REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NUMBER 86 of 2013

CECILIA MUTHONI MUIRURI...……..…..APPELLANT

VERSUS

REPUBLIC ……..……..…….RESPONDENT

(An appeal from the original conviction and sentence in Chief Magistrate's Court at Milimani in Cr. Case No. 126 of 2011 delivered by Hon. K. W. Kiarie, CM on 21st May 2013)

JUDGMENT

Background

Cecilia Muthoni Muiruri, the Appellant herein was charged alongside another with the offence of stealing by servant contrary to Section 281 of the Penal Code. The particulars of the charge were that on 22nd January, 2011 at African Banking Corporation's (ABC), Libra House Branch in Nairobi within Nairobi County, being servants of African Banking Corporation Limited stole a total of Ksh. 24,759,800/-, the property of the aforementioned bank, which came to their possession by virtue of their employment.

They were both found guilty and each was sentenced to five years imprisonment. The Appellant was dissatisfied with that court's decision and has decided to lodge this appeal. She set out her grounds of appeal in her Petition of Appeal filed 31st May, 2013. They were, first, that the learned magistrate erred when he found that the ingredients of the offence were proved beyond reasonable doubt. Second, that the learned trial magistrate erred when he took into account unproven matters and based the conviction upon them. Third, that the trial magistrate erred when he relied on unsafe circumstantial evidence as the basis of the conviction when there were exculpatory facts exonerating the Appellant. Fourth, that the honorable magistrate erred when he failed to take into account the Appellant's defence. Fifth that the learned magistrate erred when he failed to note that the evidence led by the prosecution was riddled with contradictions and could not therefore sustain a conviction. Finally, that the learned magistrate erred when he shifted the burden of proof to the Appellant.

Submissions

Appellant's submissions.

The appeal was canvassed by way of written submissions. Those of the appellant were filed on 18th October, 2016 by Ngatia and Associates alongside a list of authorities. The Respondent filed two bundles of written submissions; one on 25th October, 2016 and a supplementary copy on 15th November, 2016.

The parties were given an opportunity to highlight the submissions. For purposes of this judgment I will summarize the submissions collectively. In brief, the appellant's submission was that the elements of the offence of stealing by servant as set out under Section 281 of the Criminal Procedure Code were not proved. That is to say that the prosecution did not establish that there was appropriation of property belonging to the complainant in a dishonest manner and with the intention of depriving it (bank) the money lost. It was submitted that the appellant must have taken the money to her benefit. However, the evidence adduced did not establish that fact. No money was recovered from her or found in her possession. Further, it was not established that the appellant facilitated the theft of the money from the bank. In addition, the prosecution failed to demonstrate that at all material times, the appellant was in exclusive possession and control of the bank and safe keys. According to the appellant, this exculpatory fact exonerated her because any other person could have accessed the money anyway. Furthermore, the learned trial magistrate in his judgment had observed that one of the prosecution witnesses namely, PW7 may have been culpable.

According to the appellant, the evidence on which she was convicted was circumstantial in nature. However, the same crystalized together did not link her to the offence and failed to meet the threshold of circumstances under which an accused can be convicted based on circumstantial evidence. The case of ***Kipkering Arap Koskei vs. Republic [1947] 16 EACA 135, and Teper vs. R 1952 EC*** were cited to buttress this submission. In addition, the appellant submitted that crucial witnesses were not called for the prosecution. In particular, the supervisor of the security staff and other bank staff who were in custody of the bank keys. It was submitted that the failure to call the witnesses who would have given crucial evidence meant that the prosecution was concealing some evidence. It also gave the inference that had the witnesses been called they would have adduced adverse evidence. Amongst the cases cited to buttress the submission was ***Bukenya & others v Uganda [1972] EA 549.***

Learned counsel, Mr. Oonge who made oral submission in addition submitted that Section 200 of the Criminal Procedure Code was not complied with when Hon. E. Maina, Chief Magistrate took over the conduct of the trial from Hon. Mutembei, Chief Magistrate. On the whole, it was the appellants submission that the case was not proved beyond a reasonable doubt and that the conviction of the appellant was based on mere suspicion which can never found a basis for conviction.

Respondent' submissions.

In opposing the appeal, learned State Counsel Miss Aluda on behalf of the Respondent submitted that the case was proved beyond a reasonable doubt. According to the counsel, the prosecution demonstrated that the appellant was a custodian of the key to the safe and that the spare key was with her co-accused. It was submitted that she was not able to explain how the safe key was found in an unlocked drawer. She conceded that the appellant was convicted based on circumstantial evidence but the same was sufficient to warrant the conviction. Indeed, the prosecution established that the appellant had access to the money on the day it was stolen. Therefore, she was convicted on tangible and credible evidence.

Determination

Before I delve into the summary of the evidence adduced, it is vital that I address the legal issue raised by counsel for the appellant. This is with respect to non-compliance with Section 200 of the Criminal Procedure Code. Although Mr. Oonge referred generally to the entire provision, I understood him to be referring to sub-section (3). This is the sub-section that deals with the procedure that a magistrate who succeeds a trial must comply with. For avoidance of doubt, I duplicate the provision as under.

> ***(3) Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be re-summoned and reheard and the succeeding magistrate shall inform the accused person of that right.''***

The submission was that Hon. Mutembei was in conduct of the trial up to the testimony of PW11. It was after the witness testified that Hon. E. Maina took over the conduct of the trial. Counsel submitted that

she was required to inform the appellant of her right to choose to either have the trial heard de novo or recall the witnesses who had already testified. It is important that I re-state the proceedings of 23rd January, 2012 when the next witness, PW12 testified when Hon. E. Main was in conduct of the trial. The same were recorded as follows:

> ***"E. Maina (m/s) CM***
>
> ***SP Towett for State***
>
> ***Faith – CC***
>
> ***Accused- Both present.***
>
> ***Mr. Enonda for 1st accused***
>
> ***Mr. Ng'ang'a for 2nd accused***
>
> ***<u>Mr. Ng'ang'a</u>: Only three witnesses remained. Defence ready to proceed from where matter had stopped and are ready today.***
>
> ***<u>Mr. Enonda</u>: I concurred***
>
> ***<u>Pros</u>: Ready with 2 witnesses.***
>
> ***[signed]***
>
> ***<u>Ct</u>: Hg at 11 o'clock.***
>
> ***[signed]"***

The court then proceeded to hear PW12 at 11 o'clock.

I emphasize that the subsection (3) of Section 200 places on a succeeding magistrate a mandatory obligation to explain to an accused person how he wishes the matter to proceed. This is provided in the terms that the accused may demand that any witness be re-summoned or re-heard. The obligation being in mandatory terms implies that if the succeeding magistrate fails to comply with it, the consequences render the entire trial a nullity. As shown in the duplicated proceedings, Hon. E. Maina blatantly ignored to comply with this mandatory legal provision; that is she failed to record that she had explained to the accused the requirements of the provision. My understanding of the provision is that the obligation is direct and personal on the court and cannot be delegated to any other person, including the accused's advocate. The accused cannot therefore make a decision on how the matter would proceed before a succeeding magistrate himself has made an inquisition from the accused on how he wished the matter proceeds. For the failure to comply with this mandatory provision, I hold that the entire proceedings were vitiated thus rendering the trial a nullity. Let me add that the Court of Appeal has severally delivered itself on this piece of law as in the case of ***Henry Kailutha Nkairichia & another v. Republic[2015] eKLR- Cr. App. No. 21 of 2013, CA sitting at Meru,*** *viz*

> ***"All of these decisions declare that the provisions of Section 200 (3) [of the Criminal Procedure Code] are mandatory and a succeeding Judge or Magistrate must inform the accused person <u>directly and personally</u> of his right to recall witnesses. It is a right exercisable by the accused person himself and not through an advocate and a Judge or magistrate complies with it out of statutory duty requiring no application on the part of an accused person. Further, failure to comply by the court always renders the trial a nullity."(emphasis added).***

This error can only be corrected if this court orders that a retrial be conducted. But again, a retrial can

only be ordered on consideration of several factors. See the case of **Opicho vs. Republic [2009] KLKR, 369**, the Court of Appeal sitting in Nakuru held that:

> ***"In general a retrial would be ordered only when the original trial was illegal or defective. It would not be ordered where the conviction was set aside because of insufficiency of evidence or for purpose of enabling the prosecution to fill gaps in its evidence at the first trial. Even where a conviction was vitiated by a mistake of the trial court for which the prosecution was not to blame, it does not necessarily follow that a retrial should be ordered. Each case must depend on its own facts and circumstances and an order for a retrial should only be made where the interests of justice require it.***

Also in ***Mwangi vs. Republic [1983] KLR 522*** *to wit:*

> ***"That a retrial should not be considered unless the appellate court is of the opinion that, on a proper consideration of the admissible evidence, or potentially admissible evidence a conviction might result; Braganza vs. Republic [1957] E.A 152(CA) 469; Pyarwa Bussam vs. Republic [1960] E.A 854***

Several factors have therefore to be considered. These include:

> ***1. When the original trial was illegal or defective a retrial will be ordered.***
>
> ***2. A retrial will not be ordered if the conviction was set aside because of insufficient evidence.***
>
> ***3. A retrial should not be ordered to enable the prosecution to fill up the gaps in its evidence at the first trial.***
>
> ***4. A retrial should not be ordered where it is likely to cause an injustice to the accused person.***
>
> ***5. A retrial should be ordered where the interest of justice so demand.***
>
> ***6. Each case should be decided on its own merits.***
>
> ***7. Whether there is evidence to support the conviction."***

In the present case, the prosecution called a total of thirteen witnesses. As rightly submitted by both the appellant and the respondent, the appellant was convicted based on circumstantial evidence. But as it was held by the Court of Appeal in the case of **Sawe vs. republic [203] KLR 364** that:

> ***"In order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt."***

The prosecution was engendered to demonstrate that the circumstances of the case left no doubt that the appellant committed the offence to the exclusion of any other person. Back to the evidence, the appellant was convicted alongside the bank's manager on ground that they were in custody of the bank's main door key and entrance to where the safe was kept. From the evidence of PW1, the appellant left the branch manager Victor Owuor Okeyo in the bank. PW5, Daniel Emeli further testified that about seven employees of the branch had copies of the key to the main door. This included the branch and the headquarters' doors. In addition, the combination to the safe was not in the hands of one person. Amongst the key persons who had to be present before the safe was opened was PW7, Bernice Mwihaki Kiragu who was the operations manager. In exonerating the appellant, she testified that the appellant was to be off duty on 22nd January, 2011, the day the theft was committed. She personally advised the appellant to leave her keys with the manager and in turn the manager instructed her to leave the key in her drawer from where she would pick them.

It can then be deduced that the key that the appellant held was not solely in her custody and more so, she was not in its control by the time the theft was orchestrated. It is questionable how PW7 as an operations manager advised the appellant who was a mere cashier to leave her key in an open drawer if she did not know what was to follow. It was also PW7's evidence that the appellant's drawer was not lockable and was therefore accessible to any other person. Again, this statement raises eyebrows how she advised the appellant to leave the safe keys in an open drawer without the knowledge of the risk the same posed. Interestingly, PW7 also acknowledged that the combination number to the safe had been written on a notebook by one Rebecca and that on the date of the theft, the note book was not kept in a safe place. All these circumstances lead the court to conclude that the theft was an inside job of which the appellant was charged as a scapegoat. Furthermore, since copies of the main door key were distributed to many staff members, there was a possibility that any of the holders of the key could have accessed the bank as well as the safe combination and its keys and proceeded to steal the money. In my view therefore, the co-existing circumstances of the case weakened the chain of events that would have solely implicated the appellant. For these reasons, doubts abound that the appellant either committed the offence or was involved in the commission of the offence.

In the result, I find that the circumstantial evidence adduced did not form a concrete basis to found a conviction against the appellant. Therefore, even if the court was to order that a retrial be conducted, the same is unlikely to result in a conviction. I accordingly quash the conviction, set aside the sentence and order that the appellant be forthwith set free unless otherwise held. It is so ordered.

Dated And Delivered at Nairobi this 31st Day of July, 2017.

G.W.NGENYE-MACHARIA

JUDGE

In the presence of:

1. Mr. Oonge h/b for Mr. Ngatia for the Appellant

2. Mr. Ndamu for the Respondent.