accused person's repudiated extrajudicial statement under inquiry which as earlier indicated in this judgment was admitted in evidence by the trial court after a trial within a trial. In any event, in his defence, the appellant did not deny having authorised and received the payments of the various sums of money reflected in the twelve payment vouchers referred to above but contended that in the absence of these payment vouchers being rejected by the Kakamega District Commissioner's Office, it was not possible for him to detect any mistakes in them. Yet, as the Officer-in-Charge of Kakamega G.K. Prison, he controlled the travelling and subsistence vote for that institution. Besides, according to the Assistant Commissioner of Prisons Julius Mailu Komu (P.W.1), as the Officer-in-Charge of Kakamega G.K. Prison, the appellant was responsible for deployment of each and every Prison Warder under his charge and was required to sign such deployment in the Duty Roster every day. At any rate, he was the only person who could authorise the Duty Officer at that Prison to effect the movement of prisoners and thereafter authorise his accounts section to prepare payment vouchers which should have been checked against the balance in the travelling and subsistence Vote Book before authorising payment. Hence, although the appellant's escape route was that he was not a trained accountant and that he relied on his accounting staff, as the holder of the travelling and subsistence vote, he was under an obligation to ensure that that vote was not over-spent and that every payment voucher authorised for payment and paid was entered in the Vote Book.

In his six grounds of appeal to this Court, the appellant has complained of the use of the second accused person's extra-judicial statement under inquiry against him which, according to his counsel, Mr. Gathuku, required corroboration which latter, according to counsel, though available, was of the weakest kind and therefore incapable of sustaining the appellant's conviction on each of the twelve counts of stealing by a person employed in the public service. The appellant has also complained of absence of proof of common intent with his co-accused persons in the court of first instance which, according to his counsel, meant that none of the twelve counts referred to above were proved against him.

Finally, the appellant has also complained that the reference to and the acceptance by the two courts below of the evidence relating to the over expenditure of funds over and above the K.Shs. 100,000/- allocated to Kakamega G.K. Prison on account of travelling and subsistence for the financial year 1981/1982 by a sum of K.Shs. 3,290, 157/65 was prejudicial to his case as it had the effect of overly influencing both the trial court and the first appellate court against him. According to Mr. Gathuku, the appellant was not on trial for the theft of K.Shs. 3,290, 157/65 but for the sums of money reflected in the twelve counts of stealing by a person employed in the public service whose aggregate amounted to K.Shs. 40,299/-. On account of this and from the totality of the evidence adduced before the trial magistrate, both courts below ought to have found that that evidence pointed to the appellant's dereliction of duty other than the commission of the criminal offences for which he was charged, tried, convicted and sentenced as is set out at the beginning of this judgment.

The response of counsel for the respondent, Mr. Bwonwong'a, to the appellant's complaints was that the second accused person's repudiated extra-judicial statement under inquiry amounted to a confession and on its admission in evidence by the trial court it was treated as such. That statement was inculpatory of the second accused person as it was of the appellant. In acting on it as against the appellant the learned trial magistrate appropriately warned himself and treated it as accomplice evidence requiring corroboration which latter he found and acted on it. To Mr. Bwonwong'a therefore, that statement as against the appellant was correctly treated and acted on by the learned trial Magistrate. Without more, the appellant's conviction was home and dry.

While dealing with this aspect of the appellant's first appeal in the first appellate court, the first appellate judges recognised that the evidence of a co-accused implicating another in a confession that had been

repudiated was evidence of the weakest kind which could only be used to lend assurance to other evidence against the co-accused. See the cases of Anyuma s/o Omolo & Another v. R , (1953) 20 E.A.C.A 218 and Kinyua and Ibrahim M'Inanga v. Republic , [1980] K.L.R. 141. They, however, found ample corroborative evidence of the second accused person's repudiated extrajudicial statement under inquiry as we have earlier attempted to outline in this judgment. That evidence sealed the appellant's escape route and placed him at the centre of the commission of the offences in the twelve counts referred to in this judgment. Even the exclusion of any reference to the excess expenditure of K.Shs. 3,290,157/65 beyond the allocated sum of K.Shs. 100,000/- for travelling and subsistence during the financial year 1981/1982 could not have affected his conviction on each of the twelve counts of stealing by a person employed in the public service contrary to section 280 of the Penal Code . On account of what we have endeavoured to outline above, we think that the appellant's first appeal to the superior court was properly dismissed and accordingly his second appeal to this Court against conviction suffers the same fate. It is dismissed.

Dated and delivered at Nairobi this 7th day of November, 1997.

J.E. GICHERU

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JUDGE OF APPEAL

A.A. LAKHA

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JUDGE OF APPEAL

S.E.O. BOSIRE

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JUDGE OF APPEAL