REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL NO.193 OF 2011

BETWEEN

DAVID MUKONYOLE YESWA ……APPELLANT

AND

REPUBLIC ……..RESPONDENT

(Being an appeal from original conviction and sentence in Butali PMC Criminal case No.21 of 2008 delivered on the 15/08/2011 by Hon. S.N. Abuya, SRM)

J U D G M E N T

Introduction

1. The Appellant herein was arraigned before the Principal Magistrate's Court at Butali on one count of stealing contrary to section 275 of the Penal Code. The particulars being that on 3rd May, 2007 at Cheroso village, Cheroso sub location, South Kabras location in Kakamega North District within the Western Province, he stole Kshs.300,000/= (Three hundred thousand) the property of FLORENCE NYAKOA.
2. The appellant denied the charge when he appeared for plea on 01/02/2008. The case thus proceeded to hearing during which the prosecution called 6 witnesses. After the close of the prosecution case, the appellant was put on his defence. He testified and also called 2 witnesses.
3. Upon careful consideration of all the evidence that was placed before him the learned trial Magistrate reached the conclusion that the prosecution had proved its case against the appellant beyond any reasonable doubt. The appellant was found guilty as charged, convicted and sentenced to a fine of kshs.50,000/= in default 1 (one) year imprisonment.

The Appeal

4. The Appellant was not satisfied with the findings of the learned trial Magistrate and on 26/05/2011, he filed the Petition of Appeal through the firm of Momanyi Manyoni and Company Advocates. The same firm had represented the appellant during the trial. The Petition of Appeal sets out the following 5 grounds of appeal:-

    i) The learned trial Magistrate erred both in law and fact in holding that the prosecution had proved their case beyond reasonable doubt.

    ii) The learned Magistrate erred both in law by rejecting the defence of the appellant.

    iii) The learned Magistrate erred both in law and fact in analyzing the evidence before her

and hence arriving at a wrong finding (sic)

iv) The learned Magistrate erred both in law and fact by shifting the burden of proof to the appellant.

v) The learned Magistrate erred both in law and fact by giving an excessive sentence to the appellant.

5. The appellant prays that the appeal be allowed, conviction quashed and sentence set aside.
6. This is a first appeal. In the circumstances, this Court is under a duty to reconsider and evaluate the evidence afresh and reach its own conclusions in the matter. It is only after such reconsideration and upon careful analysis of the trial Court's judgment that this Court can say with any degree of certainty whether or not the findings of the learned trial magistrate can stand. In the case of **Koech & another –vs- Republic [2004] 2 KLR 322**, the Court of Appeal held, inter alia, that "as this was a first appeal, the High Court was mandated to look at the evidence adduced before the trial Court afresh, re-evaluate it and re-assess it and reach its own independent decision on whether or not to uphold the conviction of the appellants." The Court had to bear in mind the fact that it did not see the witnesses as they testified and therefore it could not be expected to make any findings as to the demeanour of the witnesses. The Court is further mandated to consider the grounds of appeal put forward by the appellant." This indeed is the true legal petition and I agree with it.
7. When the issue of sentence is raised on appeal, the first appellate Court is reminded that it would not alter a sentence imposed by a trial Court unless it is evident that the trial Court acted upon wrong principles or overlooked some material factors. See **Omuse –vs- Republic [2009] KLR 214**. In the earlier case of **Griffin –vs- Republic [1981] KLR 121**, the Court held that an appellate Court "cannot interfere with the sentence imposed by the trial Court solely on the round that it was heavy, unless, it was also manifestly excessive."

The Prosecution Case

8. From the 6 prosecution witnesses, the case for the prosecution is as follows: Florence Nyakoa Muyebo, PW1 sold a piece of land to one Elam Mbashi Liselu, PW2, for kshs.360,000/= (shillings three hundred sixty thousand only) and on 03/05/2007 the money was paid to her at Ambwere Hotel in Kakamega in the presence of the appellant who is a real brother to Florence. The Chief of the area, Alfred Muhatia who testified as PW5 was also present on that evening when the money changed hands between Florence and Elam.
9. Upon receipt of the money which was counted by all present, including Chivolo Murunga, PW2 and Ernest Mulupi Asibo PW3, Florence took kshs.60,000/= out of the 360,000/= after it was agreed that the appellant would keep Kshs.300,000/= overnight and deposit it into his Post Bank account the following day. The parties then parted.
10. Florence wanted to buy another shamba with the said sum of kshs.300000/=. She looked for such a piece for 2 months and after she found it she went to the appellant and asked him to give her the money but instead of giving her the money the appellant told her that the bank book was in Nairobi and that he would have to go for it. For 8 months, the appellant did not avail the money and when Florence insisted on being given the money, the appellant became hostile. Finally, the appellant informed Florence that he had used the money to purchase a shamba in Kitale; but from investigations that shamba in Kitale was a cropper.
11. When the appellant failed to produce the kshs.3000,000/= Florence reported the matter to the Chief and later to Malava Police Station. The report to Malava Police Station was made on 22/01/2008 to PC Joshua Kiptilong who testified as PW6. PW6 recounted the story given to him by Florence and after establishing that the appellant deposited the sum of kshs.300,000/= into his account, as per bank statement produced in Court as PExhibit 2, the appellant was arrested and charged with the offence. The agreement of sale between Florence and Elam Mbashi was produced as PExhibit 1.
12. PW2, Chevolo Murunga confirmed that he was present when Florence was paid the money by Elam at Ambwere Hotel. He also confirmed that he witnessed the sale agreement. He however

stated that Florence remained with the money and that he never saw any money being given to the appellant.

13. Ernest Mulupi, PW3 testified that after the money had been counted Florence took kshs.60,000/= and gave kshs.300,000/= to the appellant who in turn put it in a hand bag which PW2 had. That on that same evening, Florence, Chivolo Murunga, the appellant and PW3 all went to the Post Bank and witnessed the appellant depositing the money into his account. PW3 further testified that when Florence wanted the money, the appellant failed to produce it. Later, the appellant told PW3 that he (appellant) had used the money and that he would only be able to pay back the money after selling a plot he had in Kitale, but the money was never paid. PW3 stated that Florence asked the appellant to bank the money for her because she did not have a bank account.
14. PW4, Elam Mbashi Liselu confirmed payment of kshs.360,000/= to Florence and that he had since taken possession of the shamba.
15. Alfred Muhatia, PW5, the Chief of South Kabras location confirmed that he was among the people who witnessed the payment of kshs.360,000/= by Elam PW4 to Florence. He also testified that while they were still at Ambwere Hotel, the appellant confirmed that he operated an account with Post Bank Kakamega Branch. PW5 said he did not accompany Florence and the appellant to the bank but he confirmed that the two had agreed to go to the bank together so that the appellant could bank the money. That marked the close of the prosecution case.

The Defence Case

16. In his sworn statement, the appellant stated that Florence is his uterine sister from the second wife of Angali Chebole. Though he admitted that kshs.300,000/= was deposited into his account, he stated that the money was for him and his siblings after sale of 2 acres of land that belonged to his father's second house. That the money was to be used for filing succession cause in respect of their father's estate. He also stated that he spent some of the money – kshs.180,000/= for the mother's funeral and a further kshs.7000/= on the surveyor. The appellant also gave details of other expenditure spent on the surveyor, some funerals after which only kshs.19000/= remained in the account. He denied stealing the money. He also testified that the money was deposited by Florence herself after he furnished her with the account number.
17. During cross examination the appellant stated that Florence was his step sister and that she deposited the money into his account because she did not have an account. He also admitted that he was the one who withdrew the money from the account.
18. DW2 was Chevolo Musali. He confirmed that he was present when the money was given to Florence but denied being present during the deposit. He could however not say how the money deposited in the appellant's account was used.
19. William Indangasi Murandu testified as DW3. He confirmed that Florence deposited the money into the appellant's account but stated that when mother to Florence died some of that money was used during the funeral namely kshs.5500/= for coffin, - receipt produced as DExhibit 2, kshs.1,000/= for transport, a cow worth kshs.10,000/=, Kshs.3000/= paid to uncles by Florence. He also testified that some kshs.55000/= had to be paid to the first buyer after the first land sale fell through. During cross examination, DW3 stated that he did not know how much money the appellant spent during the funeral. The evidence by DW3 marked the close of the defence case.

Judgment of the Learned Trial Magistrate

20. After carefully considering the evidence on record the learned trial Magistrate reached the conclusion that the appellant indeed stole the sum of kshs.300,000/= entrusted to him by Florence. The reason being that the appellant withdrew all the money save for kshs.3513.60 without permission of Florence and that the appellant had also not produced any documents to prove that he had used the money for the purposes he alleged to have used it. The trial Court thus found the appellant guilty as charged and convicted him accordingly.

Submissions

21. Parties filed and exchanged written submissions Counsel for the appellant submitted that the

prosecution failed to prove that Kshs.300,000/= was stolen by the appellant at the stated place. It was contended that although the complainant deposited the money into the appellant's account, the appellant withdrew the money on the complainant's direction, and that this Court should find that the appellant was truthful in this regard. The appellant abandoned ground four of the appeal which was to the effect that the learned trial Magistrate had erred in law and fact by shifting the burden of proof from the prosecution to the appellant. In my humble view the appellant made a wise decision in abandoning this ground of appeal.

22. On his part Counsel for the respondent submitted that there was no doubt that the appellant widened converted to his own use, the complainant's Kshs.300,000/=, which amount was admittedly deposited into the appellant's account. Regarding the gravity of the sentence imposed upon the appellant, Counsel submitted that the sentence was too lenient given the prevalence of the crime in the area. He urged the Court to dismiss the appeal in its entirety.

Analysis and Determination

23. Section 268 of the Penal Code gives a definition of stealing and provides under subsection (1) thereof that "A person who fraudulently and without claim of right takes anything capable of being stolen, or fraudulently converts to the use of any person other than general or special owner thereof any property, is said to steal that thing or property." Section 268 (2) further provides that "A person who takes anything capable of being stolen or who converts any property is deemed to do so fraudulently if he does so with any of the following intents, that is to say:

a. ……
b. ……..
c. ……..
d. ……..
e. In the case of money an intent to use it at the will of the person who takes or converts it, although he may intend afterwards to repay the amount to the owner."

24. In light of the above definition I am satisfied that the appellant indeed stole the money entrusted to him by Florence. There is no dispute that the money was deposited into the appellant's account. There is also no dispute that the appellant is the one who withdrew all the money from the account except for the sum of kshs.3513/60. Florence testified that when she wanted the appellant to withdraw the money so she could pay for a piece of land, the appellant started behaving funny saying that the pass book was in Nairobi and that after many months of pestering the appellant became hostile and did not produce the money. Later when the appellant was cornered he offered to sell a piece of land that was allegedly located in Kitale but that was not to be. It is clear from the evidence on record that the appellant's intention was to use the complainant's money at his will and to deprive Florence of it although he may have intended to refund it. I do concur with the findings of the learned trial magistrate that the appellant did not controvert the prosecution's case that he used Florence's money for his own purposes. The appellant's story about using some of the money on funerals was, in my view, a mere afterthought.

Conclusion

25. In conclusion and considering at each of the grounds of appeal I find no reason to interfere with the judgment of the learned trial Magistrate. I am satisfied that the prosecution proved its case against the appellant beyond any reasonable doubt. I am also satisfied that the learned trial Magistrate properly analysed the evidence on record before reaching the conclusions made. I have myself gone through the appellant's defence and find that the same did not displace the prosecution's case. In any event the learned trial magistrate properly set out the defence case and found that the same was not believable and was not supported.

26. As for sentence, the law prescribes 3 years. In the instant case the appellant was fined kshs.50,000/= in default one (1) year imprisonment. There is no proof that the trial Court either applied wrong principles or imposed a sentence that was too harsh in the circumstances. I have no reason to

interfere with the discretion of the learned trial Magistrate in this regard.

27. The appeal is accordingly dismissed on both conviction and sentence. The judgment of the learned trial magistrate is confirmed.

28. Orders accordingly.

Judgment delivered, dated and signed in open Court at Kakamega this 23rd day of June 2016.

RUTH N. SITATI

J U D G E

In the presence of:

Mr. Osango h/b for Manyoni (present) for appellant

Mr. Oroni (present) for Respondent

Mr. Okoiti - Court Assistant