REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

CRIMINAL APPEAL NO. 1762 OF 1984

IMANYARA……………………..……………………..APPELLANT

VERSUS

REPUBLIC………….……………………………………RESPONDENT

JUDGMENT

Facts not in dispute are that on 14.12.81 the appellant was given a cheque for Kshs 315,585 of the same date of which the sum of Kshs 300,000 was received by him for and on behalf of the complainant and the remaining sum of Kshs 15,585 was in respect of the appellant's own fees. This cheque was in due course honoured and the whole sum was in possession of the appellant by 15.12.81. It is also not disputed that the appellant gave the complainant a cheque dated 4.8.83 for Kshs 300,000 drawn on his Nanyuki account of the Kenya Commercial Bank. This cheque on being presented for payment was dishonoured.

The prosecution case is that the appellant had without authority and unlawfully converted the complainant's money being Kshs 300,000 to his own use and had thus committed the offence of stealing by agent contrary to section 283(c) of Penal Code. The defence was that the appellant had repaid this sum by two payments of Kshs 85,000 each and another payment of Kshs 100,000 during December, 1981, making a total of Kshs 270,000 and that the said cheque for Kshs 300,000 was given as a security for the balance of Kshs 27,428 pending taxation of costs between the appellant as the advocate and the complainant as his client.

Grounds 1, 4 and 5 of the appeal were argued together by Mr Muite on behalf of the appellant. The crux of these three grounds is that the prosecution evidence had failed to prove that the amount was stolen on 15.12.81, the date shown in the particulars of the charge as being the date on which the money was alleged to have been stolen.

In addition to the above point Mr Muite also submitted that failure by the prosecution to prove who were the recipients of the three cheques of Kshs 85,000 dated 16.12.81 and duly cashed and Kshs 100,000 and Kshs 85,000 both dated 17.12.81 and duly cashed, and all drawn on and paid from the appellant's Nanyuki account of the Kenya Commercial Bank was a fatal omission particularly in view of the fact that the trial magistrate had stated that it was not clear from the appellant's statement of account produced in evidence by the prosecution as to who were the recipients of these cheques.

According to the complainant (PW 1) it was during the period from December, 1979, to July, 1980, when he was still in Nyeri General Hospital recovering from injuries received in a traffic accident that one of his superiors at the place of his employment called Mugambi Muthuni came and told him at the hospital that he Mugambi had arranged for the appellant, an advocate to meet the complainant. After his discharge

from the hospital the complainant met the appellant in Mugambi's office. He informed the appellant of the sum he had received under the workman's compensation and the appellant informed the complainant that he would file a suit on his behalf against his employer company. Later the complainant received a copy of the notice dated 27.1.81 which the appellant had sent to the Insurance company.

It is not disputed that in February, 1981, the appellant filed a suit for damages against the complainant's employer, the E A P & L Co Ltd, who were defended by M/S Hamilton, Harrison and Mathews. In November, 1981, a settlement was negotiated between the appellant M/S Hamilton Harrison and Mathews under which the company agreed to pay a sum of Kshs 300,000 to the complainant by way of general damages for the injuries suffered and a sum of Kshs 15,585 towards advocate's costs. On 14.12.81 the appellant personally collected from M/S Hamilton Harrison & Mathews a cheque for Kshs 315,585 and the money eventually found its way into the appellant's Nanyuki branch account of the Kenya Commercial Bank where this sum was credited to the appellant's account on 15.12.81.

According to the complainant it was in February, 1982, that he met the appellant at whose request he signed a discharge Voucher (Exh 4(d)) following the settlement of the suit for damages. The appellant then asked him to return after 2 weeks by which time the appellant expected to have obtained the consent of M/S Hamilton Harrison & Mathews for the release of the money to the complainant. The complainant went back after 3 weeks and the appellant told him he had not received anything from M/S Hamilton Harrison & Mathews and asked him to wait. After 3 months he phoned the appellant's office and thereafter he received the copy of a letter dated 15.3.82 (Exh.E) which the appellant had written to M/S Hamilton Harrison & Mathews. Later he received a letter dated 30.3.82 (ExhF) from the appellant forbidding him from again phoning his office and requesting for all future communications between them to be in writing. After waiting further and in vain for payment the complainant then complained to the

Law Society and eventually on 2.8.83 the appellant gave him the cheque dated 4.8.83 for Kshs 300,000 drawn on the appellant's Nanyuki account of Commercial Bank.

It is not disputed that this cheque was returned unpaid with the remarks "refer to drawer". The prosecution produced evidence including bank statements from the appellant's clients's account to show that the appellant did not have the sum of Kshs 300,000 in his client's account on the day the said cheque was presented for payment. This evidence was not disputed by the appellant.

The prosecution evidence has also shown that on 15.12.81 (the date mentioned in the charge sheet) the appellant had on the close of the day a credit balance of Kshs 316,032.10 cents in his client's account. It also showed that on 16.12.81 a sum of Kshs 85,000 was withdrawn and then

on 17.12.81 two sums of Kshs 100,000 and Kshs 85,000 were withdrawn. Thus a sum of Kshs 27,000 had been withdrawn, within two days of 15.12.81. The appellant's defence is that he had given the first cheque for Kshs 85,000 to the complainant on 16.12.81 (p 71 of the record) and further sums of Kshs 85,000 and Kshs 100,000 to the complainant on 17.12.81 in presence of Mr Mugambi (p 72 of the record). As to the balance of Kshs 27,428 (after deducting some disbursements made by the appellant on behalf of the complainant in connection with the latter's suit for damages) the appellant said that payment of that was to abide the outcome of the taxation of his bill of costs between advocate and client and pending that taxation he had given the complainant on 17.12.81 after paying him Kshs 270,000 (in cross-examination) the cheque dated 4.8.83 for Kshs 300,000 as a guarantee for the said balance of Kshs 27,428.

As evidence of the aforesaid payment in full the appellant produced for the first time when he himself was giving evidence, a receipt (Exh.D) in which the complainant had acknowledged that he had received full payments of moneys due to him. This receipt was dated 7.10.84. The complainant had completed giving his evidence four days earlier on 3.10.84. That would explain why this receipt was not put to the complainant during cross-examination. Further on 29.10.84 the complainant acknowledged receipt of full payment in a letter (Exh.d) written on his behalf to the Attorney General by M/S Nzioka & Co Adovates, which letter was also produced before the trial court for the first time when the appellant was giving evidence.

The prosecution evidence to prove non-payment of any sum to the complainant is based on the complainant's own evidence which was that he had not been paid any sum at all prior to the trial. The giving of the cheque dated 4.8.83 for Kshs 300,000 by the appellant which cheque was dishonoured, is corroboration of that fact. In view of the overwhelming prosecution evidence we have no hesitation in rejecting the defence that the said cheque of Kshs 300,000 was given as a guarantee for the balance of Kshs 27,428. In any event there were no adequate funds in the appellant's account to meet that amount. One would have reasonably expected a cheque for sum of Kshs 27,428 or even of Kshs 30,000 to have been ample to serve the purpose of a guarantee for the said balance. The staggering figure of Kshs 300,000 as a guarantee for Kshs 27,428 is preposterous and unbelievable. We also do not accept that the cheque was given on 17.12.81. The appellant never challenged the complainant that the complainant was given the cheque on 17.12.81 and not on 2.8.83.

The prosecution has produced further evidence to prove non-payment to the complainant and to demolish the defence that a sum of Kshs 270,000 had been paid to the complainant in December, 1981. This was a letter dated 15.3.82 written by the appellant to M/S Hamilton Harrison & Mathews and copied to the appellant (Exh.4(e)), in which by 15.3.82 the appellant was still seeking approval of the other advocates for release of the funds to the complainant.

Again this letter was not disputed by the appellant. In fact he referred to this letter in his subsequent letter of 26.8.83 which he produced as Exh 10D. The fact that in this letter of 15.3.82 the appellant was seeking approval of the other advocates to the discharge voucher in order to enable him to release money to the complainant shows that he had by that date not released that money to the complainant. That again demolishes the appellant's claim that he had paid Kshs 270,000 to the complainant through 3 cheques dated 16.12.81 and 17.12.81. We also reject the defence claim that the note in acknowledgment of payment dated 7.10.84 (Exh. 14d) made by the complainant and the complainant's letter of 29.10.84 to M/S Nzioki and Co was an acknowledgment of any payment received by the complainant through the said three cheques or otherwise prior to 3.10.84 which was the day on which the complainant completed his evidence in court. We are satisfied from the evidence that the appellant had not paid the complainant a sum of Kshs 270,000 or any other sum and that he gave the said cheque for Kshs 300,000 dated 4.8.83 as purported payment of the award in damages that he had received on behalf of the complainant. The trial magistrate was satisfied beyond reasonable doubt on that issue and so are we. In view of the above evidence we do not see any need for the prosecution to have produced evidence to show who the receipients of the said three cheques of Kshs 85,000 of 16.12.81 and Kshs 85,000 and Kshs 100,000 dated 17.12.81 were. It is not essential evidence for proof of conversion as an ingredient in the charge.

The prosecution produced evidence through relevant bank statements to show that on 4.8.83 the appellant had a credit balance of Kshs 142.045 cents in his account at Kenya Commercial Bank, Nanyuki Branch. This evidence was uncontroverted. So the appellant did not have a sum of Kshs 300,000 on the day his cheque for that sum given to the complainant was banked and dishonoured. The only conclusion that can be drawn is that the appellant used the money belonging to the complainant. He had no authority to use it. The trial magistrate was satisfied and so are we that the appellant stole that money which he had received as an agent for and on account of the complainant. The evidence shows that the appellant stole the money between 16.12.81 and 4.8.83.

That brings us to the point very strongly argued by Mr Muite that the charge sheet had specifically stated that the date of theft was 15.12.81. The charge sheet had originally stated the dates as 14.12.81. Then during the hearing the prosecutor had applied for and obtained an amendment of the date to read 15.12.81. Mr Muite argued that the prosecution had thereby narrowed down the time to 15.12.81. The prosecution could have but had not stated in the particulars that the offence occurred on or about the 15th December, 1981 or between certain dates. The appellant had therefore been clearly given to understand that he had stolen the money on 15.12.81.

To our minds what really has to be taken into account is whether or not this discrepancy in the date given in the charge and the time of theft as proved by evidence has in fact occasioned a failure of justice. We have in mind the provisions of sections 214(2) and 382 of the Criminal Procedure Code. Sub-section (2) of Sec. 214 of Criminal Procedure Code provides as follows.

> "Variance between the charge and the evidence adduced in support of it with respect to the time at which the alleged offence was committed is not material and the charge need not be amended for such variance if it is proved that the proceedings were in fact instituted within the time (if any) limited by law for the institution thereof."

Mr Muite's argument was that the term "time" was to be strictly construed so as to mean time and not date. We do not agree with that restrictive interpretation of the word "time". Near the end of the sub-section the use of the word "time" in relation to limitation period surely must refer only to date, month and year of the event. Another example is that despite the use of the word "time" in Sec 137(f) of Criminal Procedure Code wherein are stated rules for the framing of charges and informations and the general rule as to description, the period or time of the offence is always described in the particulars of the charges with dates, and only where appropriate is also given with the date the time of the offence. We are satisfied that the term "time" in sub-sec 214 means the date on which or period during which the offence is alleged to have been committed.

We have already stated that in view of sec. 382 of Criminal Procedure Code what is important is to be satisfied that this variance between the time as stated in the particulars of the charge and the time of theft as proved by evidence has in fact not occasioned a failure of justice. We have carefully studied the evidence for the prosecution as well as the evidence of the appellant. We are satisfied that the appellant was well aware of all the material facts and was not taken by surprise at any stage. Both from his cross-examination of witnesses and from his own evidence it is clear and we are satisfied that he was very concerned with the events subsequent to 15.12.81 and leading up to the time he issued the cheque for Kshs 300,000 to the complainant. We are satisfied that no failure of justice was occasioned by the said discrepancy relating to the time of the commission of the offence. We are also satisfied that the variance as regards the said time is not material and that there was no need for the charge to be amended. No prejudice at all has thereby been caused to the appellant. That disposes of grounds 1, 4 and 5 of the appeal.

We shall now deal with ground 3 of the appeal which complains that the appellant had been charged under section 283(a) of the Penal Code while the magistrate had proceeded on a charge sheet under section 283(c) of the Penal Code. In the alternative the magistrate had erred in amending the charge to read section 283(c) of the Penal Code without requiring the appellant to plead to it or without informing him of the amendment. Mr Muite pointed out that the original typed copy of the charge sheet as filed in the court file stated that the charge was contrary to section 283(a) of the Penal Code. The charge sheet supplied to the appellant had also indicated that the appellant had been charged contrary to section 283(a) of the Penal Code. This was borne out by the fact that the appellant had during his address (p.80 of record) referred to this matter that he was charged under section 283(a) of the Penal Code. If that statement of the appellant had been inaccurate then the trial magistrate or the prosecutor would have pointed out to him at the time that he had been charged under section 283(c) of the Penal Code. As that was not done added Mr Muite, that showed that up to that stage the criminal charge sheet in file still indicated the charge to be under section 283(a). Mr Muite complained that the trial magistrate in her judgment had completely ignored that submission by the appellant. There was nothing on record to show as to when the typed letter "(a)" was altered by a blue biro pen to read "(c)". After citing authorities Mr Muite submitted that this variance between the charge and the particulars if cured under section 382 of Criminal Procedure Code would result in grave injustice and the benefit must be given to the appellant.

We agree with Mr Muite that there is no indication in the record as to when the alteration by hand of letter (a) to (c) was done. We are also mindful of the possibilities implied in the appellant's reference in his final address to his having been charged under section 283(a). But this court has to accept the record as it is. The charge sheet shows the alteration. It is quite possible that the chief magistrate or the trial magistrate on perusing the charge sheet for the first time noticed the discrepancy between the charge and the particulars and amended the charge then and there even before the charge was ever read out to the appellant. It might equally well have been amended at a much later stage. It is not for this court to conjecture. We accept the record as it is. But even accepting Mr Muite's contention that the charge was amended at a much later stage without knowledge of the appellant, and we are not making any finding on that issue, what injustice would that variance have caused to the appellant? The appellant, an advocate of

the High Court of Kenya, must have understood very well the particulars of the offence as stated in the charge sheet. The particulars made it clear that the offence that the prosecution had undertaken to prove to have been committed was that under subsec.(c) and not under sub-sec (a). The appellant did not raise any objection to this variance which was an obvious defect immediately after the charge and the particulars were read out to him. Further the whole of the prosecution evidence and the cross-examination of each prosecution witness by the appellant show that the appellant was well aware that what was being attempted to prove were the allegations made in the particulars as shown in the charge sheet and not what would have purported to be an offence under sub-sec.(a). He never suggested to the complainant that he had or had not received the complainant's money from the other advocates with a power of attorney for its disposition.

We are satisfied that the appellant was at all times throughout the proceedings well aware that the charge he was facing was in fact that under section 283(c) of the Penal Code. We are satisfied that even if Mr Muite's claim as regards the said variance was to be accepted, no prejudice or injustice would have been or was likely to have been occasioned to the appellant. We reject this ground of appeal.

Mr Muite did not wish to address the court on ground 8 which alleged that the trial magistrate was prejudiced against the appellant from the time the trial commenced which bias was evidenced by the fact that when the appellant had stated that he would renew his application (for adjournment) the following day the magistrate had recorded that he wished to change his plea on the said following day. We have carefully gone through the whole record and also through the portion thereof that is related to the incident referred to in this ground. We are satisfied that there is no evidence at all to cause us to suspect existence of any prejudice by the trial magistrate against the appellant, at any stage of the proceedings. We reject ground 8 of the appeal.

Ground 9 of the appeal states that on the first day of the proper hearing it was the court prosecutor who had informed the court of the position that the state would not be proceeding with the trial. Yet the trial magistrate was so prejudiced that she in her judgment wrongly imputed upon the appellant the offence of compounding a felony. We agree with Mr Muite that restitution of stolen money to the complainant cannot be termed "compounding a felony". We have carefully studied the proceedings before the court on the day the trial started (page 14 of record). The appellant had applied for a short adjournment to enable a reconciliation to be reached with the complainant. The court prosecutor, not objecting to the application for adjournment, had then made references to the charge in the position as regards the prosecution of the case in the event of a restitution of stolen money. We are satisfied that the court's comments on refusing adjournment were directed against the appellants' remarks that he was trying a reconciliation. From the whole of the proceedings we are satisfied that the trial magistrate was justified in concluding that the re-payment of money was to induce a withdrawal of the charge. That might not strictly have amounted to "compounding a felony" but it might have amounted to an "act to defeat justice".

In her judgment the trial magistrate after having found that the prosecution had proved beyond any reasonable doubt that the appellant had stolen the money made the following comment.

> "The court must note that the accused had tried to reconcile in this matter and sought to ask the court time to pay Kshs 300,000 to the complainant. This kind of practise should not be allowed as it amounts to compounding a felony."

We are satisfied that there is no misdirection in this statement. All that the trial magistrate has referred to is the incident we have already considered above. She was merely re-iterating what she had felt towards the use of the word "reconciliation" by the appellant when she had refused the application for adjournment. There is no substance in this ground

The remaining grounds of appeal are No 2, 7, 6, 10, 11, 12, 13, 14. Of these Mr Muite did not argue grounds 2 and 6 stating that ground 2 was covered by grounds 10 and 11 and 12 and ground 6 was covered by the explanation given by the appellant as to how the cheque for Kshs 300,000 was given as security for Kshs 27,000 and was covered in grounds 1, 4 and 5. Mr Muite said nothing about No 7. We have considered ground 7 and find no substance in it and we dismiss it. While arguing grounds 13 and 14

Mr Muite had urged that on account of complaints made therein conviction was shown to be unsafe and the appellant should be acquitted.

We have already dealt with that aspect when we considered grounds 1, 4 and 5. Mr Muite also argued grounds 13 and 14 in support of his submission for a non-custodial sentence. We shall therefore now deal with Mr Muite's submissions made together, in respect of the sentence as per grounds 10, 11, 12, 13 and 14.

Grounds 10, 11 and 12 of the petition complained that earlier at the close of proceedings the trial magistrate had refused to admit evidence tendered from the bar but later when the Attorney General appeared personally before her she had allowed him to introduce fresh evidence at the close of the defence case without the same being put from the witness box, or being subjected to cross-examination and further that such evidence was unrelated and irrelevant to the appellant's case. Thereafter the trial magistrate had denied the appellant the right to address her in mitigation and had wrongfully and unlawfully treated the appellant's reply to the Attorney General as his address in mitigation.

Ground 13 of the petition stated that the trial magistrate had imposed a custodial sentence and had ignored the fact that the appellant had repaid the money.

Ground 14 of the petition stated that after denying him the opportunity to address in mitigation the trial magistrate had wrongfully held that the appellant was unrepentant.

What had happened was that at the conclusion of evidence and submission by the court prosecutor and the appellant on 21.11.84 the court prosecutor applied to read out a statement purported to be a submission on law directed to him by Mr Chunga the ADPP from the Attorney General. Before this statement was read out it was given to the appellant to peruse who then successfully objected to its admission on grounds that it was highly prejudicial (part of complaint in ground 11 of the appeal). On 27.11.84 after the judgment was delivered and the appellant convicted and when it was time for addresses on sentence the Attorney-General personally addressed the court.

Prior to that it is recorded that on 3.10.84 at 2.20 pm before the arrival of the appellant in court the court prosecutor informed the trial magistrate that Mr Aswani of the Attorney General's Chambers wished to contact the magistrate. The trial magistrate complied with his request to adjourn the court and receive the call. It is further recorded that the magistrate after all, did not receive the call from Mr Aswani. Although it is not stated what the intended phone call was about, but from the fact that the magistrate recorded the request in this file and made it a part of the proceedings the only conclusion that we can draw is that she must have been given to understand that the phone call was connected with the trial. Otherwise she would not have recorded the request in this file. We can only comment that the episode did not reflect propriety.

Put very briefly the Attorney General in his address made reference to loss of court files with the purpose of defeating the ends of justice happening in a manner to lead him to think of the existence of an organized syndicate which was responsible for such loss of court files and his determination to put an end to these activities. He also pointed out his duty as a court prosecutor to bring all facts relating to attempts at reconciliation in the appellant's case which was governed by Sec 176 of the Criminal Procedure Code and which was allowed only in nonfelonious offences. He produced a letter dated 30.10.84 from M/S Nzioka & Co Advocates, which was also signed by the complainant informing the Attorney General that the money in question had been paid in full, that the court and prosecutor also had been informed of the fact, and requesting the Attorney General to have the proceedings terminated. He produced another document which from the comments of the magistrate during sentence appears to have been the complainant's letter to his advocate M/S Nzioka & Co Advocates, (Exh 15D) requesting the Attorney General to be informed that he had received the full amount. The Attorney General expressed his displeasure that such attempts at reconciliation had proceeded without the court being informed of the same. He warned that in any future attempts at reconciliation or settlement out of court which did not follow the provisions of Sec 176 of Criminal Procedure Code he would institute proceedings under Sec 117 of the Penal Code, and in the appeal he had for that purpose Sec 118 of the Penal Code, that is relating to compounding a felony, in mind.

After that the Attorney General who said that he had appeared with Miss Mbarire and Mr Kilemi then left and Mr Kilemi took over the prosecution and merely added that the appellant was a first offender.

The appellant then addressed the court in which he referred to an earlier attempt to introduce matters to which he had successfully objected, how the Attorney General had influenced the court by addressing it on matters completely irrelevant to the appellant's case and the Attorney General's threat regarding section 118 of the Penal Code. He pointed out that the chief inspector knew at the start of the proceedings about the matter related to reconciliation and how the address by the Attorney General and production of documents by him at that stage had damaged the proceedings. Stating that there had been no denial that the complainant had been paid his moneys the appellant added that the

> "prosecution had been (intended) to interfere with his legal practise and with his communications with his client (the complainant). It was a gross misuse of the powers of prosecution under section 118 of the Penal Code."

Thereafter the court made its comments and passed the sentence. We have very carefully considered all the arguments put forward by Mr Muite and Mr Chunga in respect of these grounds.

The Attorney General as a public prosecutor (Sec 2 of the Criminal Procedure Code) like any other public prosecutor has a right to take over the prosecution after delivery of judgment the rules of procedure would confine him only to those matters which at that stage would be relevant to the assessment of sentence to be imposed on the appellant. Further it is clear from the proceedings on the first day of the proper hearing that the court knew of the appellant's continuing attempts at reconciliation and the attitude of the court prosecutor towards it.

In our view the Attorney General in his address had introduced matters which were not only irrelevant to this case but also from the manner in which they were introduced they were prejudicial to the appellant in the assessment of sentence. The appellant's address would appear to be a reply to the Attorney General's address and not a plea in mitigation. The appellant, we are satisfied, had not been able to urge anything in mitigation. We also note that the trial magistrate has made no reference to the fact that after the commencement of the trial the appellant had repaid in full the money due to the complainant.

An attempt by an accused to effect a reconciliation in a charge of felony with a view to induce a withdrawal of the charge, as we stated earlier, is not compounding a felony although perhaps depending on facts it might amount to a conspiracy intended to defeat justice. But restitution of the amount stolen by itself, even after the commencement of proceedings, is not an offence and is a matter which should certainly be taken into account as a mitigating factor. During the hearing of the appeal Mr Muite stated facts in mitigation of which we are fully mindful.

We are satisfied that had the trial magistrate kept the above factors in mind the sentence she imposed would have been less. There is no substance at all in the appeal against conviction which we are satisfied is a safe one.

Appeal against conviction is dismissed. The sentence of 5 years imprisonment imposed by the lower court is reduced to 3 years from the date of sentence in the lower court.

Dated and Delivered at Nairobi this 29th day of May, 1985

A.M. COCKAR

....

JUDGE

E.N.A TORGBOR

....

JUDGE