REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 120 OF 2018

BETWEEN

REPUBLIC …………………………………………………..APPELLANT

AND

TOM MISANGO KIDIGA………………………………….RESPONDENT

(Being an appeal from judgment of Hon. B. Ochieng, Chief Magistrate dated 13th August, 2018 in Kakamega Chief Magistrates' Criminal Case No. 3761 of 2016)

JUDGMENT

Introduction

1. The respondent herein was arraigned before the Chief Magistrate's court at Kakamega on one count of stealing by agent contrary to Section 283(b) of the Penal Code, the particulars thereof being that on diverse dates between 30th day of July, 2012 and 6th August, 2013 at Kakamega township in Kakamega central District within Kakamega County being an agent of STEPHEN MUCHAKI, stole Kshs.1,050,000/= the money of the said STEPHEN MUCHAKI which was entrusted to him to buy him a parcel of land Reg. No. BUTSOTSO/SHIKOTI/17339, and fraudulently registered the parcel of land in his own name.

2. The appellant denied the charge. The prosecution called three witnesses in support of its case against the appellant. At the close of the prosecution case, the appellant was put on his defence. He gave sworn evidence and called one witness.

3. At the conclusion of the hearing, the learned Chief Magistrate found that the evidence availed by the prosecution had not proved the charge against the respondent to the required standard of beyond reasonable doubt. The trial court accordingly acquitted the appellant of the charge under section 215 of the Criminal Procedure Code for lack of sufficient evidence.

The Appeal

4. The appellant felt aggrieved by the judgment of the learned trial magistrate, hence this appeal which is premised on grounds THAT;-

> **(1) The trial Magistrate erred by failing to find that the prosecution had proved its case beyond reasonable doubt**
>
> **(2) The trial court failed to critically analyse the evidence adduced, and the exhibits which were tendered by the prosecution hereby arriving at wrong conclusion.**
>
> **(3) The trial Magistrate failed to consider evidence presented by way of documents**
>
> **(4) The trial court failed to consider corroborative material tendered by the prosecution**
>
> **(5) The trial Magistrate erred in law and fact in finding that the respondent was not guilty of the offence of stealing by agent contrary to section 283(b) of the Penal Code.**
>
> **(6) The trial court occasioned a gross miscarriage of justice**

5. The appellant prays that the appeal be allowed by this court by making a finding that the prosecution proved its case beyond reasonable

doubt, and to convict he appellant accordingly

6. This is a first appeal and in this regard, this court is under a duty to rehear the appellant's case albeit without the benefit of seeing and hearing the witnesses who gave evidence and to make an allowance for the same. It is this rehearing of the case that will enable this court to reach its own conclusions in the matter, and to decide whether or not to support the trial court's findings. In **Okeno- vs – Republic [1972] EA 32**, the Court of Appeal for Eastern Africa held, inter alia, 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 R [1957] EA 336)** and the appellate court's own decision on the evidence. The firs appellate court must itself weight conflicting evidence and draw its own conclusions (**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 courts findings and conclusion. It must make its own findings and draw its own conclusion. 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 witnesses see **Peters – vs – Sunday post [1958]EA 424.**"*

<u>The Prosecution Case</u>

7. From both the evidence on record and the judgment of the learned trial court, the prosecution case is as follows:-

The complainant in this case, Stephen Muchaki Mudekhele, PW2, was a lecturer at Masinde Muliro University of Science and technology, Kakamega. He doubled up his teaching position with real estate business. He was a member of the Chrisco Church to which the respondent also belonged. It was that fellowship in the church that brought PW2 and the respondent into contact, the respondent having been introduced to PW2 as a surveyor. With the common bond in the church, PW2 soon engaged the respondent as his agent for purposes of acquiring land. In the year 2010, PW2 was able to buy a plot from one Charles Onyango Odindo of Shirere area through the appellant. The sale agreement, produced in court as Pexhibit 5 was evidence of this agency relationship. Again in 2011, the respondent acted for PW2 when the latter acquired a plot from one Christine Imboga Mboga vide a sale agreement produced in court as Pexhibit 6.

8. Upon the successful completion of the land transactions allude to above, PW2's trust in the respondent to act likewise for any future transactions grew.

Sometime in 2012, PW2 contracted the appellant and informed him of his intention to sell plot No. Butsotso/Indangalasia/4648 so that could buy a much bigger plot at Koromatangi area. PW1, Moses Mungoni, was to buy plot 4648. The parties negotiated the deal for plot 4648 which was clinched at the price of Kshs.850,000/=. The larger plot at Koromatangi, was to be bought from Loisa Ongaya for the sum of kshs.1,050,000/=. The Koromatangi plot was registered as land parcel No. Butsotso/Shikoti/12978.

9. As had happened in 2010 and 2011, PW2 allegedly entrusted, the transaction for the purchase of the Koromatangi land to the respondent by writing two letters to the respondent. Both letters, Pexhibit 1 and Pexhibit 7 were dated 2.7.2012. In the first letter, PW2 authorized PW1, to pay to the respondent the sum of kshs.500,000/= which was down payment by PW1, and in the second letter, PW2 instructed the respondent to receive the money from PW1 and to use the same as a down payment to Loisa Ongaya for land parcel No. Butsotso/Shikoti/12978 (plot Number 12978).

10. For reasons only known to himself, the respondent did not update PW2 concerning the signing of the sale agreement between Loisa Ongaya (as seller) and PW2(as buyer) Instead, the respondent went ahead and signed the sale agreement for plot 12978 between himself and Loisa Ongaya without in any way indicating that he was signing the agreement as PW2's agent.

11. On 19.12.2012, Pw2 withdraw some kshs.400,000/= from his standard chartered bank account and paid it to the respondent as a top-up to the kshs.500,000/= down payment made to Loisa Ongaya towards purchase of plot Number 12978. This amount was no doubt paid to the respondent as per Pexhibit 9 being statement of account. Additional payments were made to the respondent, by PW2 via Mpesa all totaling Kshs.120,000/= . Pexhibit 10, which is an Mpesa printout from Safaricom (K) limited, confirmed these payments to mobile number 0721200387 which was registered in the respondent's name.

12. In 2015, PW2, went ahead and put up hostels on plot 12978. PW2 testified that he placed the respondent on the plot as caretaker, but when Loisa died in July, 2016, PW2 tried in vain to get the respondent to give him the documents relating to the sale transactions from Loisa to himself (PW2). On being asked about the documents, the respondent became rude and arrogant and told PW2 that the plot he was asking about belonged to him (respondent) and not to himself (PW2). PW2 thereafter reported the matter to the police.

13. PW3, PC Geoffrey Waweru investigated the case. He made a number of visits to the lands office in Kakamega but he got no assistance, inspite of letters written to them by the police. It was only after obtaining a court order that PW3 obtained a printout from Safaricom limited regarding Mpesa transactions between PW2 and the respondent. PW3 also obtained a copy of the statement of PW2's account with Standard Chartered Bank Kakamega. The Safaricom Mpesa printout was produced as Pexhibit 10 while the Standard Chartered bank statement was produced as Pexhibit 9. Certificate of official search from lands office was Pexhibit 11 and Green card relating to land parcel No. 17339 was produced as Pexhibit 15. After concluding the investigations, PW3 arrested the respondent and charged him with the offence he was tried for but acquitted.

<u>The Defence case</u>

14. The respondent gave sworn evidence and called one witness, DW2. He testified that he was a pastor with Ambassadors Victory Centre Church Kakamega. He denied stealing any money from PW2. He also denied ever having been PW2's agent. Regarding the sale of plot No. 4648 by Moses, PW1, to PW2 at the agreed price of kshs.850,000/=, the respondent stated that PW1 did not pay the full purchase price to PW2, and that only kshs.500,000/= was paid and initially deposited into his account before he sent back the same to PW2's account. The

respondent denied PW2's allegation that he (respondent) had been entrusted with any money by PW2 to purchase land parcel 17339 from one Loisa Ongaya. The appellant stated that he bought the said parcel of land for himself for kshs.800,000/= after disposing of a parcel of land in Kabras. He produced an agreement of sale signed between himself and Loisa Ongaya. The respondent however conceded he received Kshs.500,000/= from PW2 but alleged that he transferred the money back to PW2.

15. In his further evidence, the respondent stated that the only role played by himself was to assist PW2 obtain title documents in respect of the two earlier plots he had helped PW2 to purchase.

16. The respondent also denied receiving PW2's letter which was produced in evidence as Pexhibit 7, by which PW2 had informed him that, Pw1 would send Kshs 500,000/= directly to him for onward transmission to Loisa Ongaya as part of the purchase price for a plot he was to buy from Loisa.

17. DW2 was Mulwoto Romano from kakamega. His testimony was that he acted as a witness to an agreement for sale between PW2 and PW1. He also testified that he was present when the respondent counted Kshs.500,000/= and gave it to PW2. DW2 also testified that thought he did not personally know PW2, the respondent had told him about the transactions, he had had with PW2. Dw2 denied a suggestion that the respondent used kshs.500,000/= entrusted to him by PW2 to pay for land which he later registered in his own name,

Issues for Determination

18. The only issue for determination on this appeal is whether the prosecution proved the allegations against the appellant beyond any reasonable doubt. The word "steal" according to BLACKS LAW DICTIONARY TENTH EDITION at page 1639 means "1. To take (Personal property) illegally with the intent to keep it unlawfully. 2. To take (something) by larceny embezzlement or false pretenses". The word "agency" on the other hand means "1 a relationship that arises when one person (a principal) manifests assent to another (an agent) that the agent will act on the principal's behalf subject to the principal's control and the agent manifests assent or otherwise consents to do so. An agent's actions have legal consequences for the principal when the agent acts within the scope of the agent's actual authority or with apparent authority or the principal later ratifies the agent's action – also termed common – law agency" – See BLACKS LAW DICTIONARY TENTH EDITION (above) at page 74. It is further stated therein that

"The basic theory of the agency device is to enable a person, through the services of another to broaden the scope of his activities and receive the product of another's efforts, paying such other for what he does, but retaining for himself any net benefit resulting from the work performed" Harold Gill **Reuschlern & William A Gregory**, The law of Agency and Partnership (2nd edition 1990)

SUBMISSIONS

19. The appellant's written submissions were filed on 01/09/2018. The appellant submitted that during the trial, the prosecution clearly proved the offence of stealing in accordance with the principles set out in the case of **Republic Vs John William Jones(1966)eKLR** where the Court held:-

> "It is necessary in Kenya for the prosecution in a case of theft, to prove 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 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 this presumably without the consent of the owner) is deemed to do so fraudulently if he takes it with intent to use it at his will, although he may intend afterwards to repay the amount to the owner".

20. The appellant submitted that in line with the above cited authority and the relevant provisions of the law, the prosecution clearly proved that the respondent stole Kshs.1,050,000.00 the property of the complainant, money being a thing capable of being stolen, and it having been fraudulently taken, from the complainant by the respondent. In this regard the appellant placed reliance on the case of **Davidge Vs Bennet(1984) Criminal LR 297** in which the defendant received cheques from her flatmates for payment of communal gas bill but instead spent the money on Christmas presents and disappeared without paying the bill. The court held that because the defendant spent the money received from her flat mates on things not intended, she had stolen that money. The appellant argued that in this case the respondent was required to use the money received by him from the complainant for the purchase of land on behalf of the complainant and that having failed to do so his actions amounted to stealing because he converted the money to his own use and thereby deprived the complainant of the same.

21. The appellant also contends that the learned trial court in this case rejected evidence which was exfacie trustworthy when he failed to analyse the evidence of P.W.1 which had been taken by another magistrate, and that the said evidence is completely missing from the judgment of the learned trial court. That she said judgment refers only to the evidence of P.W.2 and P.W.3. P.W.2 in this case was the complainant. The appellant also contended in its submissions that the learned trial magistrate failed to consider most of the exhibits marked Pexhibit 1 to 18 and in particular that the learned trial magistrate never considered the following exhibits:-

PExhibit 4 Sale agreement between Stephen and Moses

PExhibit 5 Sale agreement dated 11th March 2010.

PExhibit 6(a) Title deed

PExhibit 6(b) Acknowledgement letter

PExhibit 12 Letter to Land Registrar

PExhibit 16(a-d) Four scene photographs

PExhibit 17 Police Bond

PExhibit 18 Search

22. The appellant also submitted that in referring "to a sale agreement signed between them" in part of his judgment the learned trial magistrate's judgment was ambiguous in light of the fact that there were three sale agreements produced in evidence being Pexhibits 4, 5 and 8. The appellant also faulted the learned trial magistrate of giving wrong counts with regard to the various sale agreements. It was the appellant's contention that the learned trial magistrate referred and used exhibits which suited his narrative and rejected those exhibits that did not suit the narrative the court had in mind, and that in the result there was a gross miscarriage of justice to the prosecution case. The appellant placed reliance on the case of **Caroline Wanjiku Ngugi Vs Republic(2015) eKLR** in which Mativo J persuasively held, inter alia, that a trial court has a duty to weigh the evidence adduced in court by all the parties in totality, and make a finding on the culpability or otherwise of the accused. The court also held that choosing to analyse the prosecution evidence and leave out that of the accused is a fatal mistake.

23. In summary, the appellant submitted that the learned trial magistrate seriously misdirected himself on matters of both fact and law and instead opted to apply fanciful theories which should never have formed the basis of its findings of acquittal. Reliance was placed on the case of **Okethi Okale & Others Vs Republic (1965) EA 555** where the Court of Appeal for Eastern Africa stated thus at page 557:-

> "**With all due respect to the learned trial judge, we think that this is a novel preposition, for in every criminal trial a conviction can only be based on the weight of actual evidence adduced and not any fanciful theories or attractive reasoning. We think that it is dangerous and inadvisable for a trial judge to put forward a theory of the mode of death not canvassed during the evidence or in counsel's speeches"**

24. In the later case of **Kabegambire Wilber Vs Uganda Criminal Appeal No. 56 of 2006(2010) UGCA 43** referred to by the appellant in its submissions, the court held, and I entirely agree, that courts of law act on credible evidence adduced before them and do not indulge in conjecture, speculation, attractive reasoning or fanciful theories. That proposition was reiterated in the case of **Jemimah Nanyonga & 2 Others Vs Amos Kyangungu - Civil Appeal No. 0041 of 2008** where the High Court of Uganda stated that a decision which is not based on evidence adduced before the court cannot be allowed to stand.

25. The respondent relied on his written submissions filed before the Chief Magistrate's Court on 14/06/2018 in which he contended that the charge against him was bad for duplicity in that it is not clear from the particulars of the charge whether the offence committed by the respondent was one of stealing the sum of Kshs.1,050,000.00 or whether he committed the act of registering land title No. Butsotso/Shikoti/17339 into his name. The respondent contended that in this case, the charge was so badly drafted that it alleges two offences in one and the same breath and is therefore duplex. It was further contended that because the charge was not amended, it must fail for duplicity.

26. For the above arguments, reliance was placed on the case of **Josephat Shikuku Vs Republic (2010) eKLR** as well as **Timothy Victor Vs Republic (2016) eKLR.** In both these authorities, the courts held that "where two or more offences are charged to the alternative is one count, the count is bad for duplicity contravening Section 135(2) of the Criminal Procedure Code, and that such defect is not merely formal but substantial and that an accused so charged is prejudiced because he does not know exactly what he is charged with and if he is convicted, he does not know exactly of what he has been convicted.

27. The second argument raised by the respondent in his submissions is that the allegation of agency was not proved, on grounds that no written proof was adduced in court to support the same and that any alleged documentary evidence tendered in court was a fabrication only fit for rejection by the court. That the complainant did not even show to the court how the purported letter of agency was delivered to the respondent.

28. Thirdly, the respondent contended that the alleged theft of the sum of Kshs.1,050,000.00 was not proved and that in any event, the amounts given as having been stolen were inconsistent and contradictory. Regarding the Mpesa transactions upon which the complainant sought to rely as payment and deposits made to the respondent, the respondent submitted that since the transactions did not indicate the purpose for the deposits, if any, made to him, then these documents do not speak for themselves.

<u>Analysis and Determination</u>

29. The whole of the evidence tendered during the trial, the law and the rival submissions are all now before me. I note that what was required of the trial court was to render a reasoned written determination of the issues that were before it. In arriving at its determination, the trial court was under a duty to weigh the whole of the evidence of both the prosecution and the defence.

30. The appellant's major contention on this appeal is that the learned trial magistrate did not properly analyse the evidence on record and that where he attempted to do so, he mixed up the facts and also put forward his own theories that led him to making an erroneous conclusion. Upon reading the judgment, I am in agreement with the appellant's submissions first that the learned trial magistrate failed to analyse the whole of the prosecution evidence when he utterly omitted any mention of the evidence of PW1, which evidence was taken by another magistrate who had gone on transfer. I am also in agreement with submissions of the appellant that in failing to consider the evidence of PW1, the learned trial magistrate also failed to properly analyse documentary evidence through Pexhibits 4,5,6(a) and (b), 12, 16(a-d) and 18.

31. A perusal of the judgment also clearly shows that the learned trial court had a problem identifying the exhibits, the various amounts either paid directly or paid into the respondent's bank account and that the learned trial magistrate also failed to isolate each sale agreement and what its purpose was. In this regard, I could agree with the appellant's contention that the learned trial court, considered only those exhibits that suited his narrative. The only thing that is not clear is to me is whether this partiality was inadvertent of otherwise. A case in point is the trial court's reference to Pexhibit 6 at page 2 paragraph 1 of the judgment where the court stated in part "**again in 2011, he assisted him acquire another plot from one Christine Imboga Mboga and tendered in evidence the sale agreement (Pexhibit 6).** From the record Pexhibit 6(a) is the Memorandum of Sale Agreement while 6(b) is the title deed in respect of Butsotso/Indangalasia/4648. It is my considered view therefore that the conclusions reached by the learned trial magistrate were not based on a proper analysis of the evidence.

32. The record also shows that while writing the judgment, the learned trial court did not fully appreciate the evidence because portions of the said judgment are contradictory and confusing. In part of the judgment, the learned trial court wrote:-

> "*There lingers doubt as to whether the accused remitted the money to the complainant during the signing of the sale agreement." Yet on the same page 8 of the judgment lines 2 -3, the trial court rejected the complaint's evidence that the respondent did not remit the money to him (complainant) and instead stating that the respondent "handed over the same amount in cash to the complainant during signing of the agreement"*

33. From the above, I find that the learned trial court did not properly appreciate and evaluate the facts of the case that was before him. If this had been done, the outcome of the trial would have been different. This failure resulted in the miscarriage of justice caused by errors committed by the court itself. There are other errors appearing on pages 7, 9 and 10 of the trial court's judgment. On page 9 for example, the learned trial court put forward a theory to the effect that "according to the prosecution the disbursements made was for purchase of the land for the complainant but one cannot rule out the possibility that it was for purchase of building material or paying casual labourers and the like. What I can say about the above is that the trial court was engaged in guesswork as to what the monies paid to the respondent were for. As was held in **Virsa singh- vs - State of Punjab – AIR 1958 SC 465**, conclusions made during a trial are " A matter of proof, where necessary by calling in aid all reasonable inferences of fact in the absence of direct testimony. It is not one for guesswork and fanciful conjecture." The appellant has argued and rightly so that the issue of purchasing building materials and paying casual labourers never arose during the trial.

Conclusion

34. Based on the findings above, this appeal must succeed. I therefore set aside the order of acquittal of the respondent, and because the evidence laid before the trial court was not properly analysed, there was a miscarriage of justice suffered by the prosecution.

35. In the circumstances, and in order to meet the ends of justice, and this being a case of 2016 in which judgment was delivered only on 13.08.2018, I order that this case shall be heard afresh by the chief Magistrate Court of Kakamega. The case shall however be heard by a magistrate's other than Hon. B. Ochieng who heard the case in the first instance.

It is so ordered

Judgment written and signed at Kapenguria.

RUTH N. SITATI

JUDGE

Judgment delivered, dated and countersigned in open court at Kakamega on this 20th December, 2019

WILLIAM M. MUSYOKA

JUDGE

In the Presence of:-

Mr. Mukuli for appellant

Mr. Mutua for the respondent

Erick – Court Assistant