Case Number:	Criminal Appeal 66 of 1998
Date Delivered:	02 Nov 1998
Case Class:	Criminal
Court:	High Court at Mombasa
Case Action:	Judgment
Judge:	Andrew Isaac Hayanga
Citation:	STEPHEN C. MWANGI v REPUBLIC [1998] eKLR
Advocates:	Miss Njeru for the respondent; Mr. Bwonwonga State Counsel
Case Summary:	**Criminal Law-theft by servant**-appeal-conviction based on circumstantial evidence-whether there was sufficient evidence to uphold a conviction-Penal Code section 281
Court Division:	-
History Magistrates:	-
County:	-
Docket Number:	-
History Docket Number:	-
Case Outcome:	-
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

Criminal Appeal 66 of 1998

STEPHEN C. MWANGI.....
APPELLANT

versus

REPUBLIC.....
RESPONDENT

(From Original Conviction and Sentence in Criminal Case No.4083 of 1996 of the Snr. Resident Magistrate's Court at Mombasa - Mrs. L. Achonde, SRM)

JUDGEMENT

Stephen Mwangi Chege the appellant was charged with theft by servant contrary to S.281 of the Penal Code in that on diverse dates between 9-10-96 and 8-11-96 he in Harbour House along Moi Avenue in Mombasa he being servant to Maersk (K) he stole from the said company KShs.938,138/30 which came to his possession by virtue of his employment.

Evidence against him was given in the main by PW.1 AZIM SADRUDIN AMASHI an auditor with Coopers and Lybrand. Their company was called in by PW.3 UPALAPATI GURU PRASAD, Finance and Systems Manager of the complainant employer company M/S Maersk (K) Ltd. He is responsible for financial activities of the company and according to him the appellant was cashier/accountant assisting him and was responsible for collecting cash, cheques, from customers and issuing receiptsthereto and for banking them at the ABN AMRO BANK. There were 4 accounts at the bank, Freight account, Kenya Shillings Account, a dollars Account and Maersk (K) Ltd. Account. According to PW.3 the appellant was required to make deposit into the Freight and Kenya Shillings Account and for any withdrawals of which the director, Finance Manager and PW.3 were the signatories. Of the receipts from the books they used, the original would go to the customer, the first duplicate to documentation Department and one would be retained at the accounts Department. All collected cash was to be banked the next day but accused would prepare the branch pay-in-slips and pass them on to the messenger boy to do the physical banking then the appellant would check it.

Problem started when the appellant started to make late banking around June/July 1996. He was mixing cash from Freight Account Receipts, in Petty Cash and not banking it. He was asking for co-operate account and his books became late in balancing. They used an average of KShs.200,000/- in ordinary expenditure. In October he discovered receipts not banked and discovered through reconciliation he carried out that KShs.940,000/- was missing. PW.3 has a key to the safe. On being asked appellant said he had used the money to pay old debts in Nairobi and used the rest to live beyond his means and that he would attempt to repay, which he did by depositing a log-book for motor vehicle KUR 785 and two title deeds relating to two plots of land as guarantee for his promise to pay. He PW.3 requested the audit to investigate to establish whether money received by the accused was banked or

not. He said in cross examination that appellant had lOUs to present. He also said that documents relating to IOUs were not produced in court and the bank statements were not attached to the audit report. There was some money banked on 12-11-96 but the witness could not say whether it was Petty Cash or Freight Cash.

PW.l said that he conducted audit check relying on 3 main records receipts for the period in question, the bank statements and paying in slips. The receipts covering 9-10-96 up to 9-11-96 were given to the auditor by PW.3 and he relied on the said receipts to compile the audit report which he presented as MFI.l. In cross examination he said he was not availed any payment vouchers and did not investigate their petty cash account. He said he had not checked the audit conducted prior to the subject audit and that he believed that it was only Kenyan shilling account that was to be audited. He did not check December transaction but he said that owing to the late banking amount received in November would have been banked in December account, but then he did not audit December as the information was not given to him.

PW.2 Moses Durit only explained that the appellant with Financial Manager dealt in cash and that on 12-11-96 the Financial Manager PW.3 informed him that about 900,000/- was missing and that the appellant asked for time to check. He also said customers could pay cash "Directly to the cash Department," and out payments also would be by the same cash Department.

The Appellant gave a sworn statement confirming what PW.3 had said about his duty but adding that he was also in charge of Petty Cash and that sometime he would collect cash in the evenings and put it in his cash box. Of the amount received they would spend KShs.400,000/- as outgoings and KShs,150,000/- as IOU. He said on the day the box was opened KShs.400,000 was found in it. He said paying outs included lOUs, salaries in cash, port expenses, stationery and there would be receipts for those. The title Deeds he said were for his father in law to buy a matatu and he thought PW3 must have got it from his drawer. The learned Senior Resident Magistrate found that circumstantial evidence showed that the appellant stole the money and convicted him of it and sentenced him to 2 years on 9-4-98.

The Appellant has appealed against this conviction and sentence on 10 grounds in his amended grounds of appeal argued by Miss. Njeru, his learned advocate. Miss Njeru attacked the judgement on a broader argument on the grounds which I can summarise thus, that the prosecution did not prove its case beyond reasonable doubt, that she imported unproven matters into the judgement, ignored Defendant's defence.

Secondly on evidence she attacked the admission of copies of receipts, and reliance on PW.2's evidence because he was to her, as a suspect but I must state straight away that there is no such evidential status under the evidence Act that qualifies treatment of a suspect. What the appellant's advocate meant was perhaps an accomplice evidence but even if PW.2 was to be an accomplice the learned magistrate was not to be precluded from relying on it even from convicting on it. Our S.141 of Evidence Act says:-

"An accomplice shall be a competent witness against an accused person and a conviction shall not be illegal merely because it proceeds upon the uncorroborated evidence of an accomplice",

So Miss Njeru's reference to a suspect's evidence cannot be taken to affect evidence. She also attacked the circumstantial evidence the magistrate relied on.

The State counsel Mr. Bwonwonga supported the conviction. He said other accounts had no problem

and that appellant had admitted using the money to pay his debts anyway. Banking was not done in 2 days as was stated by PW3. He said the Burden on the prosecution was not shifted and he supported the reliance on circumstantial evidence by the Magistrate. He Claimed that Receipts were original under S. 65 (4) of the evidence Act.

I have narrated, the evidence and read the judgment of the learned Senior Resident Magistrate. It is a careful Judgement she rightly based her conviction on Circumstantial evidence as she saw it since the case was devoid of direct evidence. She found correctly that no one saw accused pinch the money. She set out the well known principle of circumstantial evidence which the Court of Appeal in SEMEON MBELLE V. R, CR. AP. NO.45 OF 1984 called the hallwed words laid down 50 years ago in R. v, KIPKERING ARAP KOSKE [1949] 16 EA.CA 135 that the inculpatory facts must be -

"Incapable of explanation upon any other reasonable hypothesis than that of the guilt of the accused person and incompatible with his innocence."

Again the learned Senior Resident Magistrate in a fairly well reasoned judgement set out the 5 inculpatory facts she relied on. The first inculpatory fact was that the money was received vide receipts exhibited 1-20 and that all that money was never banked by the accused. The others 4 I have noted and considered.

It is at this point with respect the careful judgement by the Learned Resident Magistrate parted ways with the direction to conclusive proof,

There was never evidence that appellant wrote out those receipts hence there was never evidence of receipt. PW.I was given those receipts by PW.3. PW.3 said the receipt books were in his custody in a store the key to which was with the secretary and when they wanted a receipt they got the key and get it. PW.3 said:-

At any time we use one book at a time. The Original receipt would *go* to the customer, the first duplicate to the documentation department and one retained in the accounts department. All cash collected was to be banked the next day by the accused. The accused would prepare the pay in slips and pass them on to the Messenger boy, who would do the physical banking ....,."

There is nowhere where it is said that the appellant prepared these receipts on receipt of the money. PW.3 further said of the copy receipts that were exhibited*:* ~

"There are copies of receipts by US givencustomers after payments when transactionis completed.... ,"

This leaves the question unanswered as to who is "US" who prepared the receipts on completion of the transaction. He produced them MFI 1-20.

Appellant in his sworn defence said -

"Whenever I collected cash from customer at my desk I would put in the cash box in my drawer and put the cash box in the safe in the evenings"

There is no evidence of who made those receipts. The law of theft is statutory it can only be committed under S.268 of the Penal Code and that prescribes two modes to the Commission of the offence. First, it can be committed either by a taking with a fraudulent intention or secondly by a

conversion. And it is by a conversion that the charge here proceeded. It provides that accused received money innocently on account of his master and misappropriated it or converted it to his own use fraudulently. It is a requirement of law of theft by servant that there must be proof that sum of tangible money had been received by the prisoner and had been dishonestly appropriated by him. Here there is no evidence of such receipt and the evidence on receipts which may have been written if that happened by some other persons to show they received the money and given it in turn to the accused is missing. Then there are several exculpatory factors. First it is in evidence that the appellant paid out from the money received certain expenses that were not shown in evidence such payments as of salaries, money paid to the use of the General Manager, as his cash requirements, and money used in running the office like stationery which the appellant said amounted to Kshs,400.000/- p.m. These were not touched by the audit report and yet inspite of appellant's raising them in his defence there was no rebutting evidence offered by the prosecution. The audit was not done after checking all the relevant documents like IOUs, or the money which was in the safe. This money which PW3 says was negligible, but appellant says it was 400.000/- was not audited. This shows that the audit report was not an accurate report. The report according to the auditor PW1 was based on receipt copies and pay-in-slips. Receipts in my judgment cannot be relied on as there is no evidence that they were made by accused so that reasonably the bank pay-in-slips, and again what that can show is that soma money was received some of it banked others not yet and without evidence of such receipt even the balance cannot be made out. A conviction cannot be based on the allegation base on the pay-in-slips showing has amount not banked when one cannot prove how much was available for banking from the amount received. The audit is based on the dates between 9/10/96 to 10/11/96 yet there's evidence which PW1 accepted that late banking could mean that what was intended to be banked in November could be late by one month or even was late then yet there was no audit in December 1996. Yet in December account not audited. This leaves a balance and therefore a doubt.

PW3 embarked *on* a Bank reconciliation without the accused and seemed to have determined the loss before the audit. Then there is the question of 2 Title deeds. Appellant says they belonged to his father in laW and he had kept them with a view to soliciting money for purchase of matatu and his father-in-law DW.l said. The PW3 says they were security for payment brought by his wife ..... he says he retained title deeds and motor vehicle log book in his safe. Now the curious fact is that PW3 did not execute any document with the wife of the appellant to show that he was taking in a third party's

Title Deeds on account of someone else’s debt. Or if it was to show the guilt of the appellant, why not make him write it so as to show the reason why the Title Deed was being left with him. This strains the credibility of PW3 in my mind to the extent that he cannot be believed by this court. Beside these Title Deeds belonging to DW1 should not have been even produced in evidence if the court had had regard to sections 138 and 139 of the evidence Act:-

"138, No witness who is not a party to the suit shall be compelled to produce his title deeds to any property or any document in virtue of which he holds any property as pledgee or mortgagee, or any document the production of which might tend to incriminate him, unless he has agreed in writing with the person seeking the production of such deed or document, or with some person through whom he claims, to produce them.

"139. No one shall be compelled to produce documents in his possession, which any other person would be entitled to refuse to produce if they were in his possession, unless such other person Consents to their production."

Then lastly there was evidence that money was in the box which money was not accounted for and yet the key to the box was held by two persons, PW3 and the appellant. Appellant giving the figure as

Kshs.400.000/- and PW3 saying off handedly that it was negligible without indicating how much it was. These points derogate from the "inculpaltoriness" of the evidence against the appellant. And raise the inference that all the facts are not inconsistent with his guilt and that quite appreciable and believable evidence point to his innocence,

I think with this analysis I must allow the appeal, quash the conviction and set aside this sentence. I have not discussed admission of the copies of receipts, but I disagree with this state Counsel in saying that S. 65(4) applies here.

Dated at Mombasa this 2nd Day of November, 1998.

A.I.HAYANGA

JUDGE

Judgement read in open court to Mr. Ng'eno State Counsel and

Miss Njeru - Advocate for Appellant.

A.I HAYANGA

JUDGE