REPUBLIC OF KENYA

Oban v Republic

High Court at Nairobi July 31, 1986

Patel J, Mbaluto J

Criminal Appeal No 501 of 1985

July 31, 1986 Patel J, Mbaluto J delivered the following Judgment.

The appellant was convicted on 3 counts, the 1st two of which were stealing by a person employed in the public service contrary to section 280 of the Penal Code and the third being obtaining by false pretences contrary to section 313 of the Penal Code and sentenced to 3 years imprisonment on each of the first two counts and to 18 months on the third count. The sentences on the first two counts were to run concurrently and on the third count to run consecutively with counts 1 and 2. He now appeals to this court against both conviction and sentence.

His grounds of appeal on count 2 and 3 with which we are concerned here (the state having conceded the appeal on ground 1) do not really amount to very much as they merely repeat what he said in his defence during the trial of the case that with regard to the charge relating to stealing Ksh 4,005 there was agreement that the appellant would refund the money after selling his sewing machine. He says that he was arrested before the meeting to arrange the repayment materialized.

The answer to this argument is that there is no evidence to support his contention that he was selling his sewing machine to enable him raise sufficient funds to refund the money. The evidence on the record is that when it was discovered that the appellant had made collections of Kshs 4,005 for which he could not account, he was given time to refund it but he failed to do so and when the crunch came, he absconded from the school.

And in any event even if there was an agreement to sell the sewing machine and refund the money, this in our view would not have changed the position in view of the definition of stealing in section 268(2) (e) of the Penal Code, which is as follows:

> ***"A person who takes anything capable of being stolen or who converts any property is deemed to do so fraudulently if he does so with any of the following intents, that is to say:***
>
> ***(e) in the case of money, an intent to use it at the will of the person who takes or converts it although he may intend afterwards to repay the amount to the owner."***

It would therefore not have mattered whether or not the appellant had made arrangements to repay if the prosecution had proved the ingredients of the offence as defined.

Similarly with regard to count 3 the appellant does not deny having collected the sum of Kshs 2,600 from the school children. He however, argues that it was his arrest that frustrated his attempts to organize the trip and that he was still struggling to get a bus for the trip. He also argued that at the time of his arrest the money he was supposed to have stolen was still in his possession at his place of work and that in fact he offered to produce it if the police would agree to take him there. However, the appellant had ample opportunity for arranging a refund of the money, from the time the children started to complain up to the time of arrest and thereafter. That he failed to refund the money indicates that his offer was not genuine. And again even if the appellant were in a position to refund, this would not have affected the charge before him in view of the provisions of section 268 (1) (e) discussed above.

Our view of the matter is that there was ample evidence to convict the appellant on the 2nd and 3rd counts as charged. Regarding the 2nd count the appellant was charged with stealing Kshs 4,005. The evidence in support of this charge was that parents of the school of which the appellant was Headmaster resolved to collect money for the construction of standard VIII classroom under the 8 4 4 project. The school committee chairman, the treasurer and the headmaster were each given a receipt book for the purpose of receiving collections from parents. Each parent was expected to pay Kshs 1000 and could effect such payment to any of the three receipt book holders. On January 26, 1985 the school committee met to assess progress of collection. When they examined the appellants receipt book they found that he could not account for Kshs 3,465 which he had collected. Confronted with this situation, the appellant agreed he had indeed collected the money but used it. He undertook to repay in on February 10, 1985, and signed a document to that effect. When the committee met again on February 10, 1985 they discovered there was another Kshs 440 which the appellant had converted making a total of Kshs 4,005, all of which he was unable to pay.

On March 19, 1985 the appellant absconded from the school without paying the said sum of Kshs 4,005.

The evidence in support of the charge of obtaining by false pretence (count 3) was that the appellant informed school children that he had organized a tour of Kisumu and that any student who wished to take part would be required to pay Kshs 100. There was evidence that through this alleged tour the appellant collected a total of Kshs 2,600. He kept on postponing the date of the journey from time to time until he absconded from the school on March 19, 1985.

In view of the above reasons the appellants appeal against conviction on count 2 and 3 is without substance and is hereby dismissed. Mr Haq for the state conceded the appeal on count 1 and we allow the same, quash the conviction and set aside the sentence.

The appellant also argued that the sentence imposed upon him was harsh and excessive. We have considered this matter carefully and on the facts of this case, we find no justification for interfering with it. It was a fair sentence in the circumstances. The appeal against sentence is dismissed.