



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NO 248 OF 1994

HILLUM MACHARIA KAMAU.....APPELLANT

VERSUS

REPUBLIC.....REPUBLIC

JUDGMENT

Appealing against both conviction and sentence of the trial magistrate at Nakuru the appellant prays in his grounds of appeal that the evidence given against him was contradictory, that the magistrate relied on inadmissible documents and rejected the appellant's defence.

His appeal was argued on his behalf by Mr. Kibera of M/S Mathenge and Muchemi advocates on the 22/3/95. The state was represented by Mr/ Maari.

This court notes that the appellant was charged with the offence of: Stealing by person in the public Servers contrary to section 280 of the Penal Code.

Particulars of the offence: On diverse days between 27/1/89 and 26/4/91 at the National Bank of Kenya Nakuru District of the Rift Valley Province being a person employed in the public service as a clerk in the Foreign Bills Department stole 43,880 case US dollars, US travelling cheques, 4,540 cash Deuche Marks, 230 cash Sterling Pounds, 1,570 cash French Francs, 800 French Francs travellers cheques, 300 cash Swiss Francs and 200 Swiss Francs and travellers cheques equivalent to Kshs. 1,119,994/40 the property of the said National Bank of Nakuru which came into his possession by nature of his employment. The appellant pleaded not guilty.

This court would further note that the National Bank of Kenya is not an institution that would generally fall under the definition of a "Public Service"

under section 280 of the Penal Code It thus reads:

"If the offender is someone employed in the Public Service and the thing STOLEN is the property of the Government or came into the possession of the offender by nature of his employment he is liable to imprisonment for seven years."

The appellant was employed by the National Bank of Kenya and NOT by the Government of Kenya. Further the amount of money stolen did not belong to the Government of Kenya and as such the prosecution in the lower courts has failed to establish this fact.

Employment in the Public Service is any person employed by the Government of Kenya and the 'thing' or item stolen must belong to the Government of Kenya or come in possession of such Government employee by nature of such employees employment.

This aspect of appeal was never raised during the appeal nor at the lower courts level. Because of this technicality, this appeal must succeed. That the appellant was charged under the wrong section of the Law. He ought to have been charged under the offence of stealing by clerk and servant contrary to section 281 of the Penal Code.

What if per chance the offence charged with was under section 281 p.c. what would be the permit of the appeal" The prosecution required to prove that the appellant was the one who played a part in dealing with certain documents to prove that he stole. The documents were taken to the document examiner but were not all submitted as required namely, the document examiner required the original documents to conduct its investigations. The prosecution failed to provide him these documents this proving the prosecution case fatal as far as the documentary evidence is concerned.

The appellant was said to be working at the foreign exchange department when in the cause of his employment some foreign exchange monies were stolen. This is said to have been committed by the appellant. The only way the prosecution could prove its case was through the documentary evidence which was inadequate.

His counsel argued on the issue of the document examiner. He relied on the authority of Wanaina versus Republic 1978 KLR 12 and the case of Peter Ngari versus Republic unreported concerning the aspect of the handwriting expert.

He also raised the issue of heresay evidence relied by the magistrate to support his case he gave the authority of Burunyi and another verus Uganda 1969 E.A. 128 and Njuguna versus Republic 1958 EA 773.

The prosecution informed the court that this case was poorly investigated and it did not establish that anything was stolen. He noted the discrepancies and agreed with the appellant counsel.

This court would have ruled that the original documents were essential to this case and ought to have been made available to the prosecution in order to prove their case.

This appeal is allowed on technicalities namely that the appellant was charged with wrong charge. The court thus quashes the conviction sets the sentence aside.

The appellant is at liberty unless otherwise lawfully held.

Dated and delivered at Nyeri this 5th day of April, 1995

M.A ANG'AWA

JUDGE



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