



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL APPEAL NO. 138 OF 2019

FLORENCE NAFULA LUSALA.....APPELLANT

VERSUS

DIRECTOR OF PUBLIC PROSECUTION.....RESPONDENT

(Being an appeal from the Judgment conviction and sentence of the Senior Resident Magistrate

(Hon. Mrs. C. M. Nzibe) on 1.2.2019 in Milimani Chief Magistrate's court

Criminal case No. 826 of 2014)

JUDGMENT

The appellant herein, **FLORENCE NAFULA LUSALA**, was charged in the lower court with upto 3 counts. She faced the first count of stealing by servant contrary to section 281 of the Penal Code. After trial and in a judgment read by the court on 1.2.2019, she was however, convicted and sentenced to serve 10 years' imprisonment on both counts II and III.

In counts II and III, she faced a charges of stupefying in order to commit a felony contrary to section 230 of the Penal Code. The particulars were that on 23.5.2014 at Spring Valley estate in Gigiri within Nairobi county with intent to commit a felony namely stealing motor vehicle KBT 121R Toyota Land Cruiser, KBU 121M Toyota Premio, KBM 121H Volkswagen Tuareg, 2 Televisions, a Samsung Home Theatre DVD players, Samsung not pad, an iPhone, apple Laptop, black berry phone, DVD player machine, assorted jewelries and clothes all valued at Ksh.16,579,879.00. The charges stated that she had administered sedative drug, benzodiazepines, a stupefying drug to Charles Makokha and Ainea Okutu Ojango, respectively. The 2 sentences of 10 years imprisonment on each of the 2 counts were ordered to run concurrently.

Aggrieved of the conviction and sentence on the 2 counts (counts II and III), the appellant filed her petition of appeal in this court on 2.7.2019, listing upto 11 grounds of appeal as follows:-

- 1. That the learned trial magistrate erred in law and fact in failing to make a finding that the entire case against the appellant was a concoction, fabrication and an afterthought brought in by the police for their failure to conduct a thorough investigation and bring the real culprits to book after the theft at house of complainant.***
- 2. That the magistrate erred in law and fact in finding that the prosecution had established prima facie case against the appellant and convict the appellant on circumstantial evidence.***
- 3. That the trial magistrate erred in law and fact in failing to consider the appellant's defence and submissions and in particular by NOT admitting as evidence the crucial documents, the OB entry No. 61/30/5/2014, Mlolongo police station and medical report from St. Emmaculate Family Health Services during defence hearing.***
- 4. That the trial magistrate erred in law and fact by holding that the appellant directly administered a sedative drug, Benzodiazepines to Charles Makokha and Ainea Okutu while there was no evidence on record directly connecting the appellant to the said act and also the medical report from Aga Khan University hospital showed there was no trace of Benzodiazepines in Ainea Ojango Okutu's urine (FNL – 1).***
- 5. That the learned trial magistrate erred in law and fact in making a finding and convicting the appellant on facts whose evidence was not on record.***
- 6. That the learned trial magistrate erred in law in fact in allowing production of and relying on evidence which offends the***

provisions of section 71 of the Evidence Act.

7. That the learned trial magistrate erred in law and in fact in relying on evidence which was biased and contradictory and did not support the charges.

8. That the learned trial magistrate erred in law and fact in failing to make a finding that a key witness, HEZRON, was not called by the prosecution thereby leaving glaring gaps in the prosecution case.

9. That the trial magistrate erred in law and fact when she decided to fill the gaps in the prosecution's case without any evidence being rendered to it.

10. That the prosecution's case was all based on surmises, suppositions, conjectures and hypothesis, to totality of which raises reasonable doubts which ought to be resolved in favour of the appellant.

11. That the trial magistrate erred in law and in fact by convicting the appellant based on insufficient and uncorroborated evidence.

It has been pleaded by the appellant that the entire conviction and sentence be set aside and that the appellant be acquitted. The respondent (the state) has opposed this appeal. Following an agreement of the parties, this appeal has been canvassed by way of written submissions. Both the appellant and Respondent's side have accordingly filed their set of submissions.

The appellant has condensed the grounds of appeal and argued on grounds 1, 5, 7, 10 and 11 together that there was no proof as to whether the sedative drug was administered by the appellant, with the only evidence tendered being that the appellant was an employee of the complainant as a househelp. Counsel relied on the authority of The Queen Versus Arnold (20020 OCA 357). On the issue of elements of an offence involving stupefying drugs. That first, the prosecution must show that the offender had intent to administer the drug, second, that the offender indeed administered the drug, and lastly, that the offender in doing so, had the intent to commit an indictable offence or to facilitate the flight of the offender.

Counsel went on to submit regarding the presence of one Hezron who had also been at the same kitchen with the appellant and PW1 and PW2, but who did not take the tea prepared by the appellant. And that the said Hezron had never been seen since. Counsel stressed that in their testimonies, both PW1 and PW2 did not see the appellant put the alleged drug in the tea. Further, that no drug was noted in PW2's medical records.

Regarding Ground 2, it was submitted that the prosecution had failed to establish a prima facie case against the appellant, the case having been based on inconclusive circumstantial evidence. On this, reliance was put on Republic Versus Kipkeriwa Arap Koske (1945)16EACA235, where it was held;

***“That in order to satisfy on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other hypothesis than that of his guilt, and the burden of proving facts which justify the drawing of the inference from the facts to the exclusion of any other hypothesis of innocence is always on the prosecution and never shifts to the accused For circumstantial evidence to form the basis of a conviction, it must satisfy several conditions, which are intended to ensure that the circumstantial evidence unerringly points to the accused person and no other person as the perpetrators of the offence.*”**

He submitted further on the same point of circumstantial evidence as held in Abanga alias Onyango Versus Republic, Criminal Application No. 32/1990 (Unreported), Harriet Kanorio and Another Versus Republic (2019)eKLR and Musili Tulo Versus Republic (2014)eKLR.

On ground 4, counsel submitted that the trial court had failed to consider the strong defence of the appellant. That the named Hezron had also been in the kitchen and that PW1 and PW2 had picked for themselves their tea. That strangers had then accosted her in the house and abducted her only to be later dropped far away in Mlolongo.

The appellant made submissions on Ground 4 that were similar to those of grounds 1, 5, 7, 10 and 11. Counsel maintained that the case of the prosecution was based on suspicious, but that suspicion however strong, cannot form the basis of a conviction (Joan Chebichii Sawe Versus republic (2003)eKLR), C.A.

The last limb of submissions were that crucial witnesses were not called by the prosecution, and that in Danold Majiwa Achilwa and 2 Others Versus republic (2009)eKLR, the court held that;

“The law as it presently stands, is that the prosecution is obliged to call all witnesses who are necessary to establish the truth in a case.”

The prosecution on the other hand made only short submissions in which it was maintained that the case against the appellant had been proved beyond any reasonable doubt as required by the law.

I have considered the submissions of both sides. This court sits on this matter as an appeal court of the first instance. And as an appeal court of the first instance, the Court of Appeal in David Njuguna Kariuki Versus Republic (2010)eKLR, directed as follows:-

“The duty of the 1st appellant court is to analyse and re-evaluate the evidence which was before the trial court and itself come

to its own conclusions.”

It is imperative therefore that this court do analyse and re-evaluate the evidence that was laid before the trial court. In summary, the case of the prosecution started with the evidence of PW1 and PW2, Charles Mukokha and Ainea Okutu Ojango, respectively. The 2 gave similar evidence that on the material date on 23.5.2014, at about 8:00am, they had both reported at their place of work at the home of the complainant. The complainant and his family had already left home. That at about 10:00AM, the appellant, the house care worker prepared for them tea. They took the tea from the kitchen and took the same at the verandah. On Hezron, who had been dismissed from work was also present. He however, did not take the tea. They then left for their work stations. Coincidentally, both of them lost consciousness and on regaining, realized that the 3 motor vehicles of the complainant that had been parked in the compound, together with the various household items, all mentioned on the charge sheet had been stolen.

The other witness material to this case was PW6, Dr. Joseph Maundu, whose evidence was that he had examined both PW1 and PW2 on 7.8.2014. This was 10 weeks after the incident, in his testimony. In his testimony, he did not indicate if he noted any drug in the systems of the 2.

These basically were the material witnesses of the prosecution with regard to counts II and III on which the appellant was convicted and sentenced.

The issues for determination in this appeal are the following:-

- i. Whether PW1 and PW2 were administered with sedative drug benzodiazepines as claimed.
- ii. If so, whether it was the appellant who administered the said drug on PW1 and PW2.
- iii. Whether the prosecution proved counts II and III against the appellant beyond any reasonable doubt as required by the law.

Regarding the first issue above, the case of the prosecution was that both PW1 and PW2 were administered with a sedative drug known as benzodiazepines, a stupefying drug. However, no evidence was laid by the prosecution to show if the 2 witnesses were ever examined and proved to have been administered the said drug. No attempt was made by the prosecution to illustrate the chemical composition of the alleged drug nor its effects, if at all on human body. The only medical officer who gave evidence for the prosecution was PW6, Dr. Maundu. Even at that, he only examined the 2 witnesses and filled in their P3 forms, about 10 weeks after the date of the alleged incident. From the evidence on record, he only carried out a casual observation on the witnesses. He conducted no laboratory examination at all. This being a case revolving around a chemical (drug) this court is not convinced that any examination lacking in laboratory tests would be any conclusive proof of the existence of a drug, any drug, in the body. The 2 P3 forms that the witnesses produced therefore offer no probative help to the prosecution. The sum total is that the prosecution failed to established the nature of the drug, if at all, how or whether that drug could have led to both PW1 and PW2 falling unconscious.

For the 2nd issue of whether it was the appellant, who administered the said drug on the 2 witnesses, a number of factors ought to be considered and are relevant. By their own admission, both PW1 and PW2 stated that they did not see the appellant apply or put any drug in their tea. She had been making and serving them tea over a long period of time. Then there is the issue of the person known to all of them as Hezron. He was well known to all of them. It is on record that he had recently been sacked from his job at the home. And as the tea was prepared and served to PW1 and PW2 by the appellant, Hezron was present, even at the kitchen. Surprisingly, Hezron did not take the tea. He was never charged. Neither was he called as a witness.

This analysis given the impression that apart from the appellant (and Pw1 and PW2) there is a possibility that a 3rd party (e.g Hezron also had the opportunity and may have put a drug, it at all into the tea). No explanation was given by the prosecution on why no investigations were stretched to cover any possible participation of Hezron into this incident.

I am therefore persuaded by the submissions of the appellant, while relying in the case of *Harriet Konorio and Another versus Republic (2019)eKLR*, that investigations are an element of fair trial and that's same ought to further to cover all the potential witnesses.

The 3rd issue is whether the case was proved beyond reasonable doubt against the appellant. I note that the case against the appellant was based on circumstantial evidence since there was no eye witness. This is an issue long decided as held in the old case of *Republic Versus Kipkeriwa Arap Koske (1945) 16 EACA, 235*, that circumstantial evidence must be such evidence that leaves no hypothesis as to the guilt of the accused, and that the burden of proving this lies on the prosecution and never shifts to the accused.

It was incumbent upon the prosecution to prove the guilt of the accused beyond any reasonable doubt.

Taking into account all the above factors, I am not convinced that the prosecution quite met this standard. I accordingly therefore allow the appeal of the appellant, both on conviction and sentence, and order that the appellant be acquitted of the 2 counts (II and III) and be released forthwith unless lawfully held.

D. O. OGEMBO

JUDGE

26.2.2021

Court:

Judgment read out in court (online) in presence of Mr. Nderitu holding brief for Ms. Mbaluka for appellant, the appellant and Ms. Chege for the state.

D. O. OGEMBO

JUDGE

26.2.2021