



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: GITHINJI, OKWENGU & J. MOHAMMED J.J.A.)

CRIMINAL APPEAL NO. 173 OF 2014

BETWEEN

NICHOLAS BURI ONKEO.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an Appeal from the Judgment of the High Court of Kenya

at Kisii, (Musinga, J.) dated 4th November, 2008

in

H.C.CR.A. NO. 21 OF 2008)

JUDGMENT OF THE COURT

[1] The appellant was charged before the Senior Resident Magistrate's Court, Rongo, with the offence of stealing by servant contrary to **Section 281** of the **Penal Code** particulars being that on the 25th day of September, 2004 at Dakianga Distributors in Kisii Central District within Nyanza Province being a servant to Dakianga Distributors, he stole Kshs. 702,966/20 from his employer which came into his possession by virtue of his employment.

[2] The trial magistrate in his judgment convicted the appellant of the offence charged and sentenced him to pay a fine of Kshs. 50,000/- or serve two years imprisonment in the alternative.

[3] The appellant appealed to the High Court at Kisii (D. Musinga, J) (as he then was) where the appeal was dismissed for lacking merit. The High Court said in part;

“In this appeal the prosecution led evidence to show that there was no robbery that took place at the said bank on the material day. It is the appellant who was alleging that such robbery took place. He was therefore duty bound to prove the same but he failed to.”

[4] In brief, the facts of the case as presented by the prosecution at the trial were as follows;

The appellant was asked by his employer to deposit sums of money at Co-operative Bank, Kisii Branch. The court was told that this was something the appellant had done a number of times before. **PW1, Nyanjui Macharia**, the appellant's manager at the time told the court that on the material date, the appellant was accompanied by another cashier to deposit the money. The other cashier returned to the office without the appellant and continued with his work. It was then that this other cashier ran into PW1's office alerting him that the appellant had lost the money he was to deposit. **PW2, Kenneth Manjau**, who was the appellant's work colleague told the court that the money lost amounted to Kshs. 702,966/20. PW3, the investigation officer told the Court that the appellant informed him that the money was stolen while he was banking it inside a cubicle within the bank and when he asked the appellant to demonstrate to him how the money was stolen, the version of events presented by the appellant failed to give a satisfactory answer on how the money disappeared, leading to his arrest.

[5] In his defence, the appellant gave unsworn evidence. He stated that he went to the bank to deposit money in form of cash and cheques; that he found about 16 people in the cubicle; that he placed the bag containing money on the floor as it was heavy; that he was forced to fill in the banking slips when standing and that is when the money disappeared. He said he never saw whoever took the money from the floor. After the theft, he called his office and informed the manager of what had happened and he was later arrested. The appellant denied stealing the money.

[6] The appellant has now filed this appeal based on grounds, among other grounds, that he was convicted on a defective charge; that the learned Judge erred by failing to find that the trial court shifted the burden of proof to him and that his right to a fair trial under Article 25 of the Constitution was violated.

[7] At the hearing of the appeal, the respective counsel for the parties relied on their filed written submissions. The appellant in his submissions maintained that the trial court erred by shifting the burden of proof to him and by putting him on his defence, whereas the prosecution had failed to discharge its duty. He submitted that the learned Judge erred when he found that the trial court never shifted the burden of proof to the appellant. On the issue of violation of his right to a fair trial, it was submitted that the appellant was arraigned in court nine days after his arrest instead of twenty-four hours as is required. Finally, the appellant submitted that the charge sheet was amended to read that he stole Kshs. 702,966/20 from Kshs. 702,689/- and was not given a chance to respond to the amendment rendering the trial defective.

[8] The respondent in its submissions opposed the appeal and maintained that as this was a second appeal, it was only limited to matters of law and that the two courts below correctly re-evaluated the evidence. On the complaint that the appellant's rights were violated, the respondent submitted that the appellant never raised the issue before the High Court, but nevertheless submitted that the appellant was not prejudiced in any way by the delay. He relied on the case of **Dominic Mutie Mwalimu v Republic [2008] eKLR**.

[9] The main ground of appeal is that the learned Judge shifted the onus of proof to the appellant. Two material witnesses, **Evans Obengo (PW4)**, a security officer at the bank and **Edward Amanyia, (PW5)**, an operation manager at the bank gave concrete evidence to support the finding of facts by the trial court. Both witnesses testified that the appellant was indeed in a bank cubicle meant to serve corporate clients of the bank. According to their evidence, their attention was drawn to the cubicle by the appellant's screams saying that the money was missing. Evans, the security officer particularly told the court that he saw the appellant arrive at the bank carrying a polythene paper but did not see anyone leave the bank carrying the bag of money. Edward, the manager, further told the court that after the appellant alerted them of the theft, the bank's doors were immediately closed and all customers searched and the money was still not recovered. In addition, the trial court was informed that it was not the first time that the appellant was depositing money in the bank.

[10] The trial court made a finding of fact that the appellant was aware that he was carrying a large sum of money and his evidence that he placed the money on the floor and went to collect banking slips was not convincing as a prudent person would not just leave money on the floor without being vigilant. On its part, the High Court concluded that investigations showed that no robbery took place in the bank; that it was the appellant who alleged that he had been robbed; and that he was duty bound to disprove the same but failed to do so.

[11] As regards the ground that the appellant was not accorded a chance to plead to the amended charge, **Section 214 (i)** of the Criminal Procedure Code gives a trial court the power to amend the charge. The charge which the appellant pleaded to on 4th October 2004 indicated that he was alleged to have stolen Kshs. 702,966/20. The record of the trial court does not show that the charge was amended. The evidence of **I. P. Japheth Kilungu**, the investigating officer, related to theft of Kshs. 702,966,/20 which is the sum stated in the charge sheet. Further, if indeed the charge was amended as alleged, the appellant has not shown that such amendment occasioned a failure of justice.

[12] Lastly, on the ground that the appellant's right to a fair trial was breached for not being arraigned in court within twenty-four hours, the matter proceeded under the provisions of the former Constitution (now repealed). The provision under which the appellant claims that his rights were breached falls under Section 72 (3) (b) of the repealed Constitution. The appellant never raised this issue of violation of his Constitutional rights before the two courts below, and one may term it as an afterthought. Be that as it may, this Court has on various occasions refused to entertain a ground of breach of Section 72 (3) (b) raised for the first time in a second appeal. Besides, the appellant was represented by an advocate during his trial before the learned magistrate and could have easily raised the issue. In the Court of Appeal case of **James Githui Waithaka & Another v Republic, Criminal Appeal No 115 of 2007 (unreported)** cited in **Norman Wachira Ngobia v Republic [2009] eKLR** the appellants in that case failed to raise their complaint in the High Court, of the violation of their constitutional rights and the court went on to find that in such a case, the appellant must be treated to have waived his right to complain about the alleged violations of his constitutional rights before he was brought to court.

This was the same position taken by this Court in the **Dominic Mutie Mwalimu** case (*supra*) relied on by the respondent. In this case, the delay in bringing the appellant to court within 24 hours did not exonerate him from the crime he was alleged to have committed (see **Julius Kamau Mbugua v Republic [2010] eKLR**).

[13] As regards the merits of the appeal, the prosecution case was dependent on the credibility of the evidence. The investigation officer found that the appellant did not give a reasonable explanation of how the money in his possession was allegedly stolen. The trial court and the first appellate court disbelieved the appellant's explanation and made a finding that the appellant stole the money in his possession. There was ample, direct and circumstantial evidence to support the concurrent findings of fact by the two courts below that the appellant stole the money in his possession. In the absence of any reasonable explanation of what happened to the money, we are satisfied that the appellant was properly convicted. As the High Court observed, the sentence meted was extremely lenient.

[15] For the foregoing reasons, the appeal has no merit and is hereby dismissed.

Dated and delivered at Kisumu this 27th day of June, 2019.

E. M. GITHINJI

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JUDGE OF APPEAL

H. M. OKWENGU

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR