



REPUBLIC OF KENYA



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**Ogeto v Republic (Criminal Appeal E010 of 2022)
[2024] KEHC 6501 (KLR) (30 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 6501 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAMIRA
CRIMINAL APPEAL E010 OF 2022**

WA OKWANY, J

MAY 30, 2024

BETWEEN

CORNELIUS NYARANGO OGETO APPELLANT

AND

REPUBLIC RESPONDENT

(Being an Appeal from the Judgment in the Principal Magistrate's Court at Keroka in PMCR No. 939 of 2018, delivered by Hon. B.N. Kimtai, Principal Magistrate on 20th April 2022)

JUDGMENT

1. The Appellant herein was charged and convicted with two counts of the offence of stealing by servant contrary to Section 281 of the *Penal Code*.
2. The particulars of the charge were that on diverse dates between November 2017 and 3rd December 2017 at Vision Point Sacco Nyansiongo, in Borabu within Nyamira County, jointly with others not before court, being employees of the said Vision Point Sacco, stole Kshs. 210,740/= which came into his possession by virtue of his employment.
3. The particulars of the second count were that on 11th December 2017, at Vision Point Sacco Nyansiongo Borabu, within Nyamira County, jointly with others not before court, being employees of the Vision Point Sacco, stole Kshs. 330,000/= which came into his possession by virtue of his employment.
4. The Appellant pleaded not guilty to both counts and the matter proceeded for trial in which the Prosecution called a total of 7 witnesses as follows: -
5. PW1 Daniel Ombaso, the CEO of the complainant, Vision Point Sacco, testified that the Sacco was in the month of October 2017 involved in paying bonuses to at least 55,000 tea farmers spread out within 322 pay points when he received a phone call from one Dennis Moogi, the in-charge of Magombo



- branch who informed him that a farmer one Jared Mongare (PW5) had checked his account and noted that it had Kshs. 59,569.10 instead of Kshs. 9569.10.
6. On enquiring the cause of the difference on the difference in the amount in the said account, the Appellant informed PW1 that there could have been an error in the system. PW1 claimed that a relative of PW5 informed him that the Appellant had called PW5 to inform him that there was more money in his account but that he should not go to their workplace. He stated that further investigations revealed that another client one Henry Momanyi, who had not registered with the Sacco for money transfer had withdrawn Kshs. 38,000 and that the said Momanyi agreed to refund the money upon being arrested.
 7. PW1 stated that a further scrutiny of the Sacco system revealed that the account of another client, Edwin Ong'era (PW2), contained Kshs. 94,784.30 yet his bonus payment was Kshs. 44,784.30, an excess of Kshs. 50,000. A further look into the Sacco's system showed that one Michael Omwenga who had account balance of Kshs. 72.80 instead had Kshs. 65,330 and that on being arrested, the said Michael refunded the money. According to PW1, the suspicious transactions in the 3 accounts resulted in the loss of a total of Kshs. 210,740 that channeled to the said accounts with the assistance of the Appellant who had the Sacco accounts password and who could not explain the discrepancies in the accounts.
 8. PW1 testified that the Sacco deposited Kshs. 400,000/= in M-Cent platform and that after the ICT Manager (Appellant) left, the Sacco requested Safaricom to change the password but that they later discovered that new names within a record of 4 minutes who were not their members but were linked to the system and had withdrawn money through M-Cent. They noted that a total of Kshs. 330,000 had been withdrawn by Maureen Atieno Oguna (Kshs. 70,000/=); Joel Miramba (Kshs. 70,000/=); Bonice Ongeru (Kshs. 60,000/=); Benard Momanyi (Kshs. 70,000/=); and Joseph Oguna (Kshs. 60,000/=). He stated that they discovered that the Appellant assisted in the withdrawal of the money by making the HR Manager the initiator while he was the completer. They also noted that the Appellant had locked them out of the system so that he would get information on any transaction ahead of them. It was his testimony that they had to reconfigure the system by stopping the M-Cent platform for a month.
 9. PW2, Edwin Ongera, a tea farmer and an account holder with the complainant testified that he expected to receive Kshs. 44,000/= from his account but discovered that the account had Kshs. 94,190/= which he withdrew after which he received a call from the Appellant who claimed Kshs. 50,000/= from his account. He claimed that he later gave the Appellant Kshs. 50,000/= but that the police arrested him and forced him to pay another Kshs. 50,000/ to secure his release as he had been accused of stealing from the bank. He testified that it was the first time he had gotten excess payment in his account and that it was the Appellant who demanded the excess Kshs. 50,000/= using phone number 0717623720.
 10. PW3, Henry Juma Nyakundi, was the accountant who audited the complainant's books of accounts and discovered that payments amounting to Kshs. 30,000 was made to non-members whom he named as Maureen Otieno - Kshs. 70,000/=; Joel Minambo - Kshs. 70,000/=; Bonice Ongeru - Kshs. 60,000/= paid on 11/12/2017; Benard Momanyi - Kshs. 70,000/= paid on 11/12/2017 and Joseph Oguna Odero - Kshs. 60,000/= amounting to Kshs. 330,000/=.
 11. PW3 testified that he discovered that certain records had also been falsified. He produced the interim audit report (P.Exh 10).
 12. PW4, Dennis Nyambati, a teller at the complainant's Tombe branch testified that he on 7th November 2017 received a phone call from one Eric Ogeto (HR Manager/2nd Accused) who asked him to pay his sister one Damaris Ogeto the sum of Kshs. 64,740 from the account of one Mitchel Omwenga who was his aunt yet the said Damaris was not in the system.



13. PW5, Jared Mong'are, a tea farmer, testified that he was to receive Kshs. 9,000/= as his tea bonus. He testified that the Appellant instructed him not to go to the Sacco offices for his payment.
14. PW6, Evans Onduko Ndubi, the complainant's Operations Manager testified about an incident that occurred at Makombo in October 2017 when a client PW5 complained that his account had been credited twice. PW6 made enquiries the ICT manager (Appellant) who informed him that the account had overlapped and explained that he had deleted the transaction. PW6 testified that he later realized that there were other accounts that had double credits amounting to Kshs. 210,736.90/=. He invited an external auditor to go through their accounts and it was established that the sum of Kshs. 540,000/= was missing.
15. PW6 stated that the Appellant thereafter disappeared from the place of work and did not hand over anything including the system password thus prompting the complainant to write to Safaricom to remove him as an administrator but added that Safaricom did not act fast enough and that the Appellant continued to create some accounts and make direct payments amounting to Kshs. 330,000/= through the M-Cent portal.
16. PW7 No. 50803 Sgt. Danson Mureithi, Deputy DCIO Borabu investigated the case and preferred the charges against the Appellant and his co-accused whose case was however withdrawn. PW7 testified that his investigations revealed that the Appellant (ICT manager) absconded work after which his phone was off and that a further Kshs. 330,000/= was withdrawn during the period in question as follows: -
 - i. On 11/12/2017 at 1545hrs, Joel Mirambo Mwebi of phone No. 0746-926049 had withdrawn Kshs. 70,000/=.
 - ii. On 11/12/2017 at 1544hrs, Maureen Otieno Miguna of phone No. 0746-926041 had withdrawn Kshs. 70,000/=.
 - iii. On 11/12/2017 at 1513hrs, Boniface Ongeri of phone No. 0746-692299 had withdrawn Kshs. 60,000/=.
 - iv. On 11/12/2017 at 1553hrs, Benard Momanyi Otworu of phone No. 0746-926043 had withdrawn Kshs. 70,000/=
 - v. On 11/12/2017 at 1554hrs, Joseph Oguna of phone No. 0746-926042 had withdrawn Kshs. 60,000/=
17. It was PW7's testimony that the above withdrawals were done within a span of 10 minutes and that the phone numbers ran consecutively except 2 numbers. He produced 17 exhibits as follows:-
 1. PExh 1 - Copy of National ID for Jared Mong'are
 2. PExh 2 – Statement of Henry Momanyi
 3. PExh 3 – Statement of Edwin Ongera for withdrawal of Kshs. 50,000/=
 4. PExh 4 - Mitchel Omwenga Statement
 5. PExh 5 – Appointment letter for Cornelius
 6. PExh 6 – M-Pesa Statement for the Sacco
 7. PExh 7 - Appointment letter for Eric
 8. PExh 8 – Withdrawal Slip for Edwin Ongera



9. PExh 9 – Undertaking Agreement for Edwin Ongera
 10. PExh 11 – Daily Adjustment Cash Book
 11. PExh 12 – Withdrawal Slip for Jared Mong'are
 12. PExh 13 – Letter to Safaricom dated 17/11/2017
 13. PExh 14 – Safaricom Response Letter
18. At the close of the Prosecution's case, the trial court found that the Appellant had a case to answer. The Appellant elected to give a sworn testimony upon being placed on his defence.
 19. The Appellant testified that he was employed by the Complainant as a system administrator. He produced his letter of employment (D.Exh1) issued on 1/9/2014. He stated that the ICT Manager at the time was Peter Nyakoni and that he worked as a system auditor until November 2017. He denied the allegation that he was an ICT Manager and explained that the CEO PW1 worked at the Sacco with his children, and that his son Victor was the ICT Manager while his daughter Faith, oversaw payrolls.
 20. DW1 denied the allegation that he was appointed as the ICT manager and testified that PW1 was the administrator of the paybill and the Mpesa portal. He stated that the ICT manager at the time was one Peter Nyakoni and noted that PW1 Ombaso did not produce the audit trail of the log file. He denied stealing any money from the Sacco or creating any accounts and stated that the incident under count the 2nd count occurred when he had already been sent away on compulsory leave. He produced the OB Extracts D.Exh 3 (a)- (e). He also narrated the circumstances under which he was arrested and locked up in police cells before being presented in court.
 21. At the end of the case, the trial court found that the prosecution had established its case against the Appellant beyond reasonable doubt. The Appellant was consequently convicted on both counts of stealing by servant and sentenced him to pay a fine of Kshs. 420,000/= for the first charge or to serve 3 years imprisonment in default and to pay a fine of Kshs. 660,000/= or to serve 5 years imprisonment in default for the second charge.
 22. Dissatisfied with the decision of the trial court, the Appellant instituted the present Appeal and listed the following grounds of Appeal in the Memorandum of Appeal: -
 1. That the honourable Trial Magistrate erred both in law and fact in not finding that the Prosecution evidence was insufficient and/or lacked the requisite probative value in proving their case against the Appellant.
 2. That the honourable Trial Magistrate erred both in law and fact by failing to make a finding that the Prosecution failed to establish their case as per the particulars set out in the charge sheet.
 3. That the honourable Trial Magistrate erred both in law and fact by taking a faulty analysis and evaluation of Prosecution evidence and by disregarding defence evidence.
 4. That the honourable Trial Magistrate erred both in law and fact in not finding that the Prosecution failed to establish their cases against the Appellant beyond any reasonable doubt in accordance with the law.
 5. That the honourable Trial Magistrate erred both in law and fact in anchoring the conviction of the Appellant allegedly on his demeanor without bringing out the specifics of demeanor which he considered.



6. That the honourable Trial Magistrate erred both in law and fact by relying on allegedly/ unspecified circumstantial evidence.
 7. That the honourable Trial Magistrate erred both in law and fact by failing to properly appreciate, evaluate and analyze evidence tendered in this matter rendering him to deliver an erroneous judgment against the Appellant whose role in Vision Point Sacco was not properly evaluated as against other employees of Vision Point Sacco.
 8. That the honourable Trial Magistrate erred both in law and fact in not considering and appreciating external factors which influenced the arrest, arraignment and prosecution of the Appellant.
 9. That the honourable Trial Magistrate erred both in law and fact by meting a manifestly harsh and cruel sentence against the Appellant whose mitigation and record the honourable Trial Court should have considered.
23. The Appeal was canvassed by way of written submissions which I have considered.
 24. The duty of a first appellate court is to subject the entire evidence from a trial court to fresh scrutiny and arrive at its own conclusions while bearing in mind the fact that it neither heard nor saw the witnesses testify. (See the Court of Appeal in *Kiilu & Another vs. Republic* [2005]1 KLR 174 and the case of *Peters v Sunday Post* [1978] E.A. 424.)

Issue(s) for Determination

25. The main issue for my determination is whether the Prosecution proved its case beyond reasonable doubt.
26. Section 281 of the *Penal Code* stipulates as follows:-
 281. Stealing by clerks and servants
If the offender is a clerk or servant, and the thing stolen is the property of his employer or came into the possession of the offender on account of his employer, he is liable to imprisonment for seven years.
27. In order to prove this charge, the Prosecution must prove, beyond reasonable doubt, that an accused person was at the time of the offence an employee or a servant of the complainant and that he or she stole property belonging to the employer.
28. Stealing is defined by the *Black's Law Dictionary* 8th Edn. as:-

“To take (personal property) illegally with the intent to keep it unlawfully”.
29. The Prosecution presented the evidence from 7 witnesses and produced 18 exhibits in support of its. The trial court considered the evidence of the said witnesses and found that the Appellant had falsified records and that he therefore had the mens rea to commit the offence. The trial court also found that it was only the Appellant who knew what could have happened to the money that was missing. The court also found that the Appellant was the sole perpetrator of the offence and held that his defence did not shake the Prosecution witnesses' evidence.
30. I have considered the evidence tendered by all the Prosecution witnesses alongside that of the Appellant. It was not disputed that the Appellant was employed by the complainant. The Appellant



testified that he was an employee of the Sacco. The point of departure was the position that the Appellant held in the organization.

31. The Appellant testified that he was employed as a system auditor. He produced his letter of appointment (D.Exh1) dated 1/9/2014. PW1, on the other hand, at first testified that the Appellant was the ICT Manager but on cross-examination stated that the Appellant was employed as an Assistant ICT Manager. As I have already stated in this judgement, the Appellant produced his Appointment letter (P.Exh 5) which indicated that he was employed as a system auditor. PW1 stated on cross-examination that the Appellant's responsibilities were to oversee installations, contribute to the organization and evaluate ICT. PW1 also stated that as the ICT Manager, the Appellant had the system password and was the initiator of payments while the HR (Eric Ogeto, formerly the 2nd Accused) was the administrator of M-Cent payment platform.
32. The Appellant however denied the claim that he was the ICT Manager and instead stated that he was merely a system auditor and insisted that the ICT Manager was one Peter Nyakoni.
33. My finding is that the Appellant proved that he was employed as a systems auditor and not an ICT Manager as alleged by PW1. I find that if indeed he was the ICT Manager, then the prosecution should have produced a letter of appointment showing the same. I have also considered the duties of the Appellant as outlined by PW1 during cross-examination and I find that there was no evidence to show that the Appellant was the sole user or even a super user of the M-Cent platform. The duties as outlined do not include the creation or linking of users to the said platform as PW1 and other Prosecution witnesses later stated in their testimonies.
34. It is my finding that the Prosecution did not prove that the Appellant was the ICT Manager and was therefore the only person capable of manipulating the system as alleged. I find that the trial court misdirected itself in failing to properly establish or evaluate the Appellant's role at the Sacco in order to satisfy itself that he was the one responsible for all the malpractices to the exclusion of all other employees.
35. Turning to the second limb of the charge, I have examined the evidence tendered by the prosecution together with all the exhibits that they produced and I find that it was not in doubt that there were malpractices that led to loss of money during the period in when bonuses were being paid. The evidence of PW2 Edwin Ongera who was to be paid Kshs. 44,000/= but instead found his account credited with Kshs. 94,000/=, an excess of Kshs. 50,000/=, proved that indeed there was an inflation of figures on the system. PW3 Henry Nyakundi the auditor also found falsified records and unknown customers mapped onto the system. He indicated in his report (P.Exh10) that a total of Kshs. 540,740/= was both falsified and paid to non-members. To this extent, I find that the Prosecution proved that indeed there was a theft of the Sacco's monies.
36. It is however trite that in order to fully prove a criminal charge against an accused person, the Prosecution must link an accused person to the crime in question. The prosecution must, in this regard, resist the urge to act on impulse or mere suspicion and instead tender evidence that points to the accused person.
37. My finding is that the entire Prosecution evidence against the Appellant was based on circumstantial evidence. While circumstantial evidence can lead to the conviction of an accused person, it must be



clearly distinguished from mere suspicion. This is the position that was taken by the Court of Appeal in the case of *Sawe vs. Republic* (2003) KLR 364 where it was held that: -

“In order to justify (conviction) on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt...

Suspicion, however strong, cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt. As this Court made clear in the case of *Mary Wanjiku Gichira v Republic* (Criminal Appeal No 17 of 1998) (unreported), suspicion however strong, cannot provide a basis for inferring guilt which must be proved by evidence.”

38. In this case, I find that it was not proved that the Appellant was the ICT Manager and therefore the one entirely in charge of the system to the exclusion of all others. The fact that the Appellant stated that he was a system auditor and not the ICT manager raises doubt as to whether he was solely in total control of the system so that he remains the sole suspect. PW1’s testimony to the effect that the Appellant was an Assistant ICT Manager raises further doubt and implies that there could have been someone else senior and in charge of the system other than the Appellant.
39. While PW1 and PW6 claimed that the Appellant had the system password and that he included strangers in the system to fraudulently pay himself, no tangible evidence was adduced to support these allegations. I note that while P.Exh 6, the Sacco’s Mpesa Statement, shows the details of transactions, the said statement only proves that monies were paid to non-members who were fraudulently created in the system but does not show who exactly created the non-members or who initiated and completed the payment process.
40. This Court takes the view that, if indeed the Prosecution wanted to prove that it was only the Appellant who could log in to the system with the password, without other people’s knowledge or authorization, then they ought to have produced login data as evidence in support of their case and not leave it to mere allegations or speculation.
41. Section 108 and 109 of the *Evidence Act* states as follows: -
 108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.
 109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.
42. It is my finding that, failure by the Prosecution to provide the audit trail of the log files proving that it was the Appellant alone who had logged in and created fraudulent members was detrimental to their case. Further, since there was a likelihood that there could have been another person employed as the ICT Manager, it cannot be assumed that the Appellant was the only one who logged into the system and paid monies fraudulently.
43. I have further considered the evidence of PW4 Dennis Nyambati who was the Tombe Branch Manager. He stated that a payment of Kshs. 15,000/= was made from the head office from the account of Mitchel Omwenga who was said to be an aunt of Eric Ogeto, the HR Manager and a balance of Kshs. 72.80/= remained. Further Prosecution evidence from PW1 suggests that this Mitchel Omwenga’s account was inflated with a figure of Kshs. 65,332.80/= on 7/11/2017 and a withdrawal of Kshs. 64,740/= was made and paid to Damaris Ogeto on instructions from his senior, Eric Ogeto. It was the Prosecution



evidence that Eric destroyed the payment voucher relating to this specific transaction and that the transaction was deleted from the system. That Eric later refunded the money through an Undertaking Agreement dated 25/11/2017 and went to school never to return to work.

44. This evidence suggests that Eric had access to the system and that he could manipulate it because the said transaction of Kshs. 64,740/= was deleted and payment vouchers destroyed. There was no evidence pointing to the Appellant in respect of this transaction. While Eric was acquitted of the charges upon the Prosecution withdrawing the case against him under Section 87 (a), it is clear to this Court that he had access to the system and could manipulate it by altering account balances and deleting transactions. Thus, the Court finds that there were other people who could access the system and manipulate it as they desired and not specifically the Appellant as implied by the Prosecution witnesses.
45. The Appellant also stated in his defence that the CEO's children worked for the Sacco. Although PW1 denied these allegations, I find them to be true because PW6, the Operations Manager stated that Victor Ombaso, PW1's son worked at the Sacco in the past but was not employed during the time when the discrepancies were discovered. I have also examined P.Exh 15, the Safaricom Portal Report for 11/12/2017. One Faith Orambui is recorded therein as one of the people transacting the payments from the Sacco. This makes the Appellant's assertions plausible enough to create doubt in the mind of the Court that other users who worked at the Sacco may have led to the impropriety that was evidenced with the customers' accounts.
46. In arriving at the above findings, I am guided by *Benson Limantees Lesimir & Ano. vs. Republic* Criminal Appeal No. 102 & 103 of 2002 where the Court of Appeal stated;

“In the circumstances, then the evidence tendered by the prosecution does not irresistibly point to the appellants to the exclusion of all others within the meaning of *R. vs Kipkering Arap Koske & Another* 16 EACA 135 where it was inter alia held that:”

“In order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt.”

47. The standard of proof in criminal matters is well settled. It is proof beyond reasonable doubt, which means that no room is given for question, gaps or doubts in the prosecution's case. In *Bakare vs. State* (1987) 1 NWLR (PT 52) 579, the Supreme Court of Nigeria emphasized on the phrase proof beyond reasonable doubt, stating: -

“Proof beyond reasonable doubt stems out of the compelling presumption of innocence inherent in our adversary system of criminal justice. To displace the presumption, the evidence of the prosecution must prove beyond reasonable doubt that the person accused is guilty of the offence charged. Absolute certainty is impossible in any human adventure, including the administration of criminal justice. Proof beyond reasonable doubt means just what it says it does not admit of plausible possibilities but does admit of a high degree of cogency consistent with an equally high degree of probability.”

48. Similarly, Denning J. stated as follows in *Miller vs. Minister of Pensions* [1947] stated:-

“It need not reach certainty, but it must carry a high degree of probability, proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If



the evidence is as strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence “of course it is possible, but not in the least probable.” the case is proved beyond reasonable doubt, but nothing short of that will suffice.”

49. My finding is that the gaps in the Prosecution evidence cannot be overlooked and must be resolved in favour of the Appellant. Consequently, I find that the Appellant’s conviction was not safe and I therefore allow the appeal, quash the conviction, set aside the sentence and direct that the Appellant be set at liberty forthwith unless he is otherwise lawfully held and further, that in the event that the Appellant had paid any fines then the same be refunded to him.

50. It is so ordered.

**JUDGMENT DATED, SIGNED AND DELIVERED AT NYAMIRA VIA MICROSOFT TEAMS
THIS 30TH DAY OF MAY 2024.**

W. A. OKWANY

JUDGE

