**Kwaka & another v Republic (Criminal Appeal 42 of 2022)**
**[2022] KEHC 16963 (KLR) (29 December 2022) (Judgment)**

Neutral citation: [2022] KEHC 16963 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT KISUMU**

**CRIMINAL APPEAL 42 OF 2022**

**RE ABURILI, J**

**DECEMBER 29, 2022**

**BETWEEN**

**PATRICIA AWUOR KWAKA ..... 1ST APPELLANT**

**EUNICE ATIENO AWALA ..... 2ND APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

***(Being an appeal from the conviction and sentence of F Rashid P M in original Winam PMC Criminal Case No 580 of 2020 delivered on August 5, 2022)***

## JUDGMENT

1. The appellants herein were charged with the offence of stealing contrary to section 268(1) as read with 275 of the *Penal Code*. The particulars were that on diverse dates between December 11, 2019 and July 14, 2020 at Equity Bank, Ang'awa Street in Kisumu Central within Kisumu county by virtue of being officials of Better for Tomorrow Youth Group, they stole money Kshs 375,360/-, the property of Better for Tomorrow Youth Group.

2. The appellants denied the charges and evidence was adduced as follows

3. PW-1 Maurine Akinyi Oluoch testified that she was the complainant's secretary and their group used to save money in their bank account at Equity Bank. She recalled that on July 30, 2020, they were to share out the money but could not because the appellants; treasurer and chairlady respectively, who did not attend the meeting could not be traced either on their mobile phones or their physical residences. They reported the matter to the police station and were referred to the bank where they obtained their bank statement showing withdrawals had been made on diverse dates amounting to Kshs 375,360/=. She stated that such withdrawals could only be made in the presence of 3 officials and supported by group minutes although in the instant case, there were no minutes to support any withdrawals and the fact that she had to be present when making withdrawals.

4. PW-2, Violet Wanjiku testified that the group members met at her house on July 23, 2020 and agreed to share out the money held by the group on July 30, 2020. That on the said date, the appellants herein did not attend the meeting and that when the chairlady was called on phone, it was switched off. They proceeded to her house and did not find her either. On August 1, 2020, they proceeded to the bank and found out that Kshs 375, 360 had been withdrawn by the appellants without their knowledge. There had been no minutes authorizing the withdrawals.

5. PW-3, PC Wilson Kemboi, the investigating officer testified that he arrested the appellants after investigating the withdrawal of the money without the authority of the group members.

6. PW-3, Naftali Ojina Ayoro testified that he mentored the group and on July 23, 2020, they had planned to share out their savings but the appellants were not present in the meeting. He later found that the money had been withdrawn without the members' consent.

7. The appellants were subsequently put on their defence and they opted to give sworn testimonies.

8. DW-1, Patricia Awuor testified that she was the treasurer of the complainant group but denied withdrawing the money. She stated that witnesses lied against her. She admitted being signatory to the bank account for the group. DW-2, Eunice Atieno admitted that she was the charlady of the complainant group and a signatory to the group's bank account but denied withdrawing the money. She stated that witnesses told lies. On being cross examined, she stated that she had been chairlady of the group for seven years and that before the incident, they used to withdraw money

9. After considering the evidence, the trial magistrate found the appellants herein guilty of the offence as charged and she convicted them and sentenced each to serve 3 years imprisonment prompting the instant appeal which anchored on the following grounds:

    a. That the learned trial magistrate erred in law and fact in convicting the appellants based on the wrong facts and law and or on charges that did not exist in law.

    b. The learned trial magistrate erred in law and fact in convicting the appellants while basing the conviction on unproven offences.

    c. The learned trial magistrate erred in law and fact in failing to appreciate the fact that the nature of the purported criminal charges were in actual sense civil in nature.

    d. The learned trial magistrate erred in law and fact by entertaining a charge that was defective and non-existent under the *Penal Code*.

    e. The learned trial magistrate erred in law and fact as the evidence was at variance with the charge facing the appellants.

    f. The learned trial magistrate erred in law and fact in convicting the appellants on the evidence that was not proved beyond reasonable doubt.

    g. The decision of the learned trial magistrate was against the weight of the evidence and that she did not appreciate the evidence from both parties.

    h. The sentence meted out against the appellants was unwarranted and excessive in view of the existing evidence.

10. The appellants also filed their supplementary grounds of appeal raising the following grounds:

a. That the learned trial magistrate erred in law in placing upon the appellants the onus of proving that they had not executed the minutes employed in withdrawing monies and thereby wrongfully shifted the burden of proving the case from the prosecution to the appellants.

b. The learned trial magistrate erred in law in relying on as evidence and convicting the appellants on the strength of documents that had not been properly produced nor proven before the court.

c. The learned trial magistrate erred in law and fact by failing to properly appreciate, process and evaluate the evidence placed before her and as a result arrived at a wrong and unjustifiable verdict.

d. The learned trial magistrate erred in law in sentencing the appellants without considering the availability of an alternative punishment and the fact that the appellants were pronounced first offenders and therefore imposing a sentence that was excessive in the circumstances.

11. The appeal was canvassed by way of written submissions. The appellants submitted that the minutes allegedly used to withdraw the money were produced in court by PW-3 as having been obtained from the bank and not in the appellants' possession.

12. It was further submitted that the money was pooled by the group members with a view of sharing out amongst themselves. That therefore, the appellants also had shares and the failure by the respondent to call other members to confirm if they had unrefunded shares was fatal to the case.

13. Counsel for the appellants submitted that the prosecution failed to discharge its burden of proof by failing to call representatives from Equity Bank and the Department of Social Services to proof that the withdrawal was made on the strength of the minutes presented.

14. It was submitted that the respondent failed to proof that the minutes were forged since a mere look at the signatures on the face of the document would not proof forgery. It was also submitted that the complainant failed to prove that the group lost money.

15. It was submitted that the onus of proving the appellants' guilt is on the respondent and not on the appellants which was not done to the required standard.

16. On the issue of sentencing, the appellants submitted that the trial court did not appreciate the fact that the appellants were first offenders and by imposing the maximum sentence, the court acted on wrong principles.

17. In support of their submissions, the cases of *Jecinta Muthoni Kimani Vs Republic* (2017) eKLR and *Tonny Kiprono Ngetich v Republic* (2019) eKLR have been cited.

**Analysis and determination.**

18. This being a first appeal, I am guided by the guidelines set by the Court of Appeal in *Kiilu & Another v Republic* (2005)1 KLR 174, where it was stated that:

> " An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions."

19. The appellants were charged under section 268(1) of the *Penal Code* which provides that:

> "A person who fraudulently and without claim of right takes anything capable of being stolen, or fraudulently converts to the use of any person, other than the general or special owner thereof, any property, is said to steal that thing or property."

20. Section 275 of the *Penal code* is the penalty section.

21. The charges facing the appellants sprung from an alleged withdrawal of money banked with Equity Bank Limited by the complainant. The appellants were office bearers-treasurer and chairlady respectively and signatories to the complainant group account. The witnesses testified that they did not sanction any withdrawal and PW-1 categorically stated that ordinarily, she had to be present at the time of withdrawal and the minutes to that effect presented. Her evidence was that the minutes presented in support of the withdrawal were not prepared by her.

22. The witnesses further testified that their suspicion arose when during the meeting of July 30, 2020, the appellants were missing and their phones switched off. Efforts to trace them to their houses bore no fruits. The witnesses' visit to the Department of Social Services, the bank and the police station showed the money had been withdrawn over a length of time without the knowledge of the group.

23. On the contention that the prosecution did not prove their case to the required standards, it is a cardinal principle of criminal prosecution that a charge has to be proved beyond reasonable doubt. This position is fortified by article 50 of the *Constitution* providing for the presumption of innocence of every accused person until proven guilty and several judicial pronouncements. In the case of *Republic v Gachanja* [2001] KLR 425 it was held that:

> "It is a cardinal principle of law that the burden to prove the guilty of an accused person lies with the prosecution. An accused person assumes no burden to prove his innocence. Any defence or explanation put forward by an accused is only to be considered on a balance of probabilities.

24. This principle of law was reiterated by the Court of Appeal in *David Muturi Kamau v Republic* (2015) eKLR, where it was stated that:

> "The burden of proof lies with the prosecution and that proof is beyond reasonable doubt."

25. Having considered and reassessed the evidence adduced in the trial court both for the prosecution and the defence, there was no dispute that the money was withdrawn from Equity Bank and that the said money belonged to the complainant group "Better for Tomorrow Youth Group." Further, it was never controverted that the appellants withdrew the money without the consent of the other group and that there were no minutes in support of the withdrawal. The bank statement produced in court clearly showed that there were withdrawals of money from the group's bank account.

26. I have also considered the defence tendered by the appellants which was to the effect that they never withdrew the money. They stated that the witnesses lied. I find those defences to be mere denial and does not dispel the fact that the appellants withdrew the money without the consent of fellow members. This is so because the appellants herein were bank account signatories for the group, being the treasurer and chairperson respectively and they never raised any issue that money belonging to the group had been irregularly or illegally withdrawn from the account without their knowledge.

27. I find that there was sufficient evidence that the appellants who were officials of the group withdrew the money knowing very well that they were not withdrawing it for the benefit of the membership of the group. That in itself was fraudulent withdrawal and was done in breach of trust bestowed upon the appellants by virtue of the offices that they held. The assertion that the appellants also had a stake in the money through their savings is no defence and in no way justifies the withdrawal without the group's sanction. In any event, the appellants did not justify that the money they withdrew was their portion owed to them by the group by right.

28. It is not lost to this court that however weak a defence may be, the duty of proving a charge still rests with the prosecution and it is not safe under any circumstances to convict on the basis of a weak defence rather on the strength of the prosecution's case. I find the prosecution's evidence to be cogent and was not discredited by way of cross examination. I do not find anywhere on record instances where the trial court shifted the burden of proving the offence to the defence as posited by the appellants.

29. I therefore find that this line of argument that the trial court shifted the burden of proof and or the offence was not proved, is without merit and is hereby rejected.

30. The appellants also complained that the failure to call representatives from Equity Bank was fatal. On this contention, section 143 of the *Evidence Act* provides;

> "No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact."

31. The import of the above provision is that the prosecution has the liberty to choose which witnesses to call and there is no number required to prove an offence provided the witnesses who testify are able to prove the offence. In this case, ample evidence was adduced showing that the appellants acted without the group's authority in withdrawing the money from the bank. The bank statements are documentary evidence and speak for themselves.

32. This finding is fortified by the decision in *Joseph Kiptum Keter v Republic*[2007] eKLR where the court of appeal held that:

> "…Bukenya v Uganda [1972] EA 549 clearly states that the prosecution is not obliged to call a superfluity of witnesses, but only such witnesses as are sufficient to establish the charge beyond any reasonable doubt."

33. In the circumstances, I find and hold that failure to call representatives from the bank was not fatal to the prosecution's case.

34. On the sentence imposed, the general penalty for stealing is provided for under section 275 which enacts that:

> "Any person who steals anything capable of being stolen is guilty of the felony termed theft and is liable, unless owing to the circumstances of the theft or the nature of the thing stolen …some other punishment is provided, to imprisonment for three years.[emphasis added]

35. From the record, the trial court after considering the mitigation handed down a 3-year sentence which is contested by the appellants as being excessive given the fact the appellants were first time offenders.

36. It is trite law that sentencing is a prerogative vested in the trial court. This position was stated in Court of Appeal in *Bernard Kimani Gacheru v Republic* (2002) eKLR where it was stated that:

> " It is now settled law, following several authorities by this court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account some wrong material, or acted on a wrong principle. Even if, the appellate court feels that the sentence is heavy and that the appellate court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already states is shown to exist.

37. The appellants' contest is based on the fact that they are first time offenders and the sentence imposed on them is therefore excessive in the circumstances. In arriving at the sentence, the trial court accorded the appellants an opportunity to mitigate where they both pleaded for a non-custodial sentence.

38. Section 275 which creates the penalty provides for a prison term without an alternative punishment.

39. The question is whether the contention that the trial magistrate did not consider the availability of an alternative punishment is merited since none is provided for in the section. In other words, does section 275 stipulate a minimum mandatory sentence, and that the court does not have discretion to impose a lesser sentence where the circumstances so dictate?

40. In *MK v Republic* [2015] eKLR the Court of Appeal stated as follows:

> "
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> " 19. What does "shall be liable" mean in law" The Court of Appeal for East Africa in the case of Opoya vs Uganda (1967) EA 752 had an opportunity to clarify and explain the words "shall be liable on conviction to suffer death". The Court held that in construction of penal laws, the words "shall be liable on conviction to suffer death" provide a maximum sentence only; and the courts have discretion to impose sentences of death or of imprisonment. The Court cited with approval the *dicta* in James vs Young 27 Ch. D. at p. 655 where North J. said:
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> "But when the words are not 'shall be forfeited' but 'shall be liable to be forfeited' it seems to me that what was intended was not that there should be an absolute forfeiture, but a liability to forfeiture, which might or might not be enforced".
>
> We consider such to be the correct approach to the construction of the words "shall be liable on conviction to suffer death: especially when contrasted with the words of s 184 which are "shall be sentenced to death".

41. Similarly, in construing the provisions of the *Narcotic Drugs and Psychotropic Substances (Control) Act*, Act No 4 of 1994, the Court of Appeal in *Daniel Kyalo Muema vs Republic* [2009] eKLR stated as follows:

> " The last observation we want to make is that the phrase as used in Penal statutes was judicially construed by the predecessor of this court in Opoya vs Uganda [1967] EA 752 where the court said at page 754 paragraph B:
>
> "It seems to us beyond argument the words "shall be liable to" do not in their ordinary meaning require the imposition of the stated penalty but merely express the stated penalty which may be imposed at the discretion of the court. In other words they are not mandatory but provide a maximum sentence only and while the liability existed the court might not see fit to impose it".
>
> We respectfully adopt that construction which conforms with the opinion of Mr Kaigai and which is supported by our preceding observations. We have no doubt that the sentences of 10 years imprisonment and 20 years imprisonment prescribed in section 3 (2) (a) of the Act for the possession of cannabis sativa are the maxima and that the court can lawfully impose any shorter term of imprisonment. Furthermore, although section 3 (2) (a) of the Act does not expressly provide for a fine, the court can lawfully in accordance with section 26 (3) of the Penal Code sentence the offender to pay a reasonable fine in substitution for imprisonment."

42. I am guided by the views expressed by the Court of Appeal in the above cases that a person convicted of the offence of stealing 'is liable', upon conviction, to a sentence of three years imprisonment. That provision, however, does not impose a mandatory minimum sentence, and the sentencing court has the discretion to impose a lesser sentence, or a fine.

43. The appellants were first offenders. The amount stolen was over Kshs 300,000 which is not little money. It is therefore not true that the sentence was excessive in the circumstances. However, it appears to this court that the sentence of 3 years imprisonment arose from a misconstruing of the provisions of section 275 as imposing a mandatory sentence.

44. Can this court alter the sentence imposed by the trial court? In *Ogolla s/o Owuor* (1954) EACA 270, the court stated that:

> " The court does not alter a sentence unless the trial judge has acted upon wrong principles or overlooked some material factors."

45. Under the *judiciary sentencing policy guidelines*, a sentence is imposed to meet the following objectives; retribution, deterrence, rehabilitation, restorative justice, community protection and denunciation.

46. In my view, had the trial court addressed its mind to the meaning of the term "is liable" in the *Penal Code*, and considered it against the circumstances of this case, including the fact that the appellants were first offenders, it would not have imposed a term of imprisonment for three years, which is the maximum provided under the *Penal Code*.

47. In the circumstances, the appeal against sentence succeeds. The appellants have been in prison since August 5, 2022, a period of four months. The complainants have the opportunity to sue the appellants for recovery of the money lost through theft. Keeping the appellants in prison will not compensate the complainants.

48. Accordingly, I dismiss the appeal against conviction and allow the appeal against sentence and substitute the sentence of three years imprisonment with a suspended sentence of eighteen months imprisonment, suspended for three years. The appellants shall not reoffend during the suspension of the sentence otherwise they shall be arrested and sent to prison to serve the remainder of the term of eighteen months imprisonment less the four months already served.

49. The appellants shall accordingly be set at liberty unless otherwise lawfully held.

**DATED, SIGNED AND DELIVERED AT KISUMU THIS 29TH DAY OF DECEMBER, 2022.**

**R E ABURILI**

**JUDGE**