



REPUBLIC OF KENYA

HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS CRIMINAL DIVISION

CRIMINAL APPEAL 37 OF 2020

SUSAN MUTHONI THANANGAAPPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the decision of; Hon. M. A Opondo – Principal Magistrate, in Criminal Case Number; 2587 of 2018,

at the Chief Magistrate’s Court; Makadara)

JUDGMENT

1. On 16th October 2018, the appellant was arrested and arraigned before the Chief Magistrates Court on 18th October 2018, charged vide criminal case number 2587 of 2018, with the offence of stealing contrary to section 275 of the Penal Code.

2. She pleaded not guilty to the charge and the case proceeded to full hearing. The prosecution called a total of four (4) witnesses, while the defence called two (2) witnesses. At the conclusion of the hearing, the trial court delivered a judgment dated 21st January 2020, where the appellant was held to have committed the offence and convicted under section 215 of the Criminal Procedure Code. She was then sentenced to serve three (3) years imprisonment.

3. Having been aggrieved by both the conviction and sentence, the appellant filed a petition of appeal dated 12th February 2020 based on the following grounds: -

- a) That, the learned trial magistrate erred in law and in fact in convicting the appellant while not considering the appellant’s constitutional rights were violated when she was detained in police custody for two (2) days;*
- b) That, the learned trial magistrate erred both in law and in fact by relying on the evidence of the prosecution and not considering the appellant’s defence;*
- c) That, the learned trial magistrate erred both in law and in fact by not taking cognizance of the fact that, the prosecution did not produce any exhibit in support of the allegations while convicting the appellant;*
- d) That, the learned trial magistrate erred both in law and in fact in convicting the appellant when she failed to consider evidence adduced by the appellant’s witness;*
- e) That, the learned trial magistrate erred both in law and in fact when she failed to protect the appellant yet her bill of rights to a fair hearing were violated;*
- f) That, the verdict in its entirety is against the tenets of natural justice and the sentence is in any event against legal practice and principles; and*
- g) That, the appeal be allowed, the conviction be quashed and the sentence be set aside.*

4. However, the appeal is opposed vide grounds of opposition dated 18th May 2021, filed by the Respondent, which state as follows: -

- a) That, the application lacks merit and is ill advised;*

b) That, the applicant was subjected to a fair trial and legal sentencing process;

c) That, the sentence meted by the trial court is proper and sound in law and not excessive in the circumstances;

d) That, the application is misconceived, frivolous, and vexatious and thus the sentence should be enhanced;

e) That, the application for a non-custodial sentence considering the charges faced by the applicant is unfounded;

f) That, the applicant has not demonstrated reasonable grounds to warrant this court in varying the sentence set by the trial court;
and

g) That, the application lacks merit, is an abuse of court process and should accordingly be dismissed.

5. Be that as it were, before I deal with the merit of the matter, I wish to observe that, although the appellant's appeal is against both conviction and sentence, she filed several applications seeking for review of sentence only, thus, the appellant by conduct thereof, seems to have abandoned the appeal on conviction.

6. Further by an order of the court dated 5th May 2021, those numerous applications were struck out for being an abuse of the court process. Therefore, the decision herein will be on both conviction and sentence. In that regard, the role of first appellate court, is to interrogate and evaluate the evidence afresh to determine whether; the conviction is safe and/or the sentence is legal or lawful.

7. This role has been well enumerated in the case of; Okeno vs. Republic (1972) EA 32 where the Court of Appeal 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 (Pandya vs. Republic (1957) EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vs. R. (1957) EA. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters vs. Sunday Post [1958] E.A 424.”

8. In the instant case, the prosecution case in brief is that, PW1 Grace Waitira Kamotho went to the bank to withdraw money from her account and learnt that, her credit balance was Kshs 33,900 instead of Kshs 64,000. She had not withdrawn any other money after depositing Kshs 33,000 on 1st October 2018, adding up to a credit balance of; Kshs 64,000. She inquired from the bank and was directed to; Oil Libya at Eastleigh, at an Mpesa agent where the money was withdrawn.

9. Upon arrival she was given details of the person who withdrew the money and informed it was the holder of; a mobile number xxxx and ID number xxxx. She keyed the telephone number in her mobile set, and the name of; “Mama Lucy” popped up. She realized it was a person known to her. It was the accused herein. Her friend. She reported her finding to the bank and was advised to inform the police. She made a report to that effect. The accused was arrested and charged.

10. However, in an unsworn statement, the appellant told the trial court that she works as a hawker and resides at Eastleigh. She denied stealing the money and told the court to investigate the case. That, anyone could use her mobile number. Further her identification number was not noted and that, the identification number on the transaction record is not hers.

11. She called DW2 Lilian Mumbia who testified that, she realized there was a number in the Mpesa Agent's record that was overwritten and that, the police questioned the agent and she said that it was not the accused who took the money and that she would show who did it. However, she was locked up in the cells and released the following day.

12. At the conclusion of the case, the trial court, expressed itself as follows: -

“The essential element in a charge of theft is that, the person accused fraudulently converts a property which is capable of being owned so as to deprive the owner of such property and this was insightful in the case of Mwaura vs. Republic, [1984] KLR 643. The amount in question in this case was Kshs 30,000 which was allegedly withdrawn by the accused. Money is a tangible good and therefore capable of being owned and stolen. The alleged stolen money was in PW1's bank account number 1180055640 making her the owner of the property (money). It is worth noting that only the account holder has access to his/her bank account and any activity not consented by him/her would be criminal. PW1 used her pin to conduct transactions in her account except for the transaction on 4th October 2018 as alleged. She stated that the accused might have seen her pin as she withdrew money in September 2018. This was complimented by the allegation that the accused came to withdraw money, Kshs 30,000 from KCB Agent and gave an ATM card to PW2. From the facts therein, the prosecution proved beyond all reasonable doubt that he accused fraudulently converted Kshs 30,000 money belonging to PW1, when she went to; PW2 and withdrew funds which she had no legal authority to possess.

The court went on to state;

“Moreover, the phone number inputted in the transaction details was saved on her phone belonging to the accused person. The accused defence consists of mere denial which does not displace the watertight evidence presented by the prosecution witnesses that placed her at the scene of the crime as held in; Evans Nyamari Ayako vs Republic [2017] eKLR. This court finds that, the ground raised by the accused in this regard holds no water. Nevertheless, as the prosecution satisfactorily proved to court that the accused stole the ATM Card belonging to PW1 thereafter went and withdrew funds from the account and her defence did not create doubts as to the prima facie case established by the prosecution. Therefore, I make the final determination that, the prosecution has proved beyond all reasonable doubt that the accused committed the offence of stealing contrary to section 275 of the Penal Code and is hereby convicted under Section 215 of the CPC.

13. I have considered the matter and I find that, the prosecution was required to establish inter alia, that the alleged sum of money was stolen and it was the appellant who stole it. As regards the 1st issue, I find that, the bank statement produced as plaintiff’s exhibit -1 established that, the Kshs 30,000 was withdrawn from the complainant’s account through; Mpesa services via an agent’s outlet known as; “Agent w/d SZE6LANMTZ, F3 SZE6LANMTF3 BKN 511411023”

14. The same is supported by plaintiff’s exhibit 2, a statement from KCB Limited, directing one; Simiyu Christopher Shikuku, to investigate the customers’ complaint of withdrawal of Kshs 30,000 from her account. The statement attached to this request proves a debit of Kshs 30,000 on 4th October 2018. Similarly, the record of Mpesa Agent known as “Mtaani Agent” show the withdrawal of Kshs30,000.

15. The key issue to knit the commission of the offence, is to; establish whether the money was withdrawn by the complainant or the accused. As per the record, it was indicated that, it was withdrawn by Grace Waithira. That, is the complainant. However, the details of the recipient’s telephone number in the record, does not belong to the complainant. It is alleged to belong to the appellant. She has not denied that, the telephone number; 0719282140, belongs to her.

16. PW2 the agent who paid the money, explained that, the recipient of the funds read out the telephone and identity number to her. Hence the possibility of cancellation and overwriting the record. Of course, that agent was negligent in transacting that way. However, there is no evidence that, the dealer knew the appellant earlier or had a grudge with her. Even then, where would the agent have gotten the appellant’s number. It can only have come from the appellant.

17. Be that as it were, I hold the considered opinion that, the prosecution would have strengthened its case had they got a document examiner report to verify the signature of the recipient and establish that, it belonged to the appellant. But that was cured by, the evidence of PW2, that corroborated the complainant’s that, it is the appellant who withdrew the money. Therefore, I find that, the appellant was positively and adequately connected to the offence.

18. In fact, the complainant has given a plausible explanation as to how the appellant may have obtained her ATM card Personal Identification Number. The appellant did not rebut that evidence neither did she rebut the evidence that, the telephone number with the Mpesa Agent was hers. As already stated, the issue of overwriting does not exonerate her, as she is alleged to be the one who read out that number to the agent. I therefore uphold the conviction.

19. As regards the sentence, I find that, the offence the applicant has been charged with carries a maximum sentence of three (3) years. In this particular case, the applicant was sentenced to serve the maximum three (3) years. The court justified the sentence by stating that, she had not compensated the complainant throughout the proceedings and therefore, was not remorseful; and had absconded proceedings when the judgment was about to be delivered.

20. However, I note a very interesting order on the court file. On the 31st October 2019, the trial court records read as follows

“Coram – Accused at large Court – Judgment delivered.

Accused sentenced to pay a fine of; Kshs 50,000 in default one (1) year imprisonment. Sentence to take effect on her arrest. Cash bail is forfeited.”

21. On 30th January 2020, upon the arrest of the applicant, the trial court set aside the earlier sentence and proceeded to sentence the appellant to three (3) years imprisonment. First and foremost, when the trial court read the judgment and sentenced the appellant, her in absentia, the court became *functus officio*.

22. The principle of *functus officio* was dealt with by the Court of

Appeal in; Telkom Kenya Limited v John Ochanda (Suing on his own behalf and on behalf of 996 former employees of Telkom Kenya Limited) [2014] eKLR, wherein it stated: -

“Functus officio is an enduring principle of law that prevents the re-opening of a matter before a court that rendered the final decision thereon...

The doctrine is not to be understood to bar any engagement by a court with a case that it has already decided or pronounced itself on. What it does is a merit-based decisional re-engagement with the case once final judgment has been entered and a decree thereon issued.”

23. Secondly, even if the trial court were to set aside the judgment and sentence pronounced in the absence of the accused again, then it should not have set aside the order relating to the sentence per se and not the judgment. Indeed, the accused had not had the benefit of

hearing the judgment being read.

24. The upshot thereof is that, the trial court had no power under the law to; set aside the final judgement and sentence after pronouncing the same. Any subsequent order and any proceedings as recorded after the order of; 31st October 2019, are null and void and of no legal basis. I declare the same as invalid.

25. Consequently, the proceedings in this matter ended on 31st October 2019. In fact, the trial court expressed itself on the finality thereof by stating that, upon arrest of the accused, “sentence to take effect on her arrest”. That is what should have happened.

26. In that case, I uphold the sentence of a fine of; Kenya Shillings Fifty Thousand (Kshs 50,000) in default one (1) year imprisonment, with effect from 22nd January 2020. It is so ordered.

DATED, DELIVERED AND SIGNED ON THIS, 22ND DAY OF JUNE 2021.

GRACE L. NZIOKA

JUDGE

In the presence of: -

No appearance for the Appellant

Appellant present in person

Mr Kiragu for the Respondent

Edwin Ombuna, the Court Assistant