Murungi & another v Republic (Criminal Appeal E108 of 2021)
[2022] KEHC 18126 (KLR) (Crim) (20 December 2022) (Judgment)

Neutral citation: [2022] KEHC 18126 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CRIMINAL

CRIMINAL APPEAL E108 OF 2021

DO CHEPKWONY, J

DECEMBER 20, 2022

BETWEEN

GEOFFREY MWANGI MURUNGI & ANOTHER ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. The Appellants were jointly charged with the offence of stealing by servant contrary to Section 268 (1) as read with Section 281 of the *Penal Code*.

2. The particulars of the offence of stealing were that"-

> " On diverse dates between March 19, 2014 and July 31, 2014 Salim Walaran Kenya Company Limited located along Kampala road in Industrial Area within Nairobi County, the Appellants jointly with another before court, being employees of Salim Walaran Kenya Company Limited as a salesman and logistics supervisor stole 11570 cartons of Indomie Noodles valued at Kshs 6,325,790.00 the property of Salim Walaran Kenya Company Limited which came into your possession by virtue of your employment".

3. After a full trial, the Appellants were convicted and sentenced to pay a fine of Kshs 200,000.00 in default serve two(2) years' imprisonment. In addition, they were ordered to pay the complainant the value of the lost goods.

4. The Appellants were aggrieved by the said conviction and sentence hence preferred this appeal vide a Petition of Appeal dated November 1, 2021 in which a plethora of grounds mainly challenging the evidence and grounds upon which the conviction was bases on the trial Magistrates Judgment and the

sentence that was meted against them. They have sought to have their conviction quashed and sentence set aside.

5. On February 28, 2022, the parties were directed to canvass the appeal by way of written submissions and at the hearing, the Appellants and the Respondent chose to entirely rely on their written submissions.

6. This is a first appellate court hence obliged to analyze and evaluate all the evidence adduced before the lower court afresh so as to draw its own conclusion while bearing in mind that it neither saw nor heard any of the witnesses testify during the trial. This was the position enunciated in the case of *David Njuguna Wairimu v Republic* [2010] eKLR, where the Court of Appeal stated:-

> "The duty of the first appellate court is to analyze the re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellant court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions."

7. Briefly, the prosecution called evidence of nine (9) witnesses whose evidence was that the Appellants were employed by the complaint Company, Salim Walaran Kenya Limited as per the employment contracts produced as Exhibit 1 and 2. The 1st Appellant, Geoffrey Mwangi was employed as a warehouse clerk and his duties involved getting orders, doing deliveries, ensuring and following up on payments from customers. The 2nd Appellant, Ibrahim Chome Ngala was in-charge of logistics and deliveries and his duties entailed organizing for loading of goods for delivery. He was also in-charage of all documents.

8. It was the prosecution's evidence that sometimes in the month of August, 2014, the salesman noted that there were a huge outstanding payments and they became suspicious. That they made follow-ups with the area Manager, one David and they met customers who include PW6, PW7 and PW8 to inquire whether they had received goods from them. The customers told them that they had not received any goods form them and they did not owe them any debt. They established that the affected invoices were adding up to a total of Kshs6.2 million.

9. The matter was reported to the DCI, Makadara, whereby PW9, IP Jacob Mungale was instructed to investigate the matter on where the Appellants were alleged to have diverted goods belonging to the complaint Company.

10. PW1, Johnson Otore Aoko, the Human Resource and Administration Manager confirmed that the two Appellants were employees of the complaint Company at the time of the incident. He told court that the 1st Appellant would fill the templates, submit them to the Sales Administrator to raise an invoice which would then be taken to the warehouse Supervisor to make arrangements for delivery, the customer hen signs the delivery note which is taken to the logistics for handing over to finance.

11. PW2 who was the National Sales Distribution Manager at the complaint Company told court in cross-examination that the 1st Appellant as a warehouse clerk would be the first to sign the stock leaving form and confirm the goods had left the store, thus he was the one who would have informed them of an outstanding debt. As for 2nd Appellant, PW2 said that he was the one who direct the drivers where to deliver the goods, and would be the first to receive and keep the delivery notes.

12. According to PW3, he had a customer called Semrose who ordered for 700 cartons of Indomie on June 25, 2014 and an invoice was raised and taken to the warehouse. But on being asked if he had received his goods, Semrose said he had not and yet the 2nd Appellant told them that the picking slip showed that the goods had been delivered to the customers but on calling the customer, it was confirmed that he had not received the said goods. PW3 went on to state that he arranged for another consignment of 500 cartons to be delivered but again found that although the picking lips showed they had been delivered, the customer denied having received any goods. It was his evidence that on both occasions, invoices were raised which were produced as Plaintiff Exhibit P5(a) – (b). He identified the 1st Appellant as the salesman and the 2nd Appellant as the one at the warehouse. When cross-examined, he told court that the 2nd Appellant had signed the invoice P.Ex 5(a). And in re-examination, he said the order and the 1st Appellant was entrusted with the goods as a salesman.

13. PW4, Dennis Mwanza Nzeberi, is a receptionist at Salim Walaran Company testified that he knew both Appellants as a Logistic Manager and saleman respectively and he was a loader. He said that he was working on Motor Vehicle Registration No KAS 643D with the driver, Joseph Milima and loader, Joseph Kaludi and would do deliveries on Rongai-Mombasa road. He also said that there was a logistic Manager who could divert the goods but would not sign anywhere after offloading them. In cross-examination, PW4 explained what it means to divert a route.

14. PW5, Mohammed Salim, a Supervisor of the warehouse and storekeeper at Salim Walaran (Kenya Limited) testified that he was custodian of the goods in the warehouse between 19th March, and 31st July, 2014 and explained what a picking slip entails and how it works in their business. In regard to this case, PW5 confirmed from P. Exhibits 5(a), (b) and (c) that he signed for the goods to leave the warehouse and none was returned. In cross-examination, he denied seeking D.Exhibit 1. In re-examination, he confirmed that the 1st Appellant was in control as a logistiscs Manager and the goods were taken by Ibrahim and his people.

15. PW6, David Mwangi testified as an owner of a wholesale shop and confirmed that he had not received any goods (indomie noodles) as per invoice dated July 14, 2014 for Kshs 50,000.00 or invoice No 38298 (Exhibit 6(a). He identified the 1st Appellant as the sales person who would take his orders.

16. PW7, Peter Wambugu was also another owner of a wholesale shop in Ruiru and he denied owing the complainant Kshs 50,000.00. He confirmed knowing the 1st Appellant.

17. PW8, Enock Olio Sumo also denied owing the complainant any money or Kshs 112,000.00 for any goods supplied to him as per Plaintiff Exhibit 11. He also confirmed that he was dealing with the 1st Appellant.

18. PW9, Inspector Jacob Mungale was the Investigating Officer who investigated the case of cartons of Indomie noodles totaling to 11,570 having been removed from the complainant's warehouse on the pretext that they were to be delivered to various customers who had made orders through 1st Appellant but when the Company demanded to be paid, it was realized that the goods had not been ordered for or delivered to them. He collected the evidence and had the Appellants who were working for the complainant as a sales Manager and logistics supervisor respectively arrested. He had the two charged for the offence of stealing by servant contrary to Section 268 as read with Section 281 of the Penal Code. He collected various exhibits which were produced as Plaintiff Exhibits 1 to 9 respectively.

19. The Appellants were placed on defence and each opted to give sworn statement in defence.

20. In his defence, the 1st Appellant, Geoffrey Mwangi confirmed that he was working for the complainant as a sales representative and his work entailed order looking and collection of cheques. He testified

that delivery of goods was not part of his duties. He also told court that he stopped working for the complainant on August 14, 2014 when he got a better job with JKUAT. According to Appellant, there was no customer who claimed to have given him an order and he failed to supply. He also stated that none of the orders produced in court were genuine and nether do they show he processed them. He further stated that a loading sheet which would confirm that the goods were loaded on his van, the name of the customer, and name of the consignor and particulars of Motor Vehicle was not produced. He then concluded that upon his arrest, his house was searched and nothing was recovered from there.

21. The 2nd Appellant, Ibrahim Chome Ngala testified that he was a logistic delivery staff of the complainant and his work was to scrutinize stock, picking slips and coordinate with Jihan Freighter, record vehicle to be used and hand orders to the warehouse Manager. He said that he knew nothing about the field and the driver was never meant to call him at all. He also said that he was never given any vehicle or computer and neither was he authorized to make or sign any document or approve any payments.

22. The Appellants did not call any witnesses in support of their respective cases and the trial court proceeded to render its Judgment.

Analysis and Determination

23. This court has carefully considered the grounds of appeal by reading through the entire evidence presented before the trial court and the Judgment thereof alongside the written submissions filed by both the Appellant and the Respondent. The cited statute and case law has also been taken into account.

24. Having done so, three main issues emerge for determination by this Court and they are:

    a. Whether the charge against the appellant was proved beyond any reasonable doubts.

    b. Whether the sentence that was meted against them was proper and lawful.

    c. Whether the trial magistrate erred by ordering the appellant to pay compensation

25. On the issue of whether the charge against the Appellants was proved, beyond reasonable doubt, the Appellant was charged with the offence of stealing by servant contrary to Section 268 (1) as read with Section 281 of the *Penal Code* as the main Count. The said Sections provide as follows;

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

26. On the other hand, Section 281 goes on to state that:

    282: "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, he is liable to imprisonment for seven years.

27. Therefore, for the prosecution to prove the charge of theft by servant, it must establish the following ingredients: that the Appellants were employees of the complainant, that the Appellant stole the property of the employer that came to his possession in the course of the employment and finally, that the appellant dishonestly appropriated the said property thereby depriving the employer of the same.

28. In the present appeal, it was common ground that the Appellants were employees of the complainant at the time the offence took place.

It is noted from the original record of proceedings that an employment contracts between the appellants and the complainant Company were produced as evidenced by Exhibits 1 and 2. It is also not in dispute that the 1st Appellant was mandated by virtue of his employment to get orders, deliver and ensure that the goods reach the customers and the delivery notes are taken back to the company a was evidenced by the testimonies of PW1, PW2, PW4, PW5, PW6, PW7, PW8 and PW9.

29. Mr. Chome, the 2nd Appellant was in charge of logistics and delivery, would organize for orders and loading.

30. The undisputed fact is that goods valued at Kshs 6,325,790.00 being the property of Salim Walaran Kenya Company Limited were stolen. Thus, the question that remains to be answered is who stole the said goods and whether the appellant conspired with others to steal the said goods. In their respective defence, the Appellants denied having anything to do with the alleged goods. The 1st Appellant stated that he had been framed since he had found a better job opportunity and that no evidence was adduced and or produced by the prosecution to show that he had processed the said goods, signed for any order or loading sheet and or was paid any money by any customer.

31. Upon considering the evidence, it is this court's view that the weight of evidence is against the appellants. The 1st Appellant was identified by PW6, PW7 and PW8 as the sales person, hence delivery person. The said prosecution witnesses identified and produced invoices alleging that the Company was owed money for goods which were never delivered yet the said goods had left the warehouse. It was evidenced that 11570 cartons of Indomie were removed from the warehouse in the pretext that they were to be delivered to various customers who had made the orders through the 1st appellant but were missing with no logical explanation from the appellant. The 2nd Appellant was shown in the misappropriation report as the one who released the goods and he had agreed to pay for the said goods. He did not offer any explanation as to how his name came to appear on the said form.

32. In this court's view, the evidence against the appellant is inculpatory, incompatible and inconsistent with his innocence. In the case of *Mary Ndunge Muthusi v Republic* [2016] eKLR, P. Nyamweya J held as follows:

> "I am alive to the fact that the evidence relied upon by the prosecution of the theft of these amounts was circumstantial. The law concerning circumstantial evidence was laid down in Ndurya v R [2008] KLR 135 by the Court of Appeal where it was held that before convicting someone on the basis of circumstantial evidence, the court has to be sure there are no other co-existing circumstances which would weaken or destroy the inference of guilt. Similar holdings were reached in Sawe v Republic [2003] KLR 364 and R v Kipkering arap Koske and Another 16 EACA 135."

33. In the present case, the circumstances are that the goods were released by the 1st Appellant and received by the 2nd Appellant but there was no money to confirm any sales and the said goods were missing. The only conclusion one can make of this is that if there were any sales made, the money was stolen since they could not give an account of either the goods or sales.

34. Additionally, having read through their respective defencces, this court finds them as mere denials as there is no evidence to confirm any element of frame-up against the 1st Appellant by his employer, or explanation by the 2nd Appellant as to why he was implicated for the offence. It is clear that the trial court analysed the evidence before it well and arrived the correct conclusion based on circumstantial evidence hence this court finds no reason to warrant any interference with the conclusion of the appellants.

35. On the issue of sentence, it is important to note that the offence under Section 281 of the *Penal Code* Cap 63 of the Laws of Kenya carries a maximum sentence of seven (7) years imprisonment. The learned trial Magistrate fined the appellants Kshs 200,000/- and in default, they were to serve two (2) years imprisonment.

36. The principles guiding interference with sentencing by the appellate Court were properly set out in the case of *Bernard Kimani Gacheru vs. Republic* [2002] eKLR which restated 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. In this case the trial magistrate opted to give an option of a fine. In the circumstances, the trial Magistrate was bound to bring the sentence within the confines of Section 28 of the *Penal Code* Cap 63 of the Laws of Kenya which deals with fines. Section 28 (2) of the *Penal Code* provides that: -

> " In the absence of express provisions in any written law relating thereto, the term of imprisonment or detention under the Detention Camps Act ordered by a court in respect of the non-payment of any sum adjudged to be paid for costs under section 32 or compensation under section 31 or in respect of the non-payment of a fine or of any sum adjudged to be paid under the provisions of any written law shall be such term as in the opinion of the court will satisfy the justice of the case, but shall not exceed in any such case the maximum fixed by the following scale"

38. It will be noted that this provision is couched in mandatory terms. It is meant to ensure that where the court considers a fine to be an appropriate sentence, which is a non-custodial sentence, the default clause should not be too long as it narrates the very essence of a none custodial sentence.

39. In this case, the trial Magistrate erred in imposing a fine of Kshs 200,000/= and ordered a default sentence of two(2) years imprisonment. This is contrary to the above mandatory provision which provides that when the fine imposed exceeds Kshs 50,000/=, the default sentence should be twelve (12) months. Therefore, a default sentence of two (2) years imprisonment is punitive and outside the scales provided for under Section 28 (2) of the Penal Code. It is thus this court's considered finding that the default imprisonment term of two (2) years for a fine of Kshs 200,000/= is irregular and illegal and proceeds to set the same aside and substitutes it with a default sentence of twelve (12) months imprisonment. The substituted sentence shall take effect from the date of the sentence by the trial court.

40. On the issue of compensation, Section 31 of the *Penal Code* provides that a person who has been convicted may be ordered to pay compensation. It states as follows: -

> " Any person who is convicted of an offence may be adjudged to make compensation to any person injured by his offence, and the compensation may be either in addition to or in substitution for any other punishment."

41. The court has discretion to order compensation in addition to the punishment imposed or may be ordered as a substitution for any other punishment. It was therefore proper for the trial magistrate to order the appellant to pay compensation.

42. Section 31 of the *Penal Code* must be read together with Section 175 (2) (b) of the *Criminal Procedure Code* which also deals with the question of compensation in criminal proceedings. It is this court's finding that Section 175 (2) operationalizes Section 31 of the *Penal Code* and provides the legal principles which should guide trial courts in exercising their discretion while deciding whether or not to order payment of compensation by a convict, in addition to any other punishment. Section 175 (2) provides as follows:

> "(2) A court which—
>
> (a) convicts a person of an offence or, on appeal, revision or otherwise, confirms the conviction; and
>
> (b) finds, on the facts proven in the case, that the convicted person has, by virtue of the act constituting the offence, a civil liability to the complainant or another person (in either case referred to in this section as the "injured party"), may order the convicted person to pay to the injured party such sum as it considers could justly be recovered as damages in civil proceedings brought by the injured party against the convicted person in respect of the civil liability concerned."

43. A reading of the above provisions leaves no doubt that an order for compensation should be based on proven facts showing the injury suffered by the complainant or any other person as a result of the act subject matter of the conviction and which act is one that can give rise to civil liability against the convict. In addition, the compensation awarded must be equivalent to damages that the complainant or injured person can justly recover from the convict in civil proceedings.

44. In this case, the Appellants were convicted of stealing Kshs 6,325,790.00 as stated in the particulars of the charge. It is this court's considered finding that the learned trial Magistrate had jurisdiction to make an order for payment of compensation to the complainant by the Appellants in addition to the fine imposed.

45. In the premises, this court finds no reason to interfere with the trial court's exercise of discretion in ordering the Appellant to compensate the complainant for the loss he incurred as a result of the Applicant's criminal actions, and thus find that the order was justified in the circumstances of this case.

46. In conclusion, having considered the evidence tendered before the trial Magistrate, the court finds that the charge against the Appellants was proven beyond reasonable doubt and their conviction proper. In the circumstances, the appeal partially succeeds to the extent that the sentence imposed by the learned trial Magistrate be and is set aside and substituted with a sentence of a fine of Kshs 200,000/- and in default, the Appellants to serve twelve (12) months imprisonment.

It is so ordered.

JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 20TH DAY OF DECEMBER, 2022.

D. O. CHEPKWONY

JUDGE

In the presence of:

Mr. Ondieki counsel for Appellant

M/S Chege for Respondent

Court Assistant - Sakina