



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

CRIMINAL APPEAL NO. 17 OF 2020

SOSPETER MICHAEL MJANJA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the original conviction and sentence in Criminal case No. 361 of 2020

of the Chief Magistrate's Court at Busia by Hon. Lucy Ambasi–Chief Magistrate)

JUDGMENT

1. Sospeter Michael Mjanja, the appellant herein, was convicted for the offence of stealing contrary to section 268 (1) as read with section 275 of the Penal Code.
2. The particulars of the offence are that on 24th and 25th day of January, 2020 at Busia Township Location in Matayos sub county within Busia County, jointly with another not before court stole Kshs.1,500,000/= the property of Joachim Njui Gachigwa.
3. The appellant was sentenced to serve one year imprisonment. He was aggrieved and filed this appeal.
4. The appellant was represented by the firm of Ashioya & Company Advocates. He raised three grounds of appeal as follows:
 - a) That the learned trial magistrate erred in law and fact in failing to find that the court had no jurisdiction to entertain this matter as the alleged theft occurred in Uganda.
 - b) That the learned trial magistrate erred in law and in fact in failing to find that the sum of money allegedly stolen as per charge sheet is Kshs. 1,500,000/= whereas the evidence by witnesses was of loss of Kshs.1,370,000/=.
 - c) That the learned trial magistrate erred in law and in fact in not finding that this matter was purely civil and that there was no criminal element proved.
5. The appeal was opposed by the state through Mr. Mayaba, learned counsel.
6. This is a first appellate court. As expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court and I have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated case of **Okeno vs. Republic [1972] EA 32**.
7. Jurisdiction in any judicial proceedings is very crucial. In the case of **Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] KLR 1** (Justice Nyarangi) while addressing the issue of jurisdiction stated:

Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.

Though these observations were made in civil proceedings, my humble opinion is that it applies equally to criminal proceedings. I will therefore interrogate the evidence herein and establish whether the trial Court had jurisdiction to entertain the charge.

8. I was urged to make a finding that the alleged offence took place in Uganda and that therefore, the learned magistrate lacked the requisite

jurisdiction. Section 5 of the Penal Code provides as follows:

The jurisdiction of the courts of Kenya for the purposes of this Code extends to every place within Kenya, including territorial waters.

9. While section 6 of the Penal Code states:

Offences committed partly within and partly beyond the jurisdiction When an act which, if wholly done within the jurisdiction of the court, would be an offence against this Code, is done partly within and partly beyond the jurisdiction, every person who within the jurisdiction does or makes any part of such act may be tried and punished under this Code in the same manner as if such act had been done wholly within the jurisdiction.

10. The appellant entered into a business relationship in Kenya. Though some money was sent to the seller of the motor vehicle in Kampala, Uganda, the evidence on record indicate that the bulk of the money was paid to the appellant in Kenya. From the above two sections of the Penal Code and without belabouring the point, it is evident that the trial court had the territorial jurisdiction to hear and determine this case.

11. The particulars of the charge indicate that the appellant stole Kshs. 1,500,000/=. It was argued for the complainant that since only Kshs.1,370,000/= was proved to have been lost, this entitled the appellant to an acquittal.

12. Joachim Njui Gachigua (PW1) the complainant herein, testified that after he was introduced to the appellant, they entered into a transaction of purchasing a black Prado motor vehicle registration number UAU 055U from Uganda. The appellant introduced him to the owner of the motor vehicle. Several monies were paid but it is evident that the delivery of the motor vehicle was not made.

13. In his evidence, the complainant testified that after he was introduced to the motor vehicle owner a Mr. Kawesa Kennedy, he sent to him (Kawesa Kennedy) Kshs. 100,000/=. He subsequently sent Kshs.320, 000/= to the appellant and Kshs.980, 000/= to Gibson Kigen. His evidence was that the money sent to Kigen was handed to the appellant. The money therefore handed to the appellant from the evidence of this witness is Kshs. 1,300,000/=.

14. Gibson Kibet (PW3) described himself as a *tenderpreneur* whatever this means for it is not an English word. He testified that he paid to the appellant Kshs.899, 800/= which he had received from the complainant. If we add this figure to Kshs.320, 000/=which the complainant had sent to the appellant, the total is Kshs.1,219,800/=

15. The evidence by the complainant and Gibson Kibet (PW3) does not agree with each other on what the appellant is said to have received and is certainly at variance with the particulars of the charge. It is trite law that where the particulars of the offence are at variance with the charge, the accused is entitled to an acquittal. This was held in the case of **John Brown Shilenje vs. R. High Court (NBI) Criminal Appeal No 181 of 1981** (unreported).

16. In a case of theft, the prosecution has the onus of proving that the accused fraudulently took or converted the property of another. This was the gist in the case of **Republic vs. John William Jones [1966] eKLR** a two judge bench stated:

It is necessary in Kenya for the prosecution, in a case of theft, to prove a fraudulent taking or conversion without claim of right; but the legislature of Kenya, unlike the English legislature, has given a detailed explanation of what is meant by fraudulently taking or converting property, and a man is to be deemed to have taken or converted property fraudulently if he does so with any one of five intents. The intent permanently to deprive the owner of property is only one of the intentions set forth, and a glance at section 268 shows that a man who takes money without a claim of right (and thus presumably without the consent of the owner) is deemed to do so fraudulently if he takes it with an intent to use it at his will, although he may intend afterwards to repay the amount to the owner. [Emphasis added]

17. In this case, the only evidence that tends to point to the intent to deprive is that of Gibson Kibet (PW3). He testified that after he gave the appellant Kshs.899, 800/= the money was not sufficient. There was a shortage of Kshs. 300,000/=. This is what he testified:

The money was not enough and was short by Kshs.300, 000/=. Joachim sent me Kshs. 20,000/= on 0706 737979. Caroline Muthu sent me Kshs.110, 000/=. I sent Kshs.94, 500/= to Francis Wanderi his [sic] Sospeter Wanderi using 0707 091 219 my number. I sent Kshs. 27, 500/= to 0713715898 accused's number and Kshs.67, 000/= to Francis Wanderi. I have the M-pesa statements for transactions. We did not go for the car after I gave him the money on 25th January 2020 and he ran away.

From this excerpt we notice that after this witness had testified of a shortfall of Kshs. 300,000/=:, the only extra money he said he sent to the appellant was Kshs. 27, 500/=. It is also not clear who Francis Wanderi and Sospeter Wanderi were in this transaction.

18. It is common knowledge that the transaction of a motor vehicle requires documentations and we cannot expect the purchase to be akin to the purchase of a loaf of bread. The prosecution had the onus to prove that the appellant did not intend to see the deal through and that he actually converted the money passed to him. This could have been easily proved by calling Kawesa Kennedy as a witness. This was a material witness to prove the intent of the appellant. In the case of **Bukenya vs. Uganda [1972] EA 549**, (Lutta Ag. Vice President) held:

The prosecution must make available all witnesses necessary to establish the truth even if their evidence may be inconsistent.

Where the evidence called is barely adequate, the Court may infer that the evidence of uncalled witnesses would have tended to be adverse to the prosecution.

19. The evidence in this case, apart from the other issues I have pointed out, does not disclose a criminal offence but points to a business transaction that did not go through. This is an issue that ought to have been addressed in a civil case. I therefore quash the conviction and set aside the sentence. The appellant is set at liberty unless if otherwise lawfully held.

DELIVERED AND SIGNED AT BUSIA THIS 30TH DAY OF JULY, 2020

KIARIE WAWERU KIARIE

JUDGE