



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 94 OF 2015

LUCY NYAMBURA MARUBU.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in the Chief Magistrate's Court at Kiambu Criminal Case No.2329 of 2014 by Hon. D. K. Mochache (Mrs), P.M dated 16th May, 2015)

JUDGMENT

The Appellant herein was charged with the offence of stealing by agent contrary to **Section 283 of the Penal Code**. The particulars of the offence were that on diverse dates between 2nd January, 2014 and 10th June, 2014 at Njathaini Village Kasarani Division within Nairobi County, stole cash Kshs. 116,900/= by withdrawing the amount from Equity Bank Account No. 0640198931613 belonging to Amina Wanjiku Ciuri. She was found guilty as charged and sentenced to serve four years imprisonment. Being dissatisfied with both the conviction and sentence, she preferred the appeal herein.

In a Petition of Appeal dated 19th June, 2015, the Appellant was dissatisfied that she was convicted based on a charge that was defective. Further, she was dissatisfied that the learned trial magistrate convicted her when no exhibits were adduced in evidence. She was also dissatisfied that the trial court shifted the burden of proof to her. She faulted the court for arriving at a conviction without indicating the offence for which she was convicted and the sentence for being harsh and excessive in the circumstances. Finally, she faulted the court for convicting her when the prosecution had not proved the case beyond all reasonable doubts.

The appeal was disposed of by filing written submissions. Those of the Appellant were filed by learned counsel Mr. Ng'ang'a Kimani and Associates. On defective charge sheet, counsel submitted that the Appellant was convicted for the offence of stealing by agent whereas she was charged under **Section 283 of the Penal Code** without specifying the subsection relating to the offence. He submitted that the offence ought to have been disclosed in a clear and unambiguous manner so that the Appellant would specifically plead to the charge. The charge as drafted, counsel submitted, did not comply with **Section 134 of the Criminal Procedure Code**. His view was that the defect was not curable under **Section 382 of the Criminal Procedure Code**, the prosecution having failed to seize the opportunity to amend the charge sheet under **Section 214 of the Criminal Procedure Code**. Counsel submitted that the learned trial magistrate failed to take into account that the prosecution had not proved the case beyond reasonable doubt as a result of which the Appellant's defence ought to have been upheld. Moreover, the court relied on computer generated documents which were not produced in court in accordance with **Section 65 (8) of**

the Evidence Act. It was further the view of the counsel that the judgment of the court clearly shifted the burden of proof to the Appellant. He justified this by the fact that the judgment questioned why the Appellant failed to explain the disappearance of the money whereas it is trite that the burden of proof lies with the prosecution to prove their case beyond all reasonable doubt. Further, counsel submitted that the judgment of the trial court failed to comply with **Section 169 of the Criminal Procedure Code** which requires the court specifies the offence that was convicted and the particular provision under which an accused is convicted. Finally, it was the submission of the counsel that the sentence imposed on the Appellant was harsh and excessive in the circumstances.

The submissions of the Respondent were filed by learned State Counsel Miss Linda Nyauncho on 18th February, 2016. She submitted that the prosecution had proved their case beyond all reasonable doubts and that the production of exhibits by the prosecution was in accordance with **Section 78A(4) of the Evidence Act.** Furthermore, the charge sheet could not be deemed as defective as the Appellant all along knew the charge facing her and she pleaded to it in a specific manner. Even if the sub-section of **Section 283 of the Penal Code** was not indicated, that defect was minor and was curable under **Section 382 of the Criminal Procedure Code.** She urged the court to disregard that submission whilst taking into account the provisions of **Article 159(2)(d) of the Constitution** that justice should be administered without undue regard to procedural technicalities. On sentence, she submitted that the same was lenient as the trial magistrate took into consideration the mitigating factors offered by the Appellant.

It is important that this court first addresses the questions of law raised by the Appellant.

Defective Charge Sheet

The Appellant contended that the charge sheet was defective since it did not specify the sub-section under which the offence was stated. A look at the statement of the charge reads as follows:

“Stealing by agent contrary to Section 283 of the Penal Code.”

Section 283 of the Penal Code bears sub-sections (a) to (e) which outline the nature or amount of the property or goods or items received by the offender and the mode of receiving such property. The question for the court is whether the failure to specify the sub-section under which the charge was drawn rendered the charge defective or the trial a nullity or occasioned the Appellant any injustice. **Section 134 of the Criminal Procedure Code** provides for what constitutes a proper charge or information. The same reads as follows:

“Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged.”

A concurrent court in **Kipkurui Arap Sigilai & another V Republic [2004] eKLR**, Hon. Justice Kimaru stated as follows:

“The offence which such an accused is charged with should be disclosed and stated in a clear and unambiguous manner so that the accused can be able plead to the specific charge which he can understand. It may also enable an accused person to prepare his defence to the charge.”

The particulars of the offence were as follows:

“On diverse dates between 2nd January 2014 and 10th June, 2014 at Njathaini Village, Kasarani Division within Nairobi County stole cash Kshs. 116,900/= by withdrawing the amount from equity Bank account No. 0640198931613 belonging to Amina Wanjiku Chiuri.”

The particulars as drawn clearly show that the Appellant pleaded to the charge of stealing by agent whose particulars of the mode of theft was by withdrawing the money from an account from Equity Bank

belonging to Amina Wanjiku Ciuri. Therefore, although the sub-section of **Section 283 of the Penal Code** was not specified in the statement of charge, the particulars of the charge were so clear and unambiguous such that the Appellant understood the specific charge that she was pleading to. That enabled her to fully participate in the trial and properly defend herself. Further both the charge and its particulars clearly were in accordance with the provisions of **Section 134 of the Criminal Procedure Code**. I therefore conclude that the charge was not defective in any manner. The trial cannot be rendered a nullity merely for want of substitution by an amendment of the charge sheet under section **214 of the Criminal Procedure Code**. In any case, the omission to specify the sub-section of the law under which the charge was drawn was minor and is curable under **Section 382 of the Criminal Procedure Code**.

Production of Exhibits

According to the Appellant's Counsel, the prosecution relied on computer generated exhibits whose production did not comply with **Section 65 (8) of the Evidence Act**. Counsel pointed to P. Exhibits 1 and 2. A look at the proceedings points that the two exhibits were produced by PW4, Police Constable Kipng'etich Kutu who was the Investigating Officer. He referred to the two exhibits as the complainant's Equity Bank Statements from 18th December, 2013 to 27th July, 2014. **Section 65(8) of the Evidence Act** provides for the manner in which computer print outs or statement in evidence should be adduced. The same reads as follows:

“(8) In any proceedings under this Act where it is desired to give a computer print-out or statement in evidence by virtue of this section, a certificate doing any of the following things, that is to say-

- a. Identifying a document containing a print-out or statement and describing the manner in which it was produced;*
- b. Giving such particulars of any device involved in the production of that document as may be appropriate for the purpose of showing that the document was produce by a computer;*
- c. Dealing with any of the matters to which the conditions mentioned in the subsection (6) relate.”*

The provision stipulates that a computer printout document or statement is admissible in evidence if the same is certified by a person holding a responsible position in relation to the operation of the relevant device of management of the activity to which the document relates in the ordinary course of business. A look at the original record of proceedings clearly shows that the statements as adduced in court as evidence were not certified by a bank official who would be a competent person for the time being responsible to confirm to the operations of the relevant device that printed the statements. PW3, although a bank official, only identified the statements but did not produce them. Therefore, the production of the said statements was not in accordance with **Section 65 (8) of the Evidence Act** and were therefore not admissible in the first instance. The trial court could not rely on them as a basis in founding a conviction against the Appellant.

Judgment

It was submitted by the counsel for the Appellant that Section 169 of the Criminal Procedure Code was not complied with. The same reads as follows:

“(1) Every such judgment shall, except as otherwise expressly provided by this code, be written by or under the direction of the presiding officer o the court in the language of the court, and shall contain the point or points for determination, the decision thereon and the reasons for the decision, and shall be dated and signed by the presiding officer in open court at the time of pronouncing it.”

A look at the judgment cleanly shows that it contained the points for determination, the reasons for the decision arrived at and it was dated and signed by the presiding officer. Under **Sub-section (2) of Section 169**, a judgment should specify the offence for which the accused is convicted and the punishment to which he is sentenced. In the last paragraph of the judgment, the presiding officer delivered herself as

follows:

“for the foregoing reason, I believe the prosecution has proved its case beyond every reasonable doubt and convict the accused person as charged under Section 215 of the Criminal Procedure Code.”

That statement partly complied with subsection (2) in that it stated the provision under which the Appellant was convicted but failed to specify the offence for which the Appellant was convicted. The omission however cannot nullify the judgment since the court was categorical it had convicted the Appellant for the offence she was charged with. That offence is none other than stealing by agent.

Proof of the case

In total, the prosecution called four witnesses. PW1 testified as the complainant. The Appellant was employed at an Equity Bank agency where she received cash deposits and issued withdrawals to clients. The complainant often banked and withdrew her money at the agency operated by the Appellant. It was whilst she went to withdraw some money that the Appellant told her that she only had Kshs. 2,787/= which shocked her because she knew she had Kshs. 130,000/=. A statement of her account from Equity Bank showed that there were withdrawals of Kshs. 70,000/= on 2nd January, 2014, Kshs.7,900/= on 21st April, 2014 and Kshs.39,000/= on 10th June, 2014 which she had not authorized. According to PW1, it was only the Appellant who could have withdrawn the money because, being an old and illiterate woman the Appellant used to sign for her transactions. She also knew her pin number because she used to enter it when the Appellant was looking. Unfortunately, according to PW2 who employed the Appellant at the agency, on the date Kshs. 7,900/= was withdrawn, the Appellant was not on duty. It was a Tuesday and the Appellant was always off duty on Tuesdays. As such, it was difficult to link all the withdrawals to the Appellant. That evidence read together with Appellant’s defence that she did not know how the complainant lost her money, should have cast doubt in the mind of the trial magistrate that the Appellant may not have stolen the cash.

Conclusion

On evaluating the evidence on record, I come to the conclusion that the prosecution did not adduce sufficient evidence to warrant a conviction. I accordingly quash the conviction and set aside the sentence. I order that the Appellant be and is hereby set free unless otherwise lawfully held. The cash bail for release pending the hearing of the appeal shall be released to the payee. It is so ordered. The cash bail paid by the Appellant pending appeal be refunded to her.

DATED and DELIVERED this 16th day of March, 2016.

G.W. NGENYE-MACHARIA

JUDGE

In the presence of:

1. *Kamonjo holding brief for Ng’ang’a for the Appellant*
2. *M/s Nyauncho Respondent.*