



REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT MOMBASA
(CORAM: OMOLO, LAKHA & O'KUBASU, J.J.A.)
CRIMINAL APPEAL NO. 73 OF 2000

BETWEEN

WILLIAM OMONDI NYAMBARE APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal from a conviction and judgment of the High Court

**of Kenya at Mombasa (Waki, J.) dated 26th November,
1999**

in

H.C.CR.A. NO. 39 OF 1998)

JUDGMENT OF THE COURT:

William Omondi Nyambare, the appellant herein comes to this court after his first appeal to the superior court was heard and dismissed by Mr. Justice Waki on the 26th November, 1999. The appellant had been tried and convicted on two counts of theft by a servant contrary to section 281 of the Penal Code and on each count, it was alleged that while he was employed as a banking cashier by the Kenya Ports Authority, the appellant stole Shs.300,000 and Shs.400,000 from his employer on the 12th and 13th April, 1995 respectively. He was sentenced to four years imprisonment on each count and the sentences were ordered to run concurrently. The appellant has complained that the evidence which he argued personally before us the appellant raised six grounds, but he argued all of them together. As this is a second appeal, only matters of law can be of interest to us. The matters of law which we understood to be of concern to the appellant was that certain documents upon which the prosecution relied in support of its case were wrongly produced in evidence and that some of those documents were altered and there was no evidence as to who had made the alterations.

As to the issue of documents having been wrongly produced in evidence, the appellant only took that point for the first time in his counsel's submissions to the trial court. He was represented by counsel in the magistrate's court where the documents were produced. The appellant and his counsel saw the prosecution offer the documents in evidence. They raised not the slightest objection to the documents being produced in evidence. Had they done so, the trial magistrate would have heard the objection and dealt with it one way or the other. The matter was raised in the superior court and Waki, J dealt with it in this manner:-

"The documents challenged as having been introduced in evidence irregularly were the Bank

statements and certified copies of paying - in slips. The Bank cashier who processed the Banking, P.W 6 testified on those documents and was cross -examined thereon by counsel for the Appellant. No objection was raised on the propriety of their production. Their authenticity was explained by P.W 7 the investigating officer who produced them as exhibits and was again cross -examined thereon. It was in submissions made by counsel in the lower court that the issue of relying on secondary evidence relating to two paying - in slips without laying a basis for failure to produce the originals, was made. That submission was considered and rejected by the learned trial magistrate and I think properly so. There are special provisions in the Evidence Act for the production in evidence of Banker's books and other documents. Certified copies may be accepted and I see no reason for rejecting the documents tendered in this case."

This conclusion by the first appellate court is in conformity with the old decision of the Court of Appeal for Eastern Africa in the case of **RAHIM BUX s/o NOOR MOHAMED & OTHERS V REGINAM**, 20 EACA, 263 where the court was of the view that:-

"The former point was not taken at the trial nor on the appeal to the Supreme Court , and we refused to allow it to be taken before us. There is probably no merit in the point at all, since the Nairobi Municipal By -laws are published in the official Gazette, and the Court will take judicial notice of the contents of this publication. But in any event, if the appellants wished to rely upon the point they should have taken at the trial and it is now too late to take it on a second appeal (.....); see pg 264 of the Report. "

We think, as Waki, J. did, that the appellant should have objected to the production of the documents right from the time the prosecution offered those documents in evidence and the trial magistrate was right in rejecting the submissions of the appellant's counsel, made long after the documents had been produced, that the documents ought to have been rejected.

The proviso to section 382 of the Criminal Procedure Code states:-

Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings. "

The objection taken as to the validity of the documents could and should have been raised at the time the prosecution offered them in evidence and as Waki, J. correctly pointed out in his judgment the documents produced were admissible in evidence under certain circumstances. If they were documents which could not be produced in evidence under any circumstances, then of course the position would have been entirely different. That is not the position here, and it is now too late in the day to ask us to invalidate the convictions on the ground that documents were irregularly put in evidence.

The same consideration must apply to the point that the document examiner himself ought to have come to produce his report which was instead produced by P.W 7, obviously under section 77 of the Evidence Act. If the appellant had wanted to cross-examine the document-examiner on the report then nothing was easier than asking the Magistrate to summon him and the Magistrate would have power to do so under section 77(3) of the Evidence Act. Having failed to say that he wanted to cross-examine the documents examiner, it is now too late in the day to ask this Court to invalidate the convictions on the ground that the document examiner was not called to testify.

On the issue as to who made the alterations on the paying-in slips the report of the examiner satisfied the two courts below that the alterations must have been made by the appellant. We did not hear any compelling argument which would warrant our reversing that conclusion. There is no merit in this appeal and we order that it be and is hereby dismissed.

Dated and delivered at Mombasa this 25th day of January, 2001.

R. S. C. OMOLO

.....

JUDGE OF APPEAL

A. A. LAKHA

.....

JUDGE OF APPEAL

E. O'KUBASU

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR