



IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: GICHERU, SHAH & O'KUBASU J.J.A)

CRIMINAL APPEAL NO.104 OF 1999

BETWEEN

THEODORE ABUNGU OKOTH..... APPELLANT

AND

REPUBLIC..... RESPONDENT

(Appeal from a conviction, judgment or as the case may be) of the High Court of Kenya at Mombasa (Justice Waki) dated 5th October 1999

in

H.C.C.R.A. No.171 of 1999)

JUDGMENT OF THE COURT

The appellant Theodore Abungu Okoth was convicted of stealing by servant contrary to section 281 of the Penal Code and sentenced to 18 months imprisonment by the learned Senior Principal Magistrate (Mr. J.S. Kaburu). We must hasten to state that although the appellant had been charged on two counts he was convicted on the first count and acquitted on the second. The appellant's appeal to the High Court was dismissed and hence this is now a second appeal.

The two lower courts made concurrent findings on issues of facts. The appellant who was the Branch Manager of Gateway Insurance Co. Ltd was issued with 51 certificates of insurance of Shs.1,000/= each but kept them in his office without raising any invoices. The courts below reached an irresistible inference that the appellant received the money (shs.51,000/=) but converted it to his own use as he did not surrender it to the company. It should be pointed out that the copies of the insurance certificates were found in the appellant's drawer.

The appellant admitted that these copies were found in his possession but his explanation was that as the certificates had not been paid for then he kept the copies until the payment had been received. He went on to explain that he had employed agents known to him. He gave a list of such agents to I.P. John Kathuri. I.P. Kathuri was unable to contact anyone of those agents.

The learned trial Magistrate having considered the prosecution case and the appellant's defence came to the conclusion that the appellant had indeed received the money for the 51 insurance certificates amounting to shs.51,000/= and converted it to his own use.

In a well reasoned judgment Waki, J. came to the same conclusion that the appellant's guilt had been proved beyond doubt and upheld both conviction and sentence of the lower court. Mr Magolo for the appellant has argued before us to the effect that the appellant's explanation had not been considered and that the appellant was entitled to the benefit of doubt. He urged us to allow the appeal and set the appeal on its face. We have carefully considered the evidence adduced in the learned senior Principal Magistrate's court and the decision reached therein and also the judgment of the High Court (Waki, J.) and it is our view that the appellant was properly convicted. We have no reason to justify interfering with the concurrent finding of fact by the two lower courts. In our view there was irresistible inference that it was the appellant who received shs.51,000/= in respect of the 51 insurance certificates and converted the money so received to his own use. His conviction was indeed inevitable.

The upshot of the foregoing is that this appeal is dismissed in its entirety.

Dated and delivered at Mombasa this 20th day of January, 2000.

J.E. GICHERU

.....

JUDGE OF APPEAL

A.B. SHAH

.....

JUDGE OF APPEAL

E. O'KUBASU

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR