REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

HCCRA NO. 17 OF 2019

NASHON MANYONGE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[Being an appeal against the conviction and sentence of the Senior Principal Magistrate's Court at Winam (Hon. F. M. Rashid SRM) dated the 25th April 2019 in Winam SPMCCR No. 116 of 2018]

JUDGMENT

The Appellant, **NASHON MANYONGE**, was convicted for the offence of **STEALING BY SERVANT** Contrary to **Section 281** of the **Penal Code**. He was then sentenced to 7 years imprisonment.

1. In his appeal he raised 7 Grounds which can be summarized as follows;

(i) The trial court did not exercise its judicial authority judiciously and impartially: the court was biased against him.

(ii) The prosecution evidence was contradictory and wanting.

(iii) The conviction and sentence was based on the evidence of only one eye and/or key witness.

(iv) The evidence of the key witness was not corroborated with evidence from SAFARICOM, which was the Mpesa service provider or by Dickens, who was mentioned by the complainant.

(v) The trial court neglected the Defence, through which the appellant indicated that he had repaid Kshs 8,000/=; and that therefore the Charge Sheet should have been amended to reflect the true sums owed or lost.

(vi) The trial court should have sought and obtained a pre-sentencing Report, which would have showed that the appellant was a first offender.

(vii) The custodial sentence, without the option of a fine was excessive in the circumstances.

2. When canvasing the appeal, the Appellant submitted that the evidence tendered by the 3 prosecution witnesses was completely inadequate.

3. In particular, he pointed out that whilst the charge sheet indicated that the sum of Kshs 73,000/= had been stolen, the Complainant testified that the amount stolen was Kshs 75,000/=.

4. Secondly, the Complainant is said to have first testified that the Appellant had refunded Kshs 4,000/=, but she later said that the sum recovered was Kshs 8,000/=.

5. It was the submission of the Appellant that if either Kshs 4,000/= or Kshs 8,000/= had been recovered, it would have been necessary to reduce the quantum of the allegedly stolen money by a sum equivalent to the money already refunded.

6. The third submission was that the charge sheet was at variance with the evidence tendered on the aspect concerning the quantum of money that was either stolen or lost.

7. It was the Appellant's contention that there was, therefore, a material contradiction, which ought to have led to an acquittal.

8. The fourth issue raised by the Appellant was that the learned trial magistrate had handled the evidence in such a manner as indicated that she was not a resident of Kisumu town at the time when the incident which gave rise to the case occurred.

9. The Appellant pointed out that on 17th December 2017 there were sporadic post-election demonstrations in Kisumu town, which led to looting of several shops and business premises.

10. According to the Appellant, the main targets of the looters were Mpesa shops and supermarkets.

11. He added, that the Kibuye Market, where the Appellant was stationed, was the worst hit by the lootings.

12. The Appellant described himself as an unfortunate victim of circumstances which were beyond his reach.

13. It was the Appellant's submission that;

"……. by the parties herein entering into an agreement to have the sum lost and or stolen refunded, by having the monthly salary of the appellant deducted, then there was no criminal element left."

14. His view was that the matter ought to have been resolved as a civil case rather than a criminal case. He said that the trial court ought to have advised the parties to go to a civil court, to have their case resolved.

15. On the issue of the sentence, the Appellant recounted that he was a first offender.

16. Secondly, as he did not run away from the problem, but instead offered to repay the money, the Appellant submitted that that was a demonstration of his sincerity. In the circumstances, he believes that the court should have been lenient.

17. He concluded by asking the court to allow the appeal, and to set him free.

18. Being the first appellate court, I have a duty to re-evaluate all the evidence tendered, and to draw my own conclusions.

19. In the process of the said re-evaluation, I am obliged to always bear in mind the fact I did not have the benefit of watching the witnesses when they were testifying.

20. The Appellant was charged with the offence of **STEALING BY SERVANT** Contrary to **Section 281** of the **Penal Code**. The particulars of the charge were that on 17th December 2017, he stole Kshs 73,000/= which had come to his possession in his capacity as a servant of **HANNAH GHAZI**, who was his employer.

21. The Complainant testified that the Appellant had the sum of Kshs 126,000/= at the Mpesa business which was located at Kibuye Market: That was on 17th December 2017.

22. On the next day the Complainant found that Kshs 75,000/= was missing. When she inquired about the missing funds, the Appellant said that he had deposited the money with Dickens.

23. However, Dickens told the Complainant he had not been given the money in issue.

24. When the Complainant confronted the Appellant thereafter, he told her that the money had gone missing from his bag, where he had kept it.

25. During cross-examination, the Complainant said that she had recovered a total of Kshs 8,000/= from the Appellant.

26. PW2, PC SHARON KIKECH, testified as the Investigating Officer. She took over the task of Investigating Officer after the retirement of PC Musoko, who had originally handled the investigations.

27. She testified that the claimant had given Kshs 126,000/= to the Appellant, for use as *"float"* in the Mpesa shop.

28. However, when the claimant later checked on the figures, Kshs 73,000/= was missing.

29. PW2 corroborated the testimony of the claimant, about how the Appellant first alleged that he had given the missing funds to Dickens. However, when Dickens denied ever being given the funds, the Appellant changed his story, saying that the money went missing from a bag where he had put it.

30. PW3, PC MICHAEL OMONDI, was the arresting officer. He testified that it was the Complainant who pointed out the Appellant, at the Complainant's Mpesa Shop, which is at Kibuye Market.

31. During cross-examination, **PW3** said that the Appellant was arrested because he had stolen cash from the Mpesa shop.

32. After **PW3** testified, the prosecution closed its case.

33. Thereafter, the Appellant gave an unsworn Defence. He confirmed that at the material time he was working for the Complainant.

34. He testified that whist he was at work, he heard some noise, and he also saw people running. In the circumstances, he also ran away, to save his life.

35. His story was that he left the shop unattended when he ran away. When he returned, later, he found that the shop had been broken into and money as well as some other items had been stolen.

36. The Appellant testified that he explained to the Complainant about what had transpired.

37. He also confirmed that he had agreed to pay back the whole amount that was missing. He was to repay the money through deductions from his salary.

38. After the incident, the Appellant worked for 2 months before he was arrested.

39. Having re-evaluated the evidence on record, I find that there is concurrence about the fact that the Appellant was an employee of the Complainant. He worked at the Complainant's Mpesa shop.

40. By a letter dated 18th January 2018, the Appellant stated that he would take

"full responsibility of Kshs 73,000/= which was entrusted on me as part of the float of M-pesa dated 01-01-2017."

41. The said letter was produced in evidence as Exhibit 1.

42. The charge sheet cited the sum of Kshs 73,000/=, which is the same amount that the Appellant took responsibility for.

43. Although the Complainant mentioned the figure of Kshs 75,000/=, I find that that does not constitute a material difference.

44. Secondly, and pursuant to the provisions of **Section 382** of the **Criminal Procedure Code**, I find that the slight discrepancy between the charge sheet and the Complainant's evidence, (on the question about the amount of money stolen), did not occasion any failure of justice.

45. Therefore, the said discrepancy cannot lead to the reversal or alteration of a conviction which was otherwise founded upon solid evidence.

46. Pursuant to **Section 281** of the **Penal Code**, the offence of **Theft by Servant** is said to have committed;

"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 ……."

47. The evidence clearly proved that the Appellant was an employee of the Complainant, and that the money in issue came into his possession on account of his said employment.

48. There is no doubt at all that the money belonged to the Complainant.

49. Having given due consideration to the submissions on record, I find that the Appellant failed to demonstrate that the learned trial magistrate was biased against him, as alleged or at all.

50. The evidence was tendered by 3 prosecution witnesses; and not 1 as contended by the Appellant.

51. The Appellant has not explained any aspect of the evidence which would have required the corroboration of the Mpesa service provider.

52. There were no transactions that went through the service provider, which could therefore be verifiable from the records of the said service provider.

53. According to Appellant himself, the money was placed in a bag.

54. And the prosecution never asserted that the money was stolen through some transactions carried out through the service provider. I therefore find that there is no evidence that the service provider could have produced to impact the case in any manner.

55. As regards Dickens, who the Appellant first said he had given the money to, I find that because the Appellant changed his story, the said Dickens was not an essential witness.

56. Had it remained the Appellant's Defence, that he had indeed given the funds to Dickens, it would probably have become necessary to have Dickens testify.

57. After the Appellant said that the funds were lost when the same was in his hands, it is the Appellant who, (by so doing) demonstrated the absence of any nexus between the funds and the person named Dickens.

58. As regards the number of witnesses who testified, the record shows that there were 3 prosecution witnesses.

59. Contrary to the Appellant's assertion, there were no eye-witnesses to the incident. But there is no legal requirement for an eye-witness before a conviction can ensue from a criminal trial.

60. Secondly, it is well settled that it is the quality of the evidence, rather than the multiplicity of witnesses that determines whether or not the case had been proved beyond any reasonable doubt.

61. In this case, the fact that the Appellant was in possession of money belonging to his employer, is conceded. There is also no dispute about the fact that the Appellant *"lost"* a portion of the said funds.

62. When the Complainant testified that the Appellant had, initially, told her that he had given the money to Dickens, that evidence provided the Appellant with the perfect opportunity to bring forth the alleged Defence about the post-election looting.

63. However, the Appellant did not suggest to either the Complainant or to any of the other 2 prosecution witnesses, that the money was lost through looting that took place at the Complainant's shop at Kibuye Market.

64. When the Appellant later, (in his Defence) introduced the issue of the alleged looting, I find that the learned trial magistrate was justified in concluding that the said line of Defence was an afterthought.

65. The fact that Kisumu had experienced some looting in December 2017 cannot, of itself, constitute a Defence for persons charged with offences such as Theft.

66. If the Appellant wished to have the trial court take Judicial Notice of the circumstances prevailing on 17th December 2017, at the Complainant's Mpesa shop at the Kibuye Market, he was obliged to have provided evidence that would have constituted a solid foundation upon which the court could have drawn appropriate conclusions.

67. In this case, I note that the Complainant checked on her Mpesa shop on the day after, and the Appellant was at his place of work. It is then that the Complainant noted that a part of the money was missing.

68. The fact that the business was operating even on the very next day, appears to be wholly inconsistent with the Appellant's contention that;

"The main targets and business persons affected and or targeted by the looters were M-PESA shops and supermarkets. Kibuye Market, where the Appellant was stationed and or worked at, was worst hit by the said post election skirmishes and or demonstrations and thereafter lootings."

69. Surely, if things were that bad, it would even have been obvious to the Complainant. And the Appellant would not have needed to tell untruths, about how he had allegedly deposited the missing funds with Dickens.

70. The assertions put forward by the Appellant were not of such common notoriety that should have led the trial court to take judicial notice about them.

71. On the question of the amount of money recovered, the evidence shows that the Appellant confirmed having worked for 2 months after the incident. The Complainant testified that she recovered Kshs 4,000/= in December 2017, and a further Kshs 4,000/= in January 2018. Therefore, the total sum recovered was Kshs 8,000/=.

72. The fact that the said amount had been recovered did not imply that the same had not been stolen, in the first instance.

73. Even when there had been a recovery of everything which had been stolen, the offender should still be convicted for the offence.

74. The fact that recoveries had been made, and the circumstances in which the said recoveries had been made are only relevant for the purposes of the sentence.

75. The recovery of stolen items cannot be the basis for an acquittal.

76. Furthermore, the recovery of a portion of the stolen items ought not to lead to the amendment of the charge sheet, to reflect the amounts that had not yet been recovered. The fact that some of the stolen items had been recovered either before the offender was charged or even during the trial, does not alter the fact about the quantity of the items that had initially been stolen.

77. In the result, there is no merit on the appeal challenging the Appellant's conviction. Therefore, I uphold the said conviction.

78. As regards the Sentence, **Section 281** provides that the offender is liable for imprisonment for 7 years. That means that the maximum penalty that could be imposed upon the Appellant was imprisonment for 7 years.

79. In this case the Appellant was sentenced to 7 years imprisonment. Whilst the said sentence was lawful, I find that the trial court did not cite any reasons which could have justified the imposition of the maximum penalty in this case.

80. As a general rule of practice, a first offender would normally not be given the maximum prescribed sentence.

81. Secondly, although it is not mandatory that in each case the trial court must first seek and obtain a pre-sentencing Report about the convict, best practice requires the trial court to record reasons for the particular sentence it is handing down.

82. Ordinarily, the prosecution would provide the trial court with a record of the convict's previous criminal record. In this case, there is no indication at all about any past criminal record, for the Appellant. Therefore, I find no basis upon which the trial court could justify the maximum sentence prescribed.

83. In the absence of the Appellant's previous criminal record, the Appellant should have been treated as a first offender.

84. I find no aggravating factors that would justify the maximum sentence. Therefore, I find that the sentence is excessive in the circumstances.

85. Accordingly, the appeal against the sentence is allowed. I set aside the sentence of 7 years imprisonment, and I substitute it with **FOUR (4) YEARS** Imprisonment. The said sentence is informed, in part, by the fact that the Appellant made a choice to say nothing in mitigation.

DATED, SIGNED and DELIVERED at KISUMU This 28th day of January 2021

FRED A. OCHIENG

JUDGE

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