



REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

CRIMINAL APPEAL NO 1034 OF 1992

FRANCIS KARANJA KINYANJUI & ANOTHER..... APPELLANTS

VERSUS

REPUBLIC..... RESPONDENT

(From Original Conviction(s) and Sentences in Criminal Case No 1763 of 1991 of the Resident Magistrate's Court Nairobi, Mrs Nzioka)

JUDGMENT

The appellant's was charged with the offence stealing by servant contrary to section 281 of the Penal Code. He was tried, convicted and sentenced to serve three years imprisonment. This is an appeal against the said conviction and sentence. The appellant was charged jointly with another and it was alleged that between 18th December 1990 and 20th March, 1991 being servant one Esther Wahome they jointly stole cash 187,478/90 the property of their employer.

The duties of the appellant and his original co-accused were set out by PW1 who was their employer. In her evidence in chief she stated:

“The work of the manager, Mr Karanja was to run the depot, supervise staff, and maintain motor vehicles receive money from salesman and pass if over to KBL Depot Manager or ensure Salesman paid directly to the KBL Manager and report to directors. The deputy, Godfrey could assist in the same duties or carry them out if the Manager was absent....”

For the prosecution to succeed in securing conviction they had to prove that the appellant and his co-accused were servants of the complainants that between the alleged period they took fraudulently and without claim or right and with the intention to deprive their employer the sum of Kshs 187,478/90. The prosecution proved that the two were employees of complainants. Thereafter the evidence adduced was disjointed and disorganised. A common *actus reus* and *mens rea* was necessary to pin the appellant with the offence. I am unable to detect any in the evidence adduced.

From the evidence as a whole and in particular that the complainant several people handled the cash or cheques due to the complainant. There was the appellant and his co-accused. There were the salesmen and their KBL Manager. This entailed a rather complex system of accountability. The thrust of the appellants defence is that he never received the money alleged to have been stolen. The ultimate handling of funds were to be reflected in the KBL daily sales summary. Regretably however, this evidence was never produced. In convicting the appellant the learned trial magistrate had the following to say

“There are documentary and witness evidence they received the money. Their explanation is not satisfactory and although the prosecution have not prove the exact amount stated in the charge sheet. I find they have proved at least theft of a certain sum of money. I therefore find the accused guilty as charged and I accordingly convict him...”

With profound respect the learned trial magistrate was misdirected in her findings. She has not identified whose documentary.....evidence showed the appellant received the money she has used the word “they” yet she makes no findings of a joint concept. Further it is the duty of the prosecution to prove the guilty of the accused beyond any reasonable doubt. But the learned trial magistrate observed that the appellant ‘ explanation is not satisfactory’ In so doing he shifted the burden of prove to the accused. This was prejudicial one last observation. The learned trial magistrate rightly found that the prosecution had proved the exact amount stated in the charge sheet had been stolen. However, there was no evidence whatsoever that the certain amount/sum of money had been stolen by the appellant and his co-accused. There was no justification after boldly stating the above to find the “accused guilty as charged”

My finding after evaluating the evidence on record is that both the appellant and his co-accused were victims of poor management and accounting procedure. There was no evidence to sustain the conviction.

In the end this appeal thrust succeed. Conviction is hereby quashed and sentence set aside. The appellant shall be set free forthwith unless otherwise lawfully held.

The appellants co-accused in the lower court did not appeal and if he did his appeal has not been brought to my notice. He shall also benefit from the orders herein.

Orders accordingly.

Dated and Delivered at Nairobi this 9th day of June, 1993

A.MBOGHOLI – MSAGHA

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JUDGE