REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CRIMINAL APPEALS NOS 81 & 82 OF 1990 (CONSOLIDATED)

ABRAHAM WILLIAM MUDOOLA

MAKO GILBERT SHISANYA……..APPELLANTS

VERSUS

REPUBLIC…….....……RESPONDENT

(From original conviction and sentence, J O Magolo, Esq Ag R M, in Criminal Case No 950 of 1986 of the Resident Magistrates Court at Kwale)

JUDGMENT

I have consolidated the appeals of Abraham William Mudoola and Mako Gilbert Shisanya. They first appeared before a 1st Class District Magistrate on the 9th July 1985, when they were charged on a total of 3 counts, the first count charging them jointly with the offence of stealing by servants contrary to section 281 of the Penal Code, the 2nd count charging Mako alone with stealing by servant contrary to section 281 of the Penal Code, and the 3rd count charging Abraham with stealing by servant under the same section. At the end of their trial they were acquitted on counts two and three but were both convicted on the 1st count, and were sentenced to prison terms. They now appeal against both the conviction and sentence. The 1st count which both of them were convicted alleged that on the 4th day of July 1985 at Msambweni Development Co Ltd, in Kwale District, within the Coast province, being employees of Msambweni Development Co Ltd, they jointly stole Shs 10,000/- belonging to the said company. During the hearing of the appeal before me I did not find it necessary to call upon Mr Wafula who represented the appellants to argue the appeal, and when I called upon the learned State Council Mr Metho to argue his case, he conceded the conviction of the two appellants was not supportable.

The first main defect is the manner in which the trial of the two appellants was conducted. As I have said, they first appeared before Mr Mganga on the 9th July, 1985 and on the 22nd January, 1986, their trial opened before that magistrate when the evidence of the three main witnesses for the Republic were taken. Those witnesses were Joseph Mwanga Njoya (PW 1) a director of Msambweni Development Company, Elly Mutala Kimanzi (PW 2) and Thomas Charo Samwel (PW 3), a cashier with Msambweni Development Company. The evidence of these three witnesses were taken by Mr Mganga between 22nd January, 1986, and 14th August 1987.

Thereafter the hearing was adjourned and it would appear from the record that Mr Mganga was unable to continue with the trial and the case was taken over by Mr Magolo, an Acting Resident Magistrate. He first appears on record on 13th January 1988 when he fixed the hearing for 5th April 1988. On the 5th

April 1988 he adjourned the hearing to 28th June 1988 when the 4th witness Joash Wendo, Kaleba Mwasia (PW 5), Makenzie Mweu (PW 6) and other witnesses subsequently gave evidence before him. It is clear that Mr Magolo took over the hearing of the case in accordance with the provisions of section 200 of the Criminal Procedure Code. The magistrate was entitled to take over under section 200(1) of the Code, but in doing so he was duty bound to comply with section 20083) of the same Code which provides:-

“Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand any witnesses be resummoned and reheard, and the succeeding magistare shall inform the accused person of that right”.

In taking over the trial as he did, Mr Magolo was under duty to inform the two appellants that they were entitled to have the previouis witnesses who had testified before Mr Mganga resummoned and retestify before him and the Magistrate was under duty to record that he had so informed the appellants. The record of the Magistrate is wholly silent as to whether or not he informed the appellants of this right, and I must take it in favour of the appellants that he did not do so. The provisions of section 200(3) CPC are meant for the protection of accused persons and they must be rigorously complied with. Dealing with the importance of that section, the Court of Appeal consisting of Madan, Kneller JJ A, (as they were then) and Nyarangi said in the case of *Peter Karobia Ndengwa v RCA* 125 of 1984 at p. 3:-

“Section 200 is a provision of the law which is to be used very sparingly indeed, and only in cases where the exigencies of the circumstances, not only are likely but will defeat the ends of justice, if a succeeding magistrate does not, or is not allowed to adopt and continue a criminal trial started by a predecessor owing to the latter becoming unavailable to complete the trial.

Section 200 is not to be invoked where, as seemingly in the instant case, such a half-heard trial is a short one, it could be conveniently started *de novo* because the prosecution witnesses are still available locally, and passage of time when the trial first commenced and another magistrate taking over almost midway, is so short so as not to cause or produce any accountable loss of memory on their part, whether actual, presumed or pretended, to the prejudice of either the prosecution or the accused.

No rule of natural justice, no rule of statutory protection, no rule of evidence, and no rule of common sense is to be sacrificed, violated or abandoned when it comes to protecting the liberty of the subject. He is the most sacrosanct individual in the system of our legal administration.

It could be also argued that the salutory and time honoured formular that the trial magistrate being the best person to do so, he should himself see, hear, assess and gauge the demeanour and credibility of witnesses. It has been and will be so in the other cases that will follow. In this case, however, the second magistrate did not himself see and hear all the prosecution witnesses even though he said that he carefully “observed” the evidence given by the prosecution witnesses. He therefore was not in a position to assess the personal credibility and demeanour of all the witnesses in the case. A fatal vacuum in this case, in our opinion.”

It is clear that Mr Magolo violated the statutory protection accorded to the appellants by section 200(3) CPC, and like the judges of the Court of Appeal I would say this was a fatal vacuum in the prosecution’s case. Clearly provisions of this section ought to be exercised sparingly and as is stated in the *Ndengwa case* (supra) there is a salutory and time honoured formular that the trial court being the best person to do so, should itself see, hear, assess and gauge the demeanour and credibility of witnesses. Important witnesses such as PW 1, PW2, and PW3 gave evidence before Mr Mganga and Mr Magolo could not have been in a position to assess and gauge their demeanour and credibility. It was the case for the

appellant Mako that he had given the money charged against them to PW 3 to go and bank and it was the case of both appellants that PW 3 had a grudge against them because when the two of them were employed by the company, PW 3 had already been there for a long time and was not happy with them because he in effect considered them his juniours. PW 3 of course denied all these things and this made it even more important for Mr Magolo to come to a decision on the issue of whether he believed PW 3 as opposed to the two appellants. In my view the appeals of the two appellants would have succeeded on this ground alone.

But even on the evidence itself it was the duty of the prosecution to prove the charge against the two appellants beyond any reasonable doubt and on the evidence brought by the prosecution I think that the appellants ought not to have been put on their defence. Some money was found missing from the company and inspector Charles Chege (PW 8) who investigated the case merely stated in his evidence that it was reported to him that the money was not in the company's bank account. No statements from the bank account were produced by the prosecution to show that money had not been deposited into the account of the company and as I have said, the appellant Mako contended that he had given the money to

PW 3 to go and bank. PW 3 denied that he was given the money, but it was still essential for the prosecution to prove that the money had not been banked. Even the manner in which PW1 and PW8 investigated the case left a lot to be desired, they merely breaking into a safe containing money and apparently adding up figures in various receipt books and charging the appellants with the theft of the difference between what they found in the receipt books and the actual cash found in the office. There was no evidence at all that PW 1 and PW 8 had any elementary knowledge of accounting. I have said enough to show that the convictions of these two appellants cannot be sustained, and in my view the learned principal state counsel was totally right in conceding the appeal.

I quash the convictions recorded against the appellants, set aside the sentences imposed on them and order that they be released from prison forthwith unless they be held for some other lawful cause.

Dated and Delivered at Mombasa this 12th Day of October, 1990,

R.S.C. OMOLO

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JUDGE

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