



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT VOI

HIGH COURT CRIMINAL APPEAL

No. 87 of 2017

BETWEEN:

EVANS WAWERU MAINA.....APPELLANT

AND

THE REPUBLIC.....RESPONDENT

(Being an Appeal from the Judgment of Hon. N. N. Njagi SPM

at the SPM's Court at Wundanyi. CR. Case No. 309 of 2016

delivered on 10th October 2017)

JUDGMENT

1. The Court now has before it an Appeal from the Senior Principal Magistrate's Court in Wundanyi. The Appellant before the Court was charged with the following offences:

COUNT I

Conspiracy to commit a felony contrary to Section 393 of the Penal Code

Particulars: On the 5th day of May 2016 at around 8.30 am at Voi Law Court within Taita Taveta County; jointly with others not before court conspired together to steal BEATRICE MKANYIKA MWABILI of her Ksh.70,450.

COUNT II

Making a document without authority contrary to Section 357(a) of the Penal Code

Particulars: PETER MUENDO (2) EVANS WAWERU MAINA

On the 5th day of May 2016 at Voi within Taita Taveta County jointly with others not before Court with intent to defraud made a court receipt serial number 6369559 of Ksh.70,450/= for Civil Case Number 100 of 2016 without lawful authority or excuse

COUNT III

STEALING CONTRARY TO SECTION 268 AS READ TOGETHER WITH SECTION 275 OF THE PENAL CODE

(1) PETER MUENDO (2) EVANS WAWERU MAINA: On the 5th day of May 2016 at VOI within Taita Taveta County, together with others not before the Court stole Ksh. 70,450/= the Property of BEATRICE MKANYIKA MWABILI

2. On 28 September 2017 the Appellant was convicted of all Counts 1, 2, and 3. The Trial Court then called for a probation officers report. From that Report the Learned Trial Magistrate deduced that the Appellant was "not suitable for probation as he is not a straight forward character." and deferred sentencing to 19th October 2017. On 19th October 2017 the Appellant was sentenced to 2 years imprisonment for all three counts. The sentence was suspended for two years and the Appellant was warned that he should keep off crime for the period of the

sentence, otherwise he will be brought back to serve sentence.

3. On 1st November 2017 the Appellant filed a Memorandum of Appeal dated 30th October 2017. The Appellant states that he was "dissatisfied with the entire hearing process, judgment and sentence by Hon. Nicholas, Njagi, SPM at Wundanyi Law courts vide CRC 309/2016 on 19/10/2017. The Appellant appeals on the following grounds:

1. *The learned magistrate erred in law and fact in finding that the respondent had proved their case beyond reasonable doubt to warrant conviction of the Appellant.*
2. *The learned magistrate erred in law and fact in giving credence to the Respondent's witnesses inconsistent testimonies.*
3. *The learned magistrate erred in law and fact in convicting the Appellant on clearly unsupported charges as per the charge sheet having instituted charges in CR 490/2016 in which the complainant had withdrawn any charges against me, the same having been noted and accepted by the trial S.P.M. Voi law courts on 15/6/2016, But instead the same S.P.M., Voi referred me to S.P.M, Wundanyi Law courts on 17/6/2016.*
4. *On 17/6/2016, Cr 490/2016 was instituted with Cr 309/2016 bringing about 3 fresh charges and throughout the hearing process CR 490/2016 was NEVER produced in Wundanyi Law Courts despite its having been cited in my interdiction letter (copy attached as annexed).*
5. *On 28/9/2017, Judgment was given with a Guilty Verdict, notwithstanding the respondents failure to produce ANY evidence in court and on the same date, despite having a valid and effective Bond, I was remanded in custody pending sentencing scheduled for 12/10/2017.*
6. *On 12/10/2017, the trial magistrate ordered for a probation report to facilitate sentencing which he scheduled for 18/10/2017.*
7. *On 18/10/2017, the trial magistrate deliberately deferred sentencing to 19/10/2017*
8. *On 19/10/2017, the trial magistrate issued a 2-year suspended sentence effectively making this a one- Man conspiracy case, glaring mockery of justice.*
9. *Your ladyship, on the said ground and such others as may be raised during hearing and submission, we shall establish that the Appellant was WRONGLY convicted and sentenced.*

WHEREFORE the Appellant prays for this appeal to be allowed and conviction and sentencing to the quashed.

4. The function and duties of the Court on a first appeal are well known and oft-repeated. However, there is always benefit in restating them. The duty of the Court was set out succinctly in Criminal Appeal No 145 of 2013. The Court said:

This being the first appeal this Court has the duty to re-evaluate and analyze the evidence in detail and come up with its own conclusions bearing in mind that neither saw the witness nor heard the evidence when parties were testifying to see their demeanor. See also the case of MARK OIRURI MOSE –VS- REPUBLIC [2013] e KLR Criminal Appeal No.295 of 2012 where the Court of Appeal stated: "It has been said over and over again that the first appellate Court has the duty to revisit the evidence tendered before the trial Court afresh, analyze it, evaluate it and come to its own independent conclusion on the matter but always bearing in mind that the trial Court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and to give allowance for that." See also the well known case of OKENO –VS- REPUBLIC [1972] E.A. 32 which sets out the same principle.

5. The Court has the benefit of the proceedings as well as the lower court file from Wundanyi. The facts as they arose from the evidence are clear from the records. The facts that were not challenged were that the Appellant was employed by the Judiciary. He had previously worked in Mariakani and then had been transferred to Voi Law Courts. The Probation Report records that by that time there were already concerns about the Appellant's integrity. When the Appellant was transferred to Voi he was sent there as a member of the Support Staff with the designation "Senior Support Staff". That is a distinct category not to be confused with Clerical Staff. The Appellant's duties were restricted to cleaning the court offices and making tea and similar general activities.

6. On 5th May 2016, a potential litigant, BEATRICE MKANYIKA MWABILI ("the Complainant") came to the Court with the intention of issuing proceedings. She had wished to sue the County Government of Taita Taveta for payment for security services rendered. She was accompanied by the Clerk from the Law firm of Koki Mbulu Advocates. At the time (around 8 am) there were only a few members of staff in the Registry (according to the evidence of Gilbert Barua). They were Gilbert Barua, Zablon Matika, Mark Ngeti and the Appellant. Mr Barua later became PW 1. He told the Court that he was in the process of preparing for Court No 3 when he was approached by Zablon Matika who asked him what would be the level of Court fees for that Plaintiff. Since the Plaintiff was claiming more than KShs.1,000,000/= the response was that the fee would be Kshs.70,000/=. To this amount the Appellant added the sum of Kshs.450/= for security etc and demanded the sum of Kshs,70,450 from the First Accused and who then claimed the same sum from the Complainant. The Complainant states that she then left and went to Voi Town. Thereafter she was given (by the Clerk who was the First Accused) the stamped documents and a receipt. It turned out that the receipt was a false document for several reasons. Firstly, the receipt book was not for the Voi Courts. It had been printed and sent to Mombasa Courts for use there. Secondly, the person preparing the "receipt" had no authority to carry out the clerical and/or accounting functions he was undertaking. The Appellant went through the whole charade of opening a file and giving it a file number. The Number given was 100 of 2016 (although the transcript of the proceedings sometimes refers to civil case No. 101). That may be a typographical error but nothing turns on that. The Complainant was also supplied with a stamped copies of the Plaintiff and a Summons signed by the Resident Magistrate on duty (Hon Kadima). The documents were to be filed on the County Government in Wundanyi. About a week later, the Complainant expected to have news of a hearing date. When she made inquiries she was told the file

could not be found. Although it is possible that given what later transpired - the file never existed. In addition, the money paid by the Complainant was never banked in the Judiciary Bank Account. In the circumstances the Complainant received nothing for the money she had paid.

7. The features of the evidence that stand out are that (1) the Appellant took the documents for issuing; (2) the Appellant received the money in cash (3) the money was not paid into the Judiciary Bank Account; (4) Neither the Appellant nor his co-accused said that the money had moved to another person to hold or pay to the benefit of the Judiciary. It later transpired that the receipt the Complainant had been given was a photocopy and therefore could not be used for handwriting analysis. The Receipt was not signed by the Accountant for the Court Station nor had she received the monies. In fact the events occurred on a day when she was not at work. The Police made their inquiries and the two persons who dealt with the plaintiff; the cash monies and the receipt were charged. During the course of those inquiries the Appellant admitted to being involved. The Learned Trial Magistrate said in his Judgment that the "confession or admission ... is not backed by the law.". This Court takes a contrary view. A previous inconsistent statement is something that can be adduced to demonstrate what weight should be given to any testimony. However the other witnesses gave eye witness accounts of the Appellant receiving the money.

8. The Appellant filed his Written Submissions and Further Written Submissions on 28th January and 9th April 2018 respectively. The Respondent's Written Submissions were filed on 27th February 2018. The Court has considered these Submissions carefully but they are not repeated verbatim in the interests of brevity.

9. The first Ground relied upon is that the Learned Trial Magistrate gave weight to the evidence of the Prosecution witnesses. There is no argument put forward for why he should not have done so. The Appellant had legal representation for part of the proceedings, he also had an opportunity to cross examine the witnesses - which he did, He was unable to demonstrate the weaknesses in their evidence which he now puts forward. The Further Submissions contain endless rhetorical questions that should have been put in cross-examination. They were not. The Appellant fails to put forward an argument for setting aside the Judgment on this Ground.

10. In relation to the venue of the Trial, the Complaint states in her evidence that she filed a case in Voi Law Courts and then withdrew it and filed a new case in Wundanyi. That is something she was entitled to do. There is no reason why a matter that has been withdrawn should be referred to in a later prosecution unless it was withdrawn on conditions. The Appellant has not put forward any such conditions. In fact, the lower court file (**309/2016**) contains a Letter from the Appellant's intended Counsel asking for the matter to be transferred elsewhere. The Application does not appear to have been made, signifying no formal complaint was raised by the Advocates at the time. However, the Appellant also **sent** an application by Notice of Motion to the High Court at Voi suggesting that the trial be transferred to Mombasa. That Application was **received** on 27th March 2017 in Voi High Court. There is nothing to show that a fee was paid and the application was issued. Prior to that the Trial in Wundanyi had been adjourned to allow the Appellant to bring an application for the recusal of the trial magistrate. That Application was not filed in Wundanyi. It is clear that the Appellant was using various courts and various law firms to set up a case for saying he had not confidence in the tribunal in the event that he was convicted. That must be an abuse of process.

11. The next complaint is that the Judgment was a verdict of guilty and the Bond was withdrawn. In fact the proceedings show that the bond was withdrawn due to non-attendance by the Appellant. Thereafter there was a probation report ordered and a sentence delivered after consideration of the Report. There can be no cause for complaint in that process. In relation to the sentence of 2 years suspended for two years, this Court takes judicial notice of the fact that it could be considered a lenient sentence from a Magistrate who was not renowned for his leniency.

12. The Appellant also suggests that the proceedings were brought as a consequence of the jealousy of colleagues who did not like him but there is not evidence of that. The Appellant then moves onto finding complaint with the fact that his co-accused was acquitted. He then uses that to suggest that there can be no conspiracy without a co-conspirator, which could be interpreted as an admission. However, the Charge Sheet is very clear when it says that the conspiracy was with persons not before the Court. That is the charge and that is the conviction. The Appellant asserts wrongful conviction but does not put forward cogent grounds for that assertion.

13. The Appellant has also put sent to the Court various complaints made to other entities about the proceedings. The Court has considered them and brought them to the notice of State Counsel for the Respondent. They add nothing to the deliberations.

14. For the reasons set out above, the Appellant has failed to demonstrate that this Court should interfere with the Judgment of the Trial Court.

15. In relation to the sentence, the Judgment of the Trial Court gives no reason why the sentence should have been suspended. The Court itself noted that the possibility of rehabilitation is unlikely. The Respondent has not asked this Court to re-consider the sentence and so the sentence too stands.

16. Appeal dismissed.

It is so ordered,

FARAH S. M. AMIN

JUDGE

SIGNED DATED AND DELIVERED ON THIS the 23rd day of January 2019.

In The Presence of :

Court Assistant: Josephat Mavu

Appellant: In Person

Respondent: Ms Anyumba