



IN THE COURT OF APPEAL

AT KUSUMU

(Coram: Hancox, Nyarangi JJA & Platt Ag JA)

CRIMINAL APPEAL NO. 143 OF 1983

Between

ANGUKO.....APPELLANT

AND

REPUBLICRESPONDENT

(Appeal from the High Court at Kisumu, Schofield J)

JUDGMENT

The appellant was convicted by the Resident Magistrate at Kisumu of the offence of stealing Shs 14,500 by a person employed in the Public Service, contrary to section 280 Penal code, and sentenced to twelve months' imprisonment.

The money in question formed part of a trust account administered by the District Commissioner, Siaya, as part of his duties in his capacity as an officer of the Public trustee, for the benefit of the family of Gilbert Alfred Olum deceased.

In practice, duties relating to the trust moneys, which were deposited in the Siaya branch of the Kenya Commercial Bank in the name of the District Commissioner as account holder, but with a separate account for each beneficiary, were performed by the District Commissioner's staff.

The procedure for withdrawal for the benefit of minors was described initially by the District Officer, Mr Mogaka and summarized by the trial magistrate and the learned first appellate judge. It was that a supporting letter had to be obtained by the parent or guardian from the local chief or headmaster of the school where the child was and presented to the appropriate accounts clerk in the District Commissioner's office, in this case the appellant, who would then complete the withdrawal form for the amount required and take it to the District Accountant for signature. When this was obtained he would give the signed form and the plastic plate issued by the Bank to the account holder (which was kept in the District Commissioner's office as account holder) to the parent or guardian, who would then present them to the bank and withdraw the money.

In the instant case the deceased's eldest son needed to withdraw Shs 3,240 for school fees for Jane Adoyo, a daughter of the deceased and aged about fifteen at the material time. He followed the prescribed procedure and duly presented the withdrawal form and plate to the bank on January 29, 1981. When he did so he discovered Shs 400 had been withdrawn without his knowledge on November 6, 1979. On further enquiry he found other sums withdrawn from the accounts of the other children. He duly reported

the matter to the District Commissioner and CID were informed.

There were concurrent findings of fact by both the lower courts that the withdrawal forms in respect of the missing sums had all been made out by the appellant and there was both the District Accountant's and expert handwriting evidence to this effect. In the case of two of the amounts in question, the Bank Cashier, Henry Otieno Omondi, positively identified the appellant by appearance as having withdrawn Shs 1,500 and Shs 1,000 respectively on December 4, 1978. In respect of two other sums, Mrs Mary Owuor Odera, a widow who collected her widow's pension from the District Commissioner's office, testified that the appellant gave her the withdrawal forms and plates for purpose of withdrawing money from the Bank on the November 6, 1979. She withdrew two amounts of Shs 400 and 1,600 which were paid to her by the other clerk who testified, John Ondege Otilo, who assumed she was the guardian of the two children concerned. She then handed the money to the appellant as he had instructed her to do.

The appellant's first memorandum of appeal contained eleven grounds. They include averments that the charge was bad for duplicity, that the money was not the property of the Republic of Kenya as alleged, that Henry Otieno Omondi was unable to identify the person to whom he had made the payments and was in any event an accomplice and unreliable, and that the beneficiaries of the respective accounts were not called as witnesses to say whether they received the sums in question. The appellant also alleged that Mrs Odera was an accomplice, that the magistrate was wrong in ascribing to the appellant a criminal intention to steal and that the magistrate should not have inferred from his completion of the withdrawal forms alone that the appellant stole the amounts other than those covered by the evidence of Mrs Odera and Henry Otieno Omondi.

On his second appeal to this Court, the appellant exhibited a curious reticence in lodging his memorandum of appeal, and over a year's delay in the hearing was caused by an alleged hiatus between himself and his advocates. When the matter eventually came on for hearing he added to his grounds of appeal to the High Court that the learned Judge had failed to address his mind to the first petition of appeal, and the arguments advanced in support thereof. In particular he had decided the case against the weight of the evidence of PW 7, (Henry Otieno Omondi), PW 10, SGT Ombima (who took possession of the documents and obtained specimens of the appellant's handwriting, and PW 12, SGT Ndungu of the CID, (who was the investigating officer).

We do not consider there is any substance in these additional grounds save that we have felt some concern regarding the last ground taken by the appellant, which was that as a civil servant of long standing who had in the past handled large sums of money without any default, he was entitled to have two judges of the High Court sitting on his appeal.

There is of course no special entitlement that a particular appellant on a first appeal, or one who has been convicted of a particular type of offence, shall have an appellate court composed of two judges. He is entitled to it as of right unless there is a direction under section 359 (1) of the Criminal Procedure Code. This provides that all criminal appeals shall be heard by two High Court judges except where the Chief Justice, or a judge to whom he has delegated the authority, directs that it be heard by one judge.

In the instant case the judge who admitted the appeal to hearing wrote:

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| “Theft | by | P/Servant. |
| V.V. | | Patel |
| J. | | I. |
| 31/7/82.....” | | |

presumably recommending that the appeal be heard by one judge. The rubber stamp on the edge of the file is dated July 28, 1982 (ie before the admission to appeal) and is unsigned. In any event, the rubber stamp is incomplete and does not contain a direction that the appeal be heard by one judge. It merely says “by judge”, which, on its own is meaningless.

We have ascertained that the Chief Justice had delegated his powers under the sub-section to Mr Justice

VV Patel, the Resident Judge at Kisumu, on April 2, 1982. He therefore had power to direct that the appeal be heard by one judge. But did he exercise that power? After careful consideration, we are prepared to assume in this case that he did, but in future it must be carefully borne in mind by judges that without a valid direction or authority of the kind we have indicated the hearing of an appeal by one judge may well be without jurisdiction to do so.

Returning to the other grounds, the learned judge was in our view correct in rejecting the grounds of appeal regarding the charge sheet and the calling of children as witnesses. A general deficiency charge is permitted by section 137 (j) of the Criminal Procedure Code in the case of stealing by a public servant, and there was abundant evidence that the member of the deceased's family who had not attained majority would not have been able to withdraw money from the Bank.

We also consider that the judge was correct in upholding the magistrate's findings that Henry Otieno Omondi and Mrs Odera were not accomplices in the theft, and were reliable witnesses, and that the only reasonable inference from the appellant's actions, and his failure to give an explanation in his unsworn defence, was that he had fraudulently converted the amounts which were traced to him to his own use and was thus guilty of stealing them. In view of the fact that the money was held by the Bank in the name of the District Commissioner as agent of the Public Trustee, this was correctly stated in the charge to be property of Kenya.

This leaves the question of whether the magistrate was entitled to infer guilt in respect of the sums not specifically sworn to by Mrs Odera and Henry Otieno Omondi. The learned judge obviously had this aspect in mind when he said that it was open to the magistrate to convict the appellant of stealing a lesser sum than that specified in the charge if the evidence warranted it.

In our judgment, while the completion of the remaining withdrawal vouchers casts the gravest possible suspicion on the appellant in respect of the other amounts, that fact alone was insufficient to establish his guilt beyond reasonable doubt in respect of them. In the result, the sums proved to have been stolen by the appellant were Shs 1,000 and Shs 1,500 which he personally withdrew from the Bank on the December 4, 1978, and the Shs 400 and Shs 1,600 he procured Mrs Odera to withdraw on the November 6, 1979, a total of Shs 4,500. This was the sum which the appellant should have been convicted of stealing. Accordingly, we substitute for the conviction recorded against the appellant a conviction of stealing the lesser sum of Shs 4,500, the property of the Republic of Kenya, which came into his possession by virtue of his employment.

The notice of appeal filed covers both the conviction and sentence. The reduction of the amount of which the appellant is convicted would not, however, move us to reduce the sentence even if we had jurisdiction to do so.

We can imagine few offences more serious than a fraudulent breach of trust in relation to juvenile beneficiaries by a person in the position which the appellant held. The sentence of twelve months' imprisonment, even bearing in mind the other consequences of the conviction to him, was in our view extremely lenient and magistrates should remember that the maximum provided for this offence is seven years' imprisonment. For the reasons given we dismiss this appeal against the conviction save as to the substitution in the amount stolen.

Dated and delivered at Kisumu this 24th day of June , 1985.

A.R.W HANCOX

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JUDGE OF APPEAL

J.O NYARANGI

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Ag.JUDGE OF APPEAL

H.G PLATT

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Ag.JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR