



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 212 OF 2013

ZAKAYO TENDEE OLORUNDAI APPELLANT

VERSUS

REPUBLICRESPONDENT

(Being an appeal from the original conviction and sentence in Chief Magistrate's Court Criminal Case No. 130 of 2012 by Hon. T. A. Odera ,P.M on 8/8/2012)

JUDGMENT

1. **Zakayo Tendee Olurundai** ,was charged as follows:-
 - a. **Count 1** – personation contrary to **Section 382** of the **Penal Code**. Particulars thereof being that on the 17th day of February, 1012 at **Mlolongo Township** in **Athi River District** within **Machakos County** with intent to defraud falsely represented himself to be **Lolotori Lemerwa Kalama**.
 - b. **Count 2** – conspiracy to commit a felony contrary to **Section 393** of the **Penal Code**. Particulars thereof being that on the 18th February, 2012 and 21st February, 2012 at **Mlolongo Township** in **Athi River District** within **Machakos County**, jointly with another not before court, conspired together to commit a felony namely to steal from **Hyllet Mwende Mutuku** of her motor vehicles registration numbers **KMZQ 755A** make **Dayun** and **KMCU 469D** make **Premier**.
 - c. **Count III** – stealing contrary to **Section 275** of the **Penal Code**. Particulars being that on the 21st day of February, 2012 at **Mlolongo Township** in **Athi River District** within **Machakos county**, jointly with others not before court, stole a motor-cycle registration number **KMCO 755** make **Dayun** valued at **Kshs. 95,000/=** the property of **Hyllet Mwende Mutuku**.
2. The case as presented by the prosecution was that PW1, **Hyllet Mwende Mutuku** entrusted the appellant and another with motor-cycles she claimed to own. Three (3) days later they disappeared with the motorcycles. The matter was reported to the police, investigations were carried out and the appellant was traced at **Makadara** area **Athi River**, he was arrested and charged.
3. When put on his defence the appellant stated that it was a case of mistaken identity. He stated that he is a Tanzanian who works in **Nairobi** as a watchman. He denied being the **Lolotori** that the police were looking for.
4. The learned trial magistrate evaluated evidence adduced and found the appellant guilty. She convicted him of all the three(3) counts and sentenced him as follows:-
 - i. **Count 1** – one(1) year imprisonment
 - ii. **Count 2** – one(1) year imprisonment
 - iii. **Count 3** – 3 years and 2 months imprisonment

Sentences were to run concurrently.

5. Being aggrieved by the conviction and sentence thereof he appealed on eleven (11) grounds of appeal which when condensed was that the case against the appellant was riddled with discrepancies and inconsistencies and hence not proved beyond any reasonable doubt.
6. The appeal was canvassed by way of written submissions.
7. This being the 1st appellate court my duty is to re-evaluate the evidence, draw my own inferences and come to a logical conclusion knowing that I did not have an opportunity of seeing or hearing witnesses who testified at the trial court. (*See Okeno versus Republic (1972) E.A. 32*).
8. With regard to the 1st count, **Section 382** of the Penal Code provides:-

“(1) Any person who, with intent to defraud any person, falsely represents himself to be some other person, living or dead, is guilty of a misdemeanour.

“(2) If the representation is that the offender is a person entitled by will or operation of law to any specific property and he commits the offence to obtain such property or possession thereof, he is liable to imprisonment for seven years”.

It is specifically stated which particular subsection the appellant contravened. According to the particulars of the offence if the appellant purportedly contravened **Section 382(1)** of the Penal Code, in order for the person to be guilty of the offence he must have had the intention to defraud a particular person – it is stated:-

“...Any person, who, with intent to defraud any person, falsely represents himself to be some other person, living or dead, is guilty of a misdemeanor”.

The person who was to be defrauded should have been mentioned in the particulars of the offence. The charge as drawn falls short of communicating whom he falsely represented himself to with the intent to defraud.

9. That notwithstanding, PW1, **Hyllet Mwende Mutuku** in her evidence was silent on the purported representation. PW5, **Faith Mueni** stated that she was at PW1's shop when the appellant produced a copy of identity card in the name of **Lolotori Lemerwa Kalama** but she insisted on seeing the original prior to her as a lawyer drafting an agreement. She did not identify the copy of the identity card that she alluded to. **PW6, No. 86529, P.C. Kennedy Mukeituii Njagi** stated that he was shown a copy of identity card which he was given by the complainant. At that point in time the document was marked for identification as 'PMF1- 5'. The document is in the name of **Lolotori Lemerwa Kalama** ID Number 26953061. PW6 requested the National Registration Bureau for particulars pertaining to **Lolotori Lemerwa Kalama**.
10. It was established that identity card number 22467365 belonged to **Lolotori Lemerwa Kakama** who hailed from Kajiado. In her evidence PW1 stated :-

“The workers/drivers are Tenderee... and the other Beyani.”

On cross examination she said the appellant was called **Zakayo Tendee**. Having not stated anything to do with the copy of the identity card or the appellant having mentioned that he was called **Lolotori**, PW6 cannot be believed when he states that he got the copy of the identity card from PW1. There is therefore absolutely no proof that the appellant represented himself as **Lolotori Lemerwa Kalama**.

11. I will deal with count 3 prior to dealing with count 2. It is stated that the appellant stole a motorcycle registration number KMCQ 755A make Dayun, the property of **Hyllet Mwende Mutuku**. It was the evidence of PW1 that she owned the motorcycle and identified its logbook. The logbook No. S0110920M for motor-cycle No. KMCQ 755A is in the name of Dayun Motor Cycle Limited. There is a document indicating it was purchased by **Joseph Mutuku** from **Setmax Traders** Limited. PW2, **Joseph Mutuku** stated that he was sent by his sister to purchase it. He did not disclose the name of his sister who sent him to purchase the motorcycle. It was a

- requirement for the registered owner of the motor cycle to clarify the fact of ownership. At the close of the prosecution's case there was no proof that the complainant was the beneficial /special owner of the motorcycle.
12. It has been stated by the complainant that the appellant worked for her for three (3) days. PW5 stated that she gave the appellant Kshs. 1000/= to service the motor cycle. In his defence the appellant argued that he was arrested following mistaken identity as he is a Tanzanian working as a watchman. He stated that he came to Kenya on the 18th February, 2012. It is a cardinal principle of Law that in a criminal case the legal onus is on the prosecution to prove the guilt of an accused person and the standard of proof is proof beyond any reasonable doubt. (***Evans Mathenge Wachira versus Republic; Section 107 (2) of the Evidence Act***).
 13. The prosecution had a duty of proving that the appellant worked for the complainant. There must have been tangible evidence that the appellant worked for the complainant for the stipulated time. The prosecution had absolutely nothing to prove the same. **PW4, John Mwaniki Mutaka** who stated that he was led to **Makadara** by a watchman who identified the appellant was not called as a witness. This would have been a proper person to state if indeed the appellant was who the prosecution witnesses alleged to be. This was a gaping doubt in the prosecution's case that should have been taken into consideration by the trial court.
 14. In the premises the prosecution failed to disprove the defence that was put up by the appellant.
 15. The appellant would be deemed to have committed the offence of conspiracy to commit a felony if it had been proved that he stole motor-cycles registration number KMCQ 755A and KMCU 469D.
 16. Having re-evaluated evidence adduced at trial it is apparent that investigations carried out were shoddy and as a result the case was not proved to the required standard of proof beyond reasonable doubt.
 17. In the result the appeal succeeds. The conviction is quashed and sentences imposed set aside. The appellant shall be set at liberty unless otherwise lawfully held.

DATED, SIGNED and DELIVERED at MACHAKOS this 22nd day of JANUARY, 2015.

L.N. MUTENDE

JUDGE