



**Director of Public Prosecutions v BASHO (Criminal Case E354 of 2021)
[2023] KEMC 285 (KLR) (23 February 2023) (Judgment)**

Neutral citation: [2023] KEMC 285 (KLR)

**REPUBLIC OF KENYA
IN THE KWALE LAW COURTS
CRIMINAL CASE E354 OF 2021
ZK KAGENYO, RM
FEBRUARY 23, 2023**

BETWEEN

DIRECTOR OF PUBLIC PROSECUTIONS RESPONDENT

AND

SAID ABDALLA BASHO ACCUSED

JUDGMENT

1. The accused person was on 3rd December 2021 arraigned for the offence of stealing contrary to section 268 as read with section 275 of the *Penal Code*.

The particulars were that on the 16th October 2021, at Pinewood Beach Resort along beach road of Diani location in Msambweni subcounty in Kwale county within Coast Region, he stole Kshs. 6, 000/= the property of Pinewood Beach Resort.

2. In the alternative, he was charged with the offence of handling stolen property, contrary to section 322 (1) (2) of the *Penal Code*. (sic)

The particulars were that on the 16th October 2021, at Pinewood Beach Resort along beach road of Diani location in Msambweni sub/ county in Kwale county within Coast Region, otherwise than in the course of stealing retained Kshs. 7300/- having reason to believe them to be a stolen property.

3. The accused denied the charges and a trial ensued.

4. The Prosecution's case was conducted by learned prosecution counsel Ms. Luseno while at defence stage it was conducted by learned PPC Ms. Kagori. The accused person was not represented. At all times of the trial, he was present in court. He conducted his case while out on cash bail of Ksh. 10, 000/=. The matter was conducted in Kiswahili Language, the language of choice by the accused.



Prosecution's Case

5. The DPP, to discharge their duty under section 107 of the *Evidence Act* called a total of 5 witnesses.
6. The theory of the Prosecution's case was that, the complainant as named in the indictment is a hotel located at Diani, within Kwale county. The hotel has some loyal and frequent clients and one such client is Mr. Mambo Nakalola a.k.a Winter. At the period around 16th October 2021 and in particular at all material times to this case, the said guest was boarding at the said hotel. On the other hand, the accused herein was an employee at the said hotel and was the steward assigned to attend to Mr. Winter's room.
7. On 11th October 2021, as Mr. Winter was going to make some payments at the hotel's accounts department, he realized that he was short of \$ 650 and inferred that they had been stolen from his room. Upon realizing this, Mr. Winter went back to his room and set up a trap by placing \$ 50 and € 10 having marked the said monies but later realized that the said money was missing. He made this complaint to the Manager madam Pamela, PW 1.
8. Madam Pamela swung into action and equally, together with her team, set up a plan. The plan was to place some money in the safe, have Mr. Winter leave the safe open and thereafter, if any money was reported missing, the accused, having been the steward assigned to that room would be frisked for any such monies.
9. Ms. Pamela and her team used Ksh. 60, 000/= in denominations of Ksh. 50, 000/= in Ksh. 1, 000/= notes, a total of 50 notes, and Ksh. 10, 000/= in Ksh. 500/= notes, a total of 20 notes. The team marked this money, all the 60 notes. The marks were placed just near the serial numbers. The photographs of the Ksh. 60, 000/= in form of the 70 notes were taken with serial numbers well captured.
10. On the 16th day of October 2021, as the accused person was leaving from work, he was stopped at the gate. While there, he was frisked and from his pockets, Ms. Pamela and her team recovered Ksh. 1, 300/= while in a bag that belonged to him, they recovered Ksh. 6, 000/=. It was the prosecution's case that the Ksh. 1, 300/= was not part of the marked money but the Ksh. 6, 000/= all bore the marks put by Ms. Pamela and her team.
11. The prosecution produced as evidence the photographs of the monies recovered, the monies set up earlier and those capturing the room and the safe.

Defence Case

12. The accused person was placed on his defence under section 210 of the Criminal procedure Code, and section 211 of the *Criminal Procedure Code* and Article 50 (2) (i) of *the Constitution* of Kenya having been explained to the accused person, he, in person, elected to defend himself by way of tendering unsworn evidence and without calling any witnesses.
13. DW 1, the accused himself denied the charges in toto. He maintained his innocence. He attributed these charges to a hatched scheme by the hotel and in particular PW 1 to form a basis of legitimately laying him off and depriving him the accrued benefits for the period he had worked in the hotel. He said that although he had been arrested on 16th October 2021 he was arraigned way much later and surprisingly, in the period between his arrest and arraignment, he was being blackmailed to resign and have these charges dropped an offer he rejected and opted for the court process. That is why he is here today.
14. After the testimony of DW 1, the Accused closed his case.



15. The Court invited the parties to put in their closing arguments. The DPP elected not to file while the accused filed his on the 13th day of December 2022.
16. Having heard both parties at their full lengths, the court retired to make its decision.
17. I have read and considered the submissions by the accused much of which was a regurgitation of his evidence on defence. I have also looked at the record in its entirety and made my findings as hereinbelow.

Analysis And Determination

18. In criminal cases, it is trite law that the burden of proof lies on the Prosecution and hardly shifts to the accused who on his part is to be presumed innocent. The standard of proof is well settled to be beyond reasonable doubt which has been time and again been said not to be beyond a shadow of doubt as doing so would fail to protect the society over flimsy reasons.
19. From the evidence by the prosecution witnesses, I noted that one very crucial witness, one Mr. Winter was not called as a witness despite having been the person at the core of the complaint, neither was the failure to call him accounted for before this court.
20. The court may be made to assume that the said Winter was a foreign national in a tour in Kenya and hence could not be found but proceeding on conjectures is an alien practice before this court. The failure to be called as a witness ought to have been explained before this court and on that premise, if need be, the court shall seek reliance in the guidance of the Court in *Bukenya & Others –v- Republic (1972) EA, 549*.
21. The foregoing notwithstanding, the accused was searched on his person and Ksh. 1, 300/= was recovered from his pockets. He did not dispute that fact. He owned up that money as his and equally the state did not accuse him of anything wrong with this money. As such, I make a finding that the Ksh. 1, 300/= recovered from the pockets of the accused belonged to him legitimately. There was no other money recovered from his body.
22. According to PW 1, in the rack-sack that belonged to the accused person, Ksh. 6, 000/= was recovered. This search was conducted by the police. PW 1 did not tell this court where the rack-sack was, whether on the person of the accused, whether on the ground or on the motorcycle as alleged by some other witnesses. The same was also not produced before this court as an exhibit nor shown to the court.
23. According to PW 4 NPS Service No. 45523, Cpl Sammy Mutiso attached at the Tourist Police Unit, when PW 1 called him to conduct a search on the person of the accused, PW 4 took the accused to the guards' room of the hotel in the company of one Mr. Changawa and PC Marakeni. On the person of the accused, the trio recovered Ksh. 1, 300/=. After that search, they proceeded to the parking lot where there was the accused's motorbike. On the accused's motorbike which it was said that the accused identified it for the police, there was a bag and inside that bag, Ksh. 6, 000/= was recovered. This money was in denominations of Ksh. 1, 000/=. The notes were marked, the marks were similar to those made by PW 1 and her team, earlier on. The notes were produced as evidence but neither the motorbike nor the bag were produced nor shown to the court from the witness box.
24. At this juncture, I must interrogate the evidence by the prosecution against the defence by the accused. The accused said that this was a set up using the planted money. He disowned the money, being Ksh. 6, 000/=: the bag and the motorbike said to be his by the PW 4 who said that he had frequented seeing him with it. Considering that the search on his body was done at a room with the 4 of them present, and the recovery was said to have been later at the parking lot, what was the integrity of the search and



recovery process? What would make the court not believe that, as the accused was in seclusion, held at the janitors' room by PW 4, someone else was planting the Ksh. 6, 000/= at the said parking lot to complete the web to net the accused? What was the distance between the janitors' room and the spot where the motorbike was? What is the loci of the parking lot from the janitors' room? Where was PW 1 when the accused was in the seclusion?

25. Be that as it may, it was said that the Ksh. 6, 000/= was recovered from the bag that was at the motorcycle belonging to the accused person, assuming it is true that the accused had the motorcycle, which again its whereabouts were not accounted for by the Prosecution, the court proceeded to analyse the evidence in the monies recovered and the processes of PW 1 and her team.
26. The prosecution produced photographs of the monies in question. I take special notice of the fact that the existence of the photographs was brought to the attention of the court on 22nd February 2022 as PW 1 was testifying and she had to be stood down for the photographs to be printed and supplied to the accused.
27. Nonetheless the 1st photograph showed the monies recovered from the accused. They were serialized as;

Ksh. 1, 000 Notes	Ksh. 500/= Notes	Ksh. 200/= Notes	Ksh. 100/= Notes
BC9560212	AK3657879	AR3294095	BM3581843
AG1248839	AG5546463	-	-
AF6354589	-	-	-
AV7390627	-	-	-
AB4206637	-	-	-
AV7957302	-	-	-

28. On the other hand, the monies set up by PW 1 and her team, which was equally produced in the photographs took the form of 50-Ksh. 1, 000/= notes and 20-Ksh 500/= notes making a total of Ksh. 60, 000/= in 70 bank notes. According to Pamela, PW 1, these were photographed before the theft by the accused. They were in 14 sets, each set having 5 notes of which, the Ksh. 500/= were in 4 sets and the Ksh. 1, 000/=, which are of interest thus far, were in 10 sets, all arranged in their order as follows.



1 st Set	2 nd Set-A6	3 rd Set-A7	4 th Set-A8	5 th Set
BE7483362	AV7390627	B07484904	AV7115366	AK6214042
BQ3533516	AB4206637	AL3334194	AV7115365	BL2221181
BC9560212	AV7119879	AZ6018675	AE6367991	AL2280332
AG1248839	AN6816487	AF1598895	AN8879304	BP6755240
AF6354589	AL0750978	AL1002779	AB1753716	AC5160462
6 th Set-A10	7 th Set – A11	8 th Set-A12	9 th Set	10 th Set
AC5881088	AR2903530	AL4917592	AF8349989	AC6734072
BK0367800	AZ7045097	AR7111895	BP8278884	BB3857512
AZ5181842	BL2182796	AW0525364	AL3324531	AT7510380
AZ5195291	BA2589788	AV6386922	AL2097981	AV7115367
A112880709	AC5725935	AZ5009017	AZ1570156	AV5904953

29. I observe that all the notes had a visible dot just before the serial number, at the tail of the letter y in the conspicuous name “Kenya” i.e (Keny.a). The marked notes, (the 10 sets) amounted to Ksh. 50, 000/=.
30. However, I observe that the note serialized as AV7957302 was said to have been recovered from the accused person. Indeed, it has the mark of the dot just like the others. However, it is not among the other 50 notes that PW 1 and her team had marked. If I include it, the notes shall be 51 and the total set up amount will be Ksh. 61, 000/= . Further, I observe that all the bank notes in the images as produced bear a very vivid blue mark but for the Ksh. 1, 000/=, the colour of the mark is conspicuously different from all the others and this fact coupled with the note being an extra note rings an alarm on the possibility of fabrication of evidence. Was this a set up gone wrong? Was Madam Pamela after setting up the accused person for whatever reason?
31. Further to the foregoing, I have looked at an exhibit produced by the prosecution as P.Exh 7. It is an Exhibit Memo date-stamped as 10th March 2022, (even though a bit faded). The author of the Exhibit Memo is NPS Service No. 72910 Cpl Kana Wario.
32. Firstly, I note that he forwarded to the Crime Scene Investigation an SD Card marked “A” containing photos of Ksh. 50, 000/= with a desire that,
- it is desired to ascertained whether the said SD marked “A” contains the photos of the money and certify the print for the purpose of court proceedings.
33. After forwarding this Exhibit Memo Form and the described exhibit, it is worth noting that a certificate was made by one M. Mosabi described as Crime Scene Investigations. The latter said that, in pursuance of the said request I processed/prepared the said photographs which I have signed, stamped and now



attached here to as annexes A1-A20. NB: photographs marked A1-A4 were taken after revisiting the scene on 30/8/2022.

My interest is in photographs marked by the officer as A13 – A16. These photographs are for 20-Ksh. 500/= notes all in sets of 5 notes, being a total of 4 sets on one A4 paper. My question is, these images were not said to have been forwarded by Cpl Kana Wario, how comes they were printed? Where did they come from? How did they get to officer Mosabi? The only thing Cpl. Kano forwarded were the 50-Ksh. 1, 000/= notes. Was officer Mosabi part of a scheme with some predetermined results? Is this the modus operandi when it comes to compliance with Section 106B of the Evidence Act. Was that the spirit and purpose of the Parliament when it included Sections 78, 78A and 106A to 106I in the Evidence Act?

34. Secondly and going back to the Exhibit Memo. At the very foot of the Exhibit Memo, Cpl. Kana Wario owns up to having “taken possession of the item forwarded on the 16th October 2021. However, I do note that on 18th March 2022, when PW 1 was testifying, she told this court that the photographs were in her phone. After the evidence of PW 3 that day, the Prosecution Counsel made an application for an adjournment, the reason being to have the investigating officer print out the photos and have them certified. The accused would then be served with those photographs on 12th April 2022. In the circumstances, is it safe to agree with the investigating officer that he took possession of the exhibit (SD Card marked “A”) on 16th October 2021 as he indicated in his exhibit memo? If so, why did he take ages to have them forwarded for the so-called certification. From the narration in the exhibit memo it would appear that the said officer who turned out to be the investigating officer did not even know quite clearly on the chain of custody of this piece of evidence or even how the photographs were taken a fact which raises too many questions on the integrity of the investigations he carried out as a whole. Did he conduct investigations that would stand the test or appear to be in line with of Articles 244 and 245 (4) (a) of the Constitution of Kenya?
35. The accused was charged with the alternative of handling stolen property which was Ksh. 7, 300/= of which Ksh. 1, 300/= was indeed said to belong to him. I take note that one would not steal from himself and this charge defeated the internal logic of the accusation within it.
36. I am inclined to agree with the accused when he says that this must have been a set up. I find that what Ms. Pamela described as planning a set up was actually planting evidence against the accused person for a different motive other than curbing crime. As a result of the actions of Ms. Pamela and her team, for the period between 16th October 2021 and 2nd December 2021, the accused person acquired a new name being Suspect which would graduate on 3rd December 2021 to today as Accused. The delay of 48 days between his arrest and arraignment was not accounted for and in the absence of any such explanation, I am inclined to agree with the accused person that it was a period of blackmail and coercion to resign from his workplace, negative energy which he managed to withstand.
37. It has been a whole 501 days of the accused dreading with the wrath of penal consequences while at the same time, holding on his name and what it bears for the period he has been on trial, he has been riding on a presumption of innocence but he should be declared and I hereby declare him as innocent having slipped through the loosely made net intended to nab him by his accusers.

Disposition

38. Having found so, this court hereby dismisses the case against the accused person and forthwith acquits him under section 215 of the Criminal Procedure Code for the main indictment of stealing which is proscribed by section 268 as read with section 275 of the Penal Code and the alternative count of



handling stolen property which is proscribed by section 322 (1) as read with section 322 (2) of the Penal Code.

39. The accused person who has been out on cash bail is hereby discharged forthwith. The cash bail of Ksh. 10, 000/= deposited in court on 3rd December 2021, shall be refunded to the depositor forthwith.
40. The prosecution produced as P. Exh 9, 10 and 11 Ksh. 1, 300/= that was said to belong to the accused person. I direct that the same be returned to the accused person.
41. The Prosecution further produced as P. Exh 8 the Ksh. 6, 000/= said to have been marked. I make a finding that these notes were monies used as tools for commission of an offence ranging from fabricating evidence to conspiracy. As such, the court issues notice to anyone interested in these amounts of money to show cause within 14 days of today why this money should not be forfeited to the state failure to which upon the lapse of 14 days of today, the Ksh. 6, 000/= produced as P. Exh 8 shall automatically stand as forfeited to the state.

JUDGMENT DATED, SIGNED AND DELIVERED IN OPEN COURT AT KWALE ON THIS 23RD DAY OF FEBRUARY 2023.

KIONGO KAGENYO

RESIDENT MAGISTRATE

In the presence of:

Mr. Archibald Kimbada - Court Assistant.

Ms. Wangari Mwaura, Principal Prosecution Counsel, for the State.

Said Abdalla Basho -The Accused person.

