



IN THE COURT OF APPEAL

AT MOMBASA

CORAM: GICHERU, OMOLO & LAKHA, J.J.A.

CRIMINAL APPEAL NO. 80 OF 2000

BETWEEN

FLUGENCE OTIENO KESSAAPPELLANT

AND

REPUBLICRESPONDENT

(Appeal from a judgment of the High Court of Kenya at Mombasa (Hayanga J) dated 3rd March, 2000

in

H.C.CR.A. NO. 337 OF 1998)

JUDGMENT OF THE COURT

Flugence Otieno Kessa , hereinafter called "the appellant", was tried before a Senior Resident Magistrate at Mombasa on three counts of fraudulent false accounting contrary to **Section 330 (a)** and one count of stealing by a servant contrary to Section 281 both sections being under the Penal Code. The first count of fraudulent false accounting alleged in its particulars that on diverse dates between September 7, 1991, and July 6, 1994, at Standard Chartered Bank Ltd, with intent to defraud, the appellant made false credit entries into account **No. 101/02/86103/00** belonging to Wanguba Francis Taabu, purporting to show that the account had an accrued interest of Shs.297,250/-. The second count made a similar allegation against the appellant in respect of account **No. 010/01/01505/00** belonging to Lungalu Judith Okumu, the account being shown to have earned interest amounting to Shs.116,540/- between 15th February, 1994 and 27th June, 1994. The third count was in respect of account No. 010/02/89086/00 belonging to Orengo Josephat and that account was shown to have earned interest amounting to Shs.404,534/- between the 30th April, 1994 and 5th July, 1994. The fourth count of theft by a servant alleged in its particulars that on diverse dates between the 26th March, 1992 and 29th June, 1994, being a servant of M/s Standard Chartered Bank Ltd, the appellant stole from its said master, the sum of K.Shs.2,801,676.10. Having heard the evidence brought by the prosecution in support of the four charges and the sworn evidence of the appellant in opposition to the charges the magistrate found the appellant guilty and convicted him on all the four counts.

The appellant was then ordered to serve six years imprisonment on each count, the sentences being

ordered to run concurrently, though the magistrate added in brackets that the sentences amounted to twenty four years.

The appellant appealed to the High Court at Mombasa. His appeal to that court was heard by Hayanga, J. who, however, dismissed the appeal and confirmed the sentence on the 3rd March, 2000. The appellant now appeals to this Court a second time. This being a second appeal, we are not concerned with the facts as found by the magistrate and confirmed by the High Court, unless it be argued that there was no evidence at all upon which a reasonable tribunal properly directing itself could make the conclusions arrived at by the two courts below.

The appellant did not contend before us that there was no evidence at all upon which the two courts could make the conclusions at which they did arrive. Consequently we are only concerned with matters of law and as far as we were able to gather from the spirited submissions made before us by the appellant himself, the serious point of law he raised was that the prosecution had wholly failed to produce any document(s) showing that he had made any false entries into the accounts mentioned in the three charges and further that in the absence of any such entries, it was not possible to conclude that he had stolen the money charged against him in count four. We agree with the appellant that the prosecution did not, as such, produce any documents to show the entries made into the accounts mentioned in the charge sheet or in any other accounts mentioned in the evidence. But the two courts below considered the fact that the appellant was the systems administrator at the bank branch where he worked and where the offences were alleged to have occurred. According to Alexander Muli Fwedha (P.W.1) who was the bank's operations manager at the branch where the appellant was working the appellant's duties, among others, was to take care of the computer, which included deleting all closed accounts and such like operations. The appellant admitted he was in charge of the computer though he denied he was responsible for making entries therein. The two courts below found that he was in fact responsible for making necessary entries into the computer. There cannot be any legal basis upon which we can interfere with this finding of fact. The two courts also found as a fact that as the one in charge of the computer, the appellant was to delete closed accounts and was also responsible for "stripping" certain accounts from the computer in order to create space therein. These were findings of fact and as far as we can see from the recorded word, they were fully justified by the evidence and we would have no legal basis for interfering with them.

Accounts which have been closed do not, and in common sense, cannot earn interest. The evidence of the prosecution was that current accounts do not equally earn interest, at least in the bank where the appellant was working.

The prosecution, however, brought witnesses such as Auma Wamboi Kamau (P.W.11) who was a secretary at an engineering company in Kisauni. In 1991, she opened a savings account at Makupa Branch of the bank. In 1993, she closed the account. In April 1993, she received a statement from the bank showing that her account had no money. She showed that statement to the magistrate and it was eventually produced as Exhibit 32. In May 1994, she received a second statement from the bank showing her account had earned interest to the tune of Shs.52,601.85. Since P.W.1 knew she had no money in the bank, she just ignored the statement. Again in June 1994, she received another statement showing that she had Shs.52,601.85. She then went to the bank to find out what was happening. She spoke to the appellant asking him where the money had come from. In her own words the appellant told her:-

"He told me it was my money. I told him then to issue me with a new pass book because I had lost my old pass book. He told me to ask for the pass book in writing. I did so on 17.6.94."

She was issued with a new pass book.

The appellant denied this evidence by P.W.11 but the two courts below repelled the denial as false. No reason was shown to us why we should interfere with the courts below on this point. There were also the accounts of Lungalu Judith Okumu and Orenge Josephat which were current accounts. There was evidence which was accepted by the two courts below that these accounts were opened with the assistance of the appellant and cheque-books were issued on them. It was equally proved that these accounts had virtually no monies in them. When police investigators searched the house of the appellant,

the cheque-books issued on the accounts were found there. At some stage, the two accounts had been "stripped" from the computer but numerous cheques were written on them and those cheques were duly honoured, despite the fact that there ought to have been no funds in the accounts. Once again the prosecution proved to the satisfaction of the two courts that some of the cheques drawn on the two accounts were issued by the appellant himself to various customers or relatives of his. He paid Peter Okumu Mukanga (P.W.5) Shs.60,000/- by cheque No. 030196; P.W.5 had repaired the appellant's vehicle. He also paid Vrajilal Madavji Mandalia (P.W.7) a total of Shs.15,900/- through cheques Nos. 026817 and 153786; P.W.7 had a tailoring shop and made suits for the appellant. Ibrahim Musa (P.W.8) was issued with numerous cheques by the appellant; the appellant was his tenant. There was also Mary Ann Wanjiku, (P.W.9) the bursar at Mombasa Parents School where the appellant's children were learning. P.W.9 received from the appellant various cheques in payment of school fees. All these cheques were issued on the stripped accounts of the two persons mentioned in the charge sheet and the magistrate found and the High Court concurred in that finding that these accounts did not have monies in them. The evidence brought by the prosecution through P.W.1 and P.W.2 was that the monies came from what they called an "accrual account", which we understand to mean an account containing money to be paid out as interest on various accounts. That would explain why witnesses such as P.W.11 and Julius Mutweri Mutunga (P.W.4) were being credited with interest on accounts which had been closed.

The appellant asked us where the false entries he made were. The answer must be that the false entries he made were to be found in the accounts he credited with interest when those accounts were not entitled to receive any interest. The accounts of P.W.4 and P.W.11 were not entitled to receive interest because they had been closed. Those of Lungalu Judith Okumu and Orengo Josephat were not entitled to receive interest because they were current accounts. They ought to have had no monies in them but various cheques were issued on them and those cheques were faithfully honoured. The cheques were so honoured because the appellant must have seen to it that there were sufficient funds in them and such funds could only have come from the accrual account. The appellant's fraudulent intent was proved by the evidence showing that the appellant benefited from the monies in the accounts, in that he used such monies to pay his mechanic, his tailor, his landlord and the school fees for his children. His using the monies in that fashion amounted to the theft of the money charged against him in count four. He was an employee of the bank when he stole the money.

Before we leave the matter there is one issue which was raised in the High Court and which we think we ought to touch on. That issue concerned the fact that the three charges of fraudulent false accounting were laid under Section 330 (a) and not under **Section 330 (b) of the Penal Code**. The particulars of the charges clearly show that they ought to have been laid under paragraph (b) of Section 330. As we have said the matter was raised in the High Court. Mr Justice Hayanga dealt with it in this way:-

"Normally the prosecution is bound by the particulars of the charge and looking at this case I do not see that the evidence given by the prosecution was at all at variance with those particulars or with section 330 (a) as provided in the Penal Code."

We think the three charges ought to have been laid under **Section 330 (b) of the Penal Code** and we understand the learned Judge to be saying that the mistake in laying the charges under paragraph (a) did not really occasion any failure of justice to the appellant and was a curable irregularity under **Section 382 of Criminal Procedure Code**. We agree with this proposition. The position would have been different if Section 330 (b) did not exist at all.

Like the two courts below, we are satisfied the prosecution proved beyond any reasonable doubt the four counts brought against the appellant. The sentences which were ordered to run concurrently were lawful and we cannot interfere. This appeal wholly fails and we order that it be and is hereby dismissed.

Dated and delivered at Nairobi this 18th day of August, 2000.

J. E. GICHERU

JUDGE OF APPEAL

R. S. C. OMOLO

JUDGE OF APPEAL

A. A. LAKHA

JUDGE OF APPEAL

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

DEPUTY REGISTRAR