



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO, (P), KIAGE & ODEK, JJ.A)

CRIMINAL APPEAL NO. 134 OF 2013

BETWEEN

CHRISTOPHER PAUL NGAU.....APPLICANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from a Ruling of the High Court of Kenya at Nairobi (Mbogholi, J.) dated 29th April, 2012

in

HC. CR. A. No. 353 of 2009)

JUDGMENT OF THE COURT

The High Court (Msagha, J.) dismissed the appellant's appeal in which he had challenged his conviction and sentence to three years' imprisonment for the offence of stealing by servant contrary to **section 281** of the Penal Code.

It was alleged in the particulars of the offence that on diverse dates, between 31st May, 2004 and 17th November, 2004 at Golf Course Club within Nairobi Area, being a servant to Messrs Royal Nairobi Golf Club where he was employed as the head cashier, the appellant stole Kshs. 545,243 the property of the said Messrs Royal Nairobi Golf Club which came into his possession on account of his employment.

The appellant denied the charge and was subjected to a full trial and maintained that the loss may have been caused by negligence.

It is common factor that indeed the appellant was the head cashier of the complainant club; and that during the period in question cash in the sum of Kshs. 545,243/= could not be accounted for.

The courts below did not believe the appellant's version of how the money was lost. In considering the appellant's defence, Msagha, J observed that, although negligence alone is not evidence of theft, there were irresistible circumstances that pointed to the guilt of the appellant; that as the head cashier, and in view of his duties as such, the appellant was responsible for receiving payments in cash and cheques and for banking; that there was no evidence that he delegated this duty to anybody else; that the appellant's explanation that he had misplaced banking slips was not plausible; and further that, given the repeated losses and the appellant's failure to alert his superiors, pointed to a deliberate intent to keep the money; and that failure to honour the undertaking to repay the lost cash in 6 months and then absconding duty, was evidence pointing to the appellant's guilt. The learned Judge then concluded his judgment;

“At no time did he sound an alarm for any discrepancy. There was only one safe and one key kept by the cashier, the appellant. There is no evidence that anyone else handled the key during that particular time. The appellant denied the offence and suggested that he was pressurized to make a commitment that he would pay. I have looked at the proceedings. The appellant was

represented by counsel, but at no time was any suggestion made that he was compelled under pressure to accept responsibility for the lost cash

No other person had the opportunity to do so. The appellant also made a written undertaking to pay the money that was

missing. That in itself is incriminating as I have found he was not coerced into making that undertaking. When a meeting was called he did not attend and could not be reached on his telephone. That is not a conduct of an innocent person.....I have come

to the conclusion that the charge against the appellant was proved beyond reasonable doubt and that the conviction was well founded”.

In this appeal, the appellant complains that the Judge did not re-evaluate the evidence and as a result arrived at conclusions that were not supported by evidence; that he failed also to analyze the appellant’s defence; that he relied on the written undertaking and treated it as a confession; and that the court shifted the burden of proof to the appellant.

Those four grounds formed the basis of the arguments in the appellant’s written submissions and the oral highlights. In particular, he submitted that the evidence presented against him being circumstantial, the learned Judge ought to have found that the inference of his guilt was dislodged; and that club members who were alleged to have paid money to the appellant were not called to corroborate the prosecution’s claim.

For the respondent, it was contended that the circumstantial evidence irresistibly pointed to the appellant as the only person who received the money, was duty-bound to bank and account for it; that although the written undertaking by the appellant to refund the money did not amount to a confession, it was admissible as it was given voluntarily and in the course of a transaction.

This is a second appeal, in which case, by the provisions of **section 361** of the Criminal Procedure Code (CPC), only matters of law fall for our consideration. The Court, in this passage from **Karingo V. R.** (1982) 213 at P.219 reiterated this;

“A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of fact arrived at in the two courts below unless based on no evidence. The test to be applied on second appeal is whether there was any evidence on which the trial court could find as it did (Reuben Kareri S/O Karanja V.R. (1956) 17 EACA 146.”.

Needless to state, in a criminal case, the prosecution is required to prove the guilt of the accused person beyond any reasonable doubt. In doing so the prosecution can rely on direct evidence which is based on personal knowledge or observation or on circumstantial evidence which indirectly establishes a fact. Generally speaking, both direct and circumstantial evidence are of equal significance and guilt or innocence may be determined based on either direct or circumstantial evidence or by a combination of both.

In this appeal as far as we can see, there is no direct evidence of how the money was lost. The proof required must be based on circumstantial evidence. As has repeatedly been said on the famous and twin authorities of **Rex V. Kipkering Arap Koske & Another** (1949) 16 EACA 135 and **Simon Musoke V. R** [1958] EA 715, to act on circumstantial evidence to support a conviction, the evidence must point irresistibly to the accused person’s guilt to the exclusion of everybody else and that before drawing the inference of the accused person’s guilt from circumstantial evidence, the court must be sure that there are no other co-existing circumstances which would weaken or destroy that inference.

The appellant was the head cashier. His duties involved receiving cash and cheques from club members. Money received in the course of the day would be kept in a locker during the day and in a safe overnight. The money would be banked the following morning. Both the locker and safe had two keys which were kept by the appellant. The appellant would prepare and sign a daily collection summary reflecting the payee, amount paid in cash or cheque and the receipt number for each day. On record are also cash and cheque bank deposit slips for various dates as well as daily receipts report for payment of various services at the club. The document examiner, Emmanuel Kenga, an Assistant Commissioner of Police, confirmed that the entries in all these documents were either in the appellant’s handwriting or the entries authenticated by him to be correct. There was evidence to the effect that between 3rd June, 2004 and 17th November, 2004 Kshs. 545,243 collected in cash could not be accounted for; and that the money was collected but not banked. All these factors, to our mind are circumstances that point to the appellant’s active and deliberate participation in the loss of money. We ourselves find no co-existing circumstances which could weaken or destroy the inference of the appellant’s guilt. The learned Judge, like the trial magistrate, considered and properly rejected the appellant’s defence.

What has however caused us some concern is the treatment by both courts below of the written undertaking. In that note, the appellant merely stated that during the period between April and August, some money was “lost” due to “negligence”; that as the chief cashier he would take responsibility for the loss; and that he would arrange to have the money recovered. At no time did he confess in the strict meaning of the word. In our view, therefore, it was improper for the Judge to say as he did below that the statement incriminated the appellant;

“The appellant also made a written undertaking to pay the money that was missing. That in itself is incriminating as I have found he was not coerced into making that undertaking”.

What the appellant did is what **section 17** of the Evidence Act calls admissions. Admission is defined in that section as;

“..... a statement, oral or documentary, which suggests any inference as to a fact in issue or relevant fact, and which is made by any of the persons and in the circumstances hereinafter mentioned”.

Admission in criminal proceedings requires an agreement between the accused and the prosecutor, before or during such proceedings, to agree that any written statement of admission be tendered in evidence after which it will be admitted as evidence in the proceedings. **Section 24** is, however, instructive that admissions are not conclusive proof of the matters admitted, but they may operate as estoppels. All the appellant’s statement confirmed was that some money was

lost. That *per se* is not incriminating.

Nothing much, however, turns on this issue.

Accordingly, we find no merit in the appeal. It is dismissed.

Dated and delivered at Nairobi this 24th day of May, 2019.

W. OUKO, (P)

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JUDGE OF APPEAL

P.O. KIAGE

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JUDGE OF APPEAL

OTIENO – ODEK

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

DEPUTY REGISTRAR