



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NANYUKI

CRIMINAL CASE APPEAL NO. 41 OF 2017

CLEMENT ALUMASA..... APPELLANT

VERSUS

REPUBLICRESPONDENT

(Being an appeal from the original conviction and sentence by Hon. W J Gichimu Principal Magistrate dated 10th March 2017 in Nanyuki Chief Magistrate Court Criminal Case No. 395 of 2016)

JUDGMENT

1. **CLEMENT ALUMASA**, the appellant, was convicted before Nanyuki Chief Magistrate's court, of the offence of stealing Contrary to Section 275 of the Penal Code. The particulars of the charge were:

“ On the 30th day of March 2015 at around 11.30a.m in Nanyuki township within the Laikipia County of the Republic of Kenya, jointly with others not before court stole Ksh. 120,000/= from the Mshwari account of the said STEPHEN OUMA.”

2. The appellant on being convicted was sentenced to a fine of Kshs. 150,000 and in default to serve 2 years imprisonment.

3. He has filed this appeal against his conviction and sentence. This court as the first appellant court is required to rehear the case and reconsider the material before the trial court and to reach its own independent decision bearing in mind it did not see or hear witnesses testify see: **KARIUKI KARANJA – v- REPUBLIC (1986) KLR 190.**

4. Although the appellant had raised 10 grounds of appeal in his written submissions in support of his appeal he summarized those ground to one: that the appellant was convicted on circumstantial evidence, which conviction was not safe because the prosecution failed to tender sufficient evidence.

5. The appellant cited the court of appeal case **ABANGA alias ONYANGO – V- REPUBLIC CR. APP.NO. 32 of (1990) (ur)** where the court of appeal discussed the principles applicable to test circumstantial evidence. The court of appeal in that case stated:

“it is settled law when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests:

(i) the circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established;

(ii) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;

(iii) the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.”

6. The appellant submitted that the evidence adduced at the trial did not pass that test for circumstantial evidence.

7. The respondent, through the Principal Prosecution's Counsel Mr. Tanui supported the appellant's conviction by narrating the evidence adduced at the trial.

8. Stephen Ouma (Ouma) (P W 1) is the owner of the cell phone number (number withheld). On 30th March 2015 at 11.50a.m. Ouma received a phone call from cell phone number 0702[...]. The caller identified himself as an employee of Safaricom. He also identified himself as Antony.

9. The caller informed Ouma that Safaricom had received complaint from someone that Ouma's cell phone number was interfering with theirs. In the process Antony, asked Ouma of his personal details. Ouma gave Antony his national identity card number and his birth date. Antony requested Ouma for his Mpesa Pin but Ouma declined.

10. Ouma testified that immediately after that telephone conversation his cell phone went off. On reporting this to Safaricom he was assured that his Mpesa account was intact. It was not until later that Ouma realised that his Mshwari account had money missing to the tune of Ksh. 120,000/=

11. Safaricom download Ouma's Mshwari account which revealed that there had been withdrawals by Gladys Chesang through cell phone number 0729[...]. The statement also revealed that there had been withdrawals by Stephen Ndungu through cell phone number 0715[...]. The prosecution's evidence was both of those phones were switched off after those withdrawals and their owners could not be traced.

12. P C Mathew Nudi (P W 2) the investigating officer obtained the Safaricom print out which indicated that cell phone 0702[...] was registered under the appellant's name Clement Alumasa Wambui. It will be recalled that this was the cell phone used to get Ouma's identity number and birth date. He was able to track that phone to Moi University where he was able to arrest the appellant. The investigating officer however stated that he had been unable to trace the owners of the cell phones through which Ouma's Mshari's account was hacked money was withdrawn. That he arrested the appellant because it was the appellant's cell phone that was 'connected' to Ouma.

13. In his defence the appellant stated, under oath, that his cell phone number 0702[...] was at the material time blocked and he could not call or receive calls. That he reported the matter to Safaricom. That he was informed by Safaricom that he could not be assisted other than removing his line. That on removing the line Safaricom informed him that his sim had been swapped.

14. He added that the money from Ouma's Mshwari's account was not credited into his cell phone line. He however admitted that the cell phone number was his.

15. On being cross examined the appellant said that he did not report to the police that his sim was swapped because his Mpesa account was not interfered with.

16. The Learned Trial Court Magistrate in his considered judgment made the following observation:

“The accused defence, though not very clear, is to the effect that someone must have used his line to call the complainant. He told the court that on 30/3/2015 his line had been blocked after someone claimed that swapped his sim card (sic). Sim swap is the process of replacing your existing sim with a new sim.

However, I note that the accused person raised that defence for the first time when he was put at his defence. The accused person knew all along that his sim had been allegedly swapped. Raising the issue at the tail end of the trial shows that it was an afterthought.

I have no doubt that the accused person called the complainant at the material date.

The accused person was traced using the said number which he used to call the complainant. Although no money was sent to the accused phone, I am satisfied that he was an accomplice of the two persons who received the money.

Electronic Crime also known as e-crime is unusually sophisticated and the criminals are wise enough not to leave trial.

The complainant in this case was duped to giving out his personal details by the accused who pretended to be an employee of Safaricom Limited.”

.... The accused person and his accomplice then used the said details to access the complainant’s sim. They proceeded to withdraw money from his M’shwari account and therefore transferred the money vide M’pesa to the mobile phone number belonging to the said Gladys Chesang and Stephen Ndungu. P/exhibit 1 questions how the money was withdrawn and later transferred.

As expected, the two numbers belonged to Chesang and Ndungu had been switched off by the time the police took action.

The accused person could not allow the money to be transferred to his account for obvious reasons.

I do not think that the entire chain of event was coincident. This was well calculated e-crime.

Although this is a case resting on circumstantial evidence, I am satisfied that the culpable act are incompatible with the accused innocence and are incapable of any hypothesis than that of his guilt.”

17. Justice **R. Nyakundi** in the case **Republic v Boniface Isawa Makodi [2016] eKLR** discussed when a court would rely on circumstantial evidence as follows:

“ in the case of Mohamed & 3 Others v Republic [2005] 1KLR 722 Osiemo J as he then was explained what constitutes circumstantial evidence as follows:

Circumstantial evidence means evidence that leads to prove a fact indirectly by proving other events or circumstances which afford a basis for reasonable inference of the occurrence of the fact at issue.

The circumstances should be of a conclusive nature and the tendency and they should be such as to exclude every hypothesis but the one proposed to be proved.

In the case of Mwangi & Another v Republic [2004] 2KLR 32 the court of appeal held thus:

In a case depending on a circumstantial evidence, each link in the chain must be closely and separately examined to determine its strength before the whole chain can be put together and a conclusion drawn that the chain of events as proved is incapable of explanation on any other reasonable hypothesis except the hypothesis that the accused is guilty of the charge.”

ANALYSIS AND DETERMINATION

18. The appellant as stated by the trial court for the first time, while giving his defence stated that his phone was blocked. Thereby implied he was not the one who made the call to Ouma. He did not put that to Ouma and more importantly he did not put it to the investigating officer while that officer testified at the trial. The investigating at Safaricom which investigation officer carried out investigation revealed that it was the appellant cell phone number that contacted Ouma. It is possible that had he put it to the investigating officer the said officer that his phone had been blocked could have given a response in reference to his investigation at Safaricom.

19. The appellant even at his time of arrest did not say to the investigating officer that his phone had been blocked.

20. The only conclusion I can come to is the same as the trial court, that the appellant's defence was an afterthought. It is therefore rejected.

21. It is also rejected because if indeed the appellant's phone was blocked then it could not have made a call to Ouma at 11.30a.m.

22. What is pertinent to note is that prosecution's exhibit No.1, the down-loaded Safaricom account of Ouma shows that the first withdrawal from Ouma's account was done at 12.18 p.m. on 30th March 2015. Several successive withdrawals were made the last being at 12.50 p.m. on that day.

23. It is not coincidental that those withdrawals from Ouma's account were made immediately after the appellant cell phone was used to call Ouma. The only inference one can draw from those facts is that the appellant was part of a common intention to prosecute a common purpose: that is the unlawful withdrawal of money from Ouma's account. I therefore find the appellant's conviction was sound.

24. Accordingly the appellant's appeal is hereby dismissed. His conviction is upheld and his sentence is confirmed.

Dated and Delivered at Nanyuki this 27th February 2018

MARY KASANGO

JUDGE

Coram

Before Justice Mary Kasango

Court Assistant: Njue/Mariastella

Accused: Clement Alumasa

For accused.....

Language

COURT

Judgment delivered in open court

MARY KASANGO

JUDGE