



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI

NYERI HIGH COURT CRIMINAL APPEAL NO. 548 OF 2014

ROBERT WANJOHI KINYUA APPELLANT

VERSUS

REPUBLIC RESPONDENT

(An appeal against conviction and sentence in original Mukuruweini SPMCR 420/2013

delivered on 30th June, 2014 by W Kagendo, senior principal magistrate on 30th June, 2014)

JUDGMENT

The appellant **Robert Wanjohi Kinyua** was charged together with **Daniel Wakinia Wangai Alias Charles Migwi Njugana** in the subordinate court with 9 counts. The ones relevant to the appellant werecount 1 where he was charged with the offence of conspiracy to commit a misdemeanor contrary to section 394 of the penal code; The particulars of the offence are that on diverse dates between 26th – 27th September, 2013 at Gakindu Trading Centre in Gakindu location of Mukuruweini sub-county within Nyeri County jointly with another not before court conspired to commit a misdemeanor namely stealing money from Biashara Sacco Ltd Gakindu Branch.

In count 4 the appellant was charged with the offence of making a false document contrary to section 247(4) of the penal code. The particulars of the offence are that on 28th day of September 2013 at Nanyuki Township in Laikipia East Sub-county in Laikipia County made a Biashara Sacco Society cash withdrawal slip purporting into be a slip to allow him withdraw shs.90,000 from account No.0643-2330089 at Nanyuki Biashara Sacco Branch.

In Count 5 appellant was charged with the offence of uttering a false document contrary to section 353 of the penal code. The particulars of the offence are that on the 28th day of September, 2013 at Nanyuki Township within Laikipia County knowingly and fraudulently uttered a forged withdrawal slip to Agnes Waithera Kalindi purporting it to be a slip to allow him to withdraw shs.90,000 from his account No.0643-23-30089 at Biashara Sacco Society Limited, Nanyuki branch.

In count 6 the appellant was charged with the offence of attempted stealing contrary to section 389 of the penal code. The particulars of the offence are that on the 28th day of September, 2013 at Nanyuki Township in Laikipia East Sub-county within Laikipia County attempted to steal cash Kshs.90,000 the property of Biashara Sacco Society limited.

After full trial the appellant was found guilty and convicted on count 1 (conspiracy to commit a felony) and sentenced to serve 3 years imprisonment; alternative to count 2 (sic) handling stolen goods and sentenced to serve 2 years imprisonment and count 6 attempted stealing and sentenced to two years

imprisonment. The imprisonment term to run concurrently. Dissatisfied with this conviction and sentence the appellant filed this appeal.

Mr. Kimina for the appellant faulted the judgment of the trial magistrate on grounds which can be condensed to 5 grounds: That the learned trial magistrate erred in finding that the ingredients of the offence of conspiracy and theft had been established when there was no evidence, the trial magistrate casually dismissed the appellants defence; that the judgment did not comply with the provision of section 169 of the criminal procedure code; the conviction was against the weight of the evidence and finally that the sentence was excessive.

Counsel for the appellant filed written submissions amplifying on the grounds of appeal. He submitted that for an offence of conspiracy to be established there must be two people involved. In the present charge, counsel submitted that conspirators were employees of the Sacco Paul, Lucy and Rachael who were not among those charged and instead it was the appellant and his co-accused Daniel Wakabia who were charged. He submitted that without the assistance of a bank employee the appellant and his co-accused would not commit the offence and cannot therefore have conspired to steal the money. The mere fact that they had opened a joint account where they attempted to withdraw money would not make them conspirators.

Counsel further submitted that the conviction in count 6 attempted stealing is silent on how the decision was arrived at as no reasons are given contrary to the provision of section 169 C.PC which enjoins the court to provide reasons for the decision; finally counsel submits that the appellant defence was dismissed without giving reasons.

Mr. Njue prosecuting counsel for the respondent opposed the appeal. He supported the conviction and sentence. He filed written submissions. Mr. Njue submitted that the appellant was never charged with an alternative charge to count 2 and therefore the conviction and sentence on that count is an error. In respect to count 1 conspiracy to commit a misdemeanor, counsel submitted that there was a conspiracy between the appellant Daniel Wakihia Wangari the co-accused and one Paul Njao Ndunga ho was an employee of the bank to steal the money and the appellant was arrested while attempting to withdraw the money which had been transferred to their account from a dummy account opened for that purpose by Paul. He therefore submitted that it is from the appellant's actions that a conspiracy can be inferred. In respect to count 6 attempted theft he submits that the appellate had taken steps to withdraw money he had not deposited in the Sacco and there was sufficient evidence to support the charge. Finally he submits that the trial magistrate considered the defence and dismissed it and that the judgment complied with the provision of sec.169 of the criminal procedure code.

Briefly the evidence before the trial magistrate was that PW1 Joseph Kamau Kariuki was the chairman of Biashara Sacco Ltd which operated banking in 6 branches in Nyeri, Karatina, Othaya, Gakindu, Kiawara and Nanyuki. On 27/9/2013 he received information from the internal auditor Peter Githinji Gitai that there was a customer Charles Wangai Njuguna who had gone to withdraw shs.200,000 from an account that had been opened the previous day and had only deposited shs.50. He went there and on checking the financial trail found that a dummy account had been opened by the branch manager Paul Njau Ndungu from where he posted Shs.200,000 to the account of Charles Wangai. They also found that Paul Njau the manager had transferred from another dummy account shs.250,000 to an account held jointly with the appellant at Nanyuki branch, which had been dormant. They alerted the police. The next day the appellant appeared at Nanyuki Branch and wanted to withdraw 90,000 from the account. He filled the withdrawal forms and presented the same and that is when he was arrested and charged with the present offence.

The appellant gave unsworn evidence stating that Paul Njau Ndunga the manager at Biashara Sacco was his friend. On 27/9/2013 Paul called him and told appellant he was going to send shs.90,000 to their joint account and he should withdraw some and give it to his wife to pay for purchase of land. On 29/9/2013 he went and completed the withdrawal forms and presented it with ID Card. He was told by the cashier to go to the manager's office and while at the office the C.I.D came and arrested him. He denied knowing where Paul had got the money from and then he did all the transactions in good faith.

From the above evidence the trial magistrate found that Paul Ndugu opened some dummy accounts then transferred money from these accounts to the accounts from which the appellant and his co-accused withdrew them. Counsel for the appellant faults this finding on the ground that as Paul Ndungu was not arrested and charged with the appellant and another, no conspiracy was established. The essential ingredients of the offence of the conspiracy to commit an offence is that two or more persons agree to put into effect a scheme with the aim of the commission of an offence. The scheme can be deduced or inferred from the actions undertaken to achieve the common intention.

The appellant admits he knew Paul Ndungu well. Indeed he informed court that they were business partners and has opened a joint account. That account had been dormant and suddenly he was told to withdrawal the 90,000; by Paul. This is the money which has been transferred from a dummy account created by Paul the previous day. The appellants defence was that he was sent by Paul and had no knowledge of the theft. From the whole evidence; it is clear to me that appellant together with his co accused and Paul Ndungu knew or hatched the scheme with the aim of stealing the money belonging to the Biashara Sacco. In my view the evidence tendered by the prosecution was overwhelming and the trial magistrate rightly in my view reached to the conclusion that appellant was guilty of the offence in count 1 conspiracy to commit a misdemeanor and count 6 attempted theft.

On the issue raised by counsel for the appellant that the judgment does not contain reasons for the decisions in compliance with section 169 criminal procedure code, I have perused the judgment and I am satisfied that it is well reasoned and findings supported by evidence.

In the result I agree with Mr. Njue that the sentence on alleged alternative charge to count 2 is irregular as appellant was not charged with alternative to count 2. The sentence imposed of two years on alternative charge to count 2 is set aside. Except a stated above, I uphold the conviction and sentence in respect of the appellant in count 1 of 3 years imprisonment and count 6 of 2 years imprisonment. Imprisonment term to run concurrently.

Dated and signed at Nyeri this 16th day of May, 2016.

S RIECHI

JUDGE