



**REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT KISUMU**

Criminal Appeal 233 of 2009

DAVID KIBET CHUMBA

..... **APPELLANT**

AND

REPUBLIC

..... **RESPONDENT**

**(Appeal from the judgment of the High Court
of Kenya at Kisumu (Mwera, J.) dated 18th May, 2009
in**

**H.C.CR.A. NO. 42 OF 2009

JUDGMENT OF THE COURT

The appellant was charged before the Chief Magistrate Kisumu with two counts i.e. Count I and VII of stealing by servant contrary to **Section 281** of the Penal Code. He was alleged to have stolen Kshs.516,000/= and Kshs.4,557,996/= respectively on diverse days in the year 2004 and 2005, the property of Kenya Commercial Bank. He was in addition charged with five counts i.e. Count II, III, IV, V, VI of stealing contrary to **Section 275** of the Penal Code of various sums of money on diverse days in the years 2004 and 2005 the property of **Kenya Commercial Bank** (KCB). In particular, Count III stated that on diverse dates between 1st October, 2004 and 25th November, 2004 at KCB Luanda Satellite Branch in Vihiga jointly with others not before the court he stole Shs.180,000/= the property of KCB.

The appellant was after trial convicted of two charges of theft by servant (Ct I and Ct. VII) and sentenced to 3 years imprisonment on each count to run concurrently. He was however acquitted of the five counts of stealing contrary to **Section 275** of the *Penal Code*, the trial magistrate saying that he believed that those five counts were repetition of the particulars of the two counts of theft by servant. On appeal to the High Court against conviction and sentence the superior court (Mwera, J.) made a finding that there was no evidence that linked or directly showed that the money allegedly stolen got in the hands of the appellants so as to be able to steal it and acquitted the appellant. The superior court however convicted the appellant of the offence of stealing contrary to **section 275** of the Penal Code in Count III and sentenced him to 2 years imprisonment saying in part:

“There was however evidence that some money was paid into or out of the appellant’s own account numbers 230-487-958 (see the evidence of Robert Tum PW1, and Lawrence Mbudo, PW4):

- (i) On 18th December, 2004 – Kshs.3,800 – paid in.**
- (ii) On 27th November 2004 – Kshs.10,000/= - paid out.**
- (iii) On 5th March 2005 – Kshs.10,000/= - paid out.**
- (iv) On 4th April 2005 – Kshs.20,000 – paid out.**

The total come to shillings 43,000/=. Surely the appellant cannot claim that he did not know of these sums going into and out of his own account. If he did not, it verges on the unbelievable and if he did, he condoned it. He did not desire to explain this in his defence”.

The appellant has appealed to this Court against the conviction and sentence on five grounds.

The appellant was at the material time employed by KCB and was in charge of Luanda Satellite Branch. The Satellite Branch was under the supervision of Kisumu Branch. The appellant had his own bank account No. 230 847 958. Sometime in April 2004, the Kisumu branch noticed that some accounts at the Satellite Branch were not balancing and the Operations Manager **Lawrence Mbundo** (PW4) started investigations and reported to KCB head office in Nairobi. When the accounts were reconciled and investigations were completed it was discovered that the bank had lost Shs.6.8 million through fraudulent transactions involving irregularly debiting the inter branch account through fictitious vouchers and crediting different customers accounts with proceeds including the appellants own account on various occasions and without debiting the customers accounts which benefitted from the fraudulent transactions. It was also discovered that the appellant had signed all the documents approving the fraudulent transactions; and that he had failed to forward relevant documents to Kisumu for posting. It was also discovered that numerous primary vouchers and documents were missing.

The appellant made unsworn statement at the trial denying theft of the money. He added that he had gone for training in Nairobi and when he returned he was told that some money was lost. He stated that he had no knowledge of the lost money.

The trial magistrate after evaluating the evidence concluded that the appellant was guilty of the two counts of theft by servant. The trial magistrate said in part:

“From the evidence of those 3 witnesses PW2, PW4 and PW5 it is apparent accused one was aware of irregular transactions that were going on and in which he participated actively by failing to remit relevant vouchers to Kisumu for posting to debit accounts of customers who were purported to have withdrawn the money”.

The trial magistrate continued:

“From the evidence adduced by PW1 a total of Kshs.243,000/= was paid to accused person but his account was not debited to reflect this transaction.

And further:

“Accused one did not deny he gave instructions to PW3 to make such payments.

.....

Accused didn't deny that he raised these vouchers and document examiner established the handwriting on those vouchers and signature are those of accused”.

And lastly,

“Accused person had no business raising vouchers reversing debits in the interbank account if no funds were withdrawn there from”.

The superior court after re-evaluation of the evidence was satisfied that the appellant signed all the questioned documents before he went for training but nevertheless the evidence did not show that the money allegedly stolen got into his hands. The superior court said in part:

“All this took place before he went on training and so it cannot be said that he had no knowledge of the questioned transactions. They bore his signature”.

The applicant has opted to prosecute the appeal although he has already been released through Presidential Amnesty. The appeal is essentially on the grounds that the ingredients of the offence of theft under section 275 were not proved; that the evidence did not prove the offence of theft as spelt out in count III and that the superior court did not properly evaluate and analyze the evidence. Mr. Mwamu, learned counsel for the appellant submitted in part that the offence for which the appellant was convicted did not fall within the particulars of count III or any other count that the trial Judge introduced his own charge; that evidence for PW1 and PW4 did not prove the offence of theft; that the primary documents showing who deposited money into the appellants account were not missing and that without the primary documents

there no evidence of conversion.

Miss. Oundo the learned Principal State Counsel on the other hand, submitted among other things, that the appellant debited the inter branch account and credited individual accounts including his own; that there was evidence that he signed the vouchers which were used to debit the accounts; that the appellant caused the money to move from inter branch account to his own account; that the appellant withdrew the money which was lying in his account and that the superior court had power under **Section 354** of the *Criminal Procedure Code (CPC)* to convict the appellant.

There was ample evidence that a large sum of money (over shs.6 million) was stolen from KCB Luanda satellite branch at the material time. The means by which the money was stolen was by transferring the money from the inter branch account through fictitious debit vouchers to certain customers accounts including the appellants account from which the money was subsequently withdrawn. There was evidence from **Lawrence Mbundo** (PW4) that the inter branch account is a suspense account where any global cash deposits un-deposited to customers accounts are suspended automatically by the computer global cash deposits and that the inter bank account is computer generated and is not supposed to be debited manually unless there is sufficient evidence to do so. There was also concurrent finding of fact by the two courts below that all the documents which facilitated the fraud were executed by the appellant as the bank officer in charge of the branch. The finding by the trial magistrate that the appellant stole the money in count I and count VII (a total of Kshs.5,073,996) as a servant, was reversed by the superior court for the reason that there was no evidence to show that the money allegedly stolen

“got into the hands of the appellant so as to be able to steal it.”

The superior court was however satisfied that the appellant stole the money (Kshs.43,800/=) which passed through his account No. 230 487 958 on various dates. Both **Robert Kipserem Tumo** (PW1) and **Lawrence Mbundo** (PW4) gave evidence relating to the entries in the appellants account and PW1 referred to the anomalies in those entries. The trial magistrate made a finding that a total of Kshs.243,000 was paid to the appellant and that the account was not debited.

The appellant did not in his defence explain the entries or explicitly deny the theft of the money. In the absence of any explanation the inference made by the superior court that the appellant had stolen the money from the bank was reasonable in the circumstances and we see no reason to interfere with it.

It is true that the particulars of the offence in count III of which the appellant was convicted, charged appellant with theft of Kshs.180,000/= between 1st October, 2004 and 25th November, 2004. It is also true that the entries in the appellants account were made between 18th December, 2004 and 4th April, 2005. However, variance between the charge and the evidence with respect to time at which the alleged offence was committed is not material (see **Section 214 (2)** CPC).

Furthermore it has not been shown that the error in the charge has occasioned a failure of justice to justify alteration of the finding of the superior court (see **Section 382** of CPC).

Lastly, there was ample evidence that the appellant fraudulently converted the money belonging to the bank and was thus guilty of theft. The superior court had power under **Section 354 (3) (ii)** to alter both the finding and the sentence of the trial court.

For the foregoing reasons the appeal has no merit and is dismissed.

Dated and delivered at Kisumu this 24th day of September, 2010.

M. OLE KEIWUA

.....
JUDGE OF APPEAL

E. M. GITHINJI

.....
JUDGE OF APPEAL

ALNASHIR VISRAM

.....
JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR