REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

CRIMINAL APPEAL NO. 20 OF 2014

SAMMY WAITHAKA NGUGI……..….APPELLANT

-VERSUS-

REPUBLIC…….....…….……....RESPONDENT

(An appeal from the conviction and sentence of the Principal Magistrate's Court (S. Ngii) at Wanguru, Criminal Case No. 5 of 2013 dated 9th May, 2014)

JUDGMENT

1. **SAMMY WAITHAKA NGUGI**, the appellant herein has appealed to this court against the conviction and sentence passed against him in **WANGURU PRINCIPAL MAGISTRATE'S CRIMINAL CASE NO. 5 OF 2013**. In that court he had been charged with two (2) counts;

(i) Stealing contrary to** Section 27 **of the Penal Code

with facts being that on 31st December, 2012 at Ngurubani Township within Kirinyaga County he stole a purse containing cash of Kshs.51,000/- cosmetics namely lip balm and other personal items belonging to MARY RIIMI JONAH the complainant in the case.

(ii) He also faced alternative count of handling the same property belonging to the same person contrary to** Section 322 (2) **of the Penal Code.

2. Being dissatisfied with both the conviction and sentence he preferred this appeal and raised seven (7) grounds in his petition as follows:

(i) That the learned magistrate erred in law and fact in failing to find that the prosecution had not proved the charges of stealing contrary to** Section 275 **of the Penal Code and handling stolen goods contrary to** Section 322 (2) **of the Penal Code.

(ii) That the learned trial magistrate erred in law and fact in convicting the Appellant from the charges against him yet the prosecution evidence did not meet the legal threshold to sustain the charges.

(iii) That the learned magistrate erred in law and in fact in Convicting the Appellant of the charges against him yet the prosecution evidence was contradicting, inconsistent and incredible.

(iv) That the learned magistrate erred in law and in fact in relying on what is

termed as manufactured and/or fact fabricated evidence in convicting the appellant.

(v) The learned magistrate erred in law and in fact in shifting the burden of proof from the prosecution to the defence occasioning miscarriage of justice.

(vi) That the learned magistrate erred in law and in fact in imposing a severe sentence to the Appellant given the nature of the charges.

(vii) ***That the rights of the Appellant under Article 50 were not observed.***

3. The Appellant's counsel in her submissions in support of the petition of appeal laid emphasis on the contradictions apparent in the prosecution case *visa vis* the judgment of the trial court. M/s Wangechi pointed out that the charge sheet indicates that the Appellant stole a purse containing Ksh.51,000/- but the learned trial magistrate in his decision found the allegation untrue and yet went ahead to convict the appellant in the same count. In the Appellant's view the charge sheet should have been amended to reflect or distinguish the theft of the purse as opposed to theft of Kshs.51,000/-. The particulars of the charge sheet combined the theft of the purse and Kshs.51,000/- thereby making it defective in Appellant's view.

4. The Appellant also questioned the particulars of what was found in the purse when recovered in regard with the particulars on the charge sheet pointing out that the mark pen found was not contained in the particulars in the charge sheet.

5. The Appellant also argued that he was arrested a few metres from the bar and it could have been possible to recover the stolen money if it is true that he had stolen and that there is no proof that he had stolen.

6. The Appellant also pointed out that the charge facing him was not proved beyond reasonable doubt pointing out the relationship between the complainant and the Appellant was not taken into account by the trial magistrate. He submitted that he was not stealing the purse but that he was taking it to the complainant who was a girlfriend to him.

7. Mr. Sitati for the State opposed the appeal and supported both the conviction and the sentence meted out against the Appellant. Mr. Sitati submitted that the evidence tendered by prosecution linking the accused with the crime was direct contrary to the submissions by the Appellant. He contended that the prosecution tendered overwhelming evidence that a purse belonging to the complainant was indeed stolen by the Appellant

and that the purse contained among other things Kshs.51,000/-. He submitted that the evidence of P.W.1 and P.W.2 clearly explained how the offence was connected and how the Appellant was arrested and the recovery of the stolen purse a few metres from the bar said to belong to the complainant.

8. Mr. Sitati further submitted that the Appellant was arrested by P.W. 3 (the investigating officer) while holding the stolen purse in his hands adding that he took the purse without authority and with intention to permanently deprive the Appellant of the same. He supported both conviction and sentence saying that the same was lenient in the circumstances.

9. I have considered the appeal and the submissions made by both counsel for the Appellant and the State. I have looked at the proceedings and the judgment of the learned trial court. It is not disputed that the Appellant and the complainant were acquaintances at the material time. The complainant told the trial court under cross-examination that she was good friend to the Appellant and were drinking together at the material time. What was disputed is the fact of theft. The Appellant defended himself against the charge and told the court on oath that he was taking the purse to his girlfriend while the complainant told the court that the Appellant was actually stealing and not carrying the purse to her. This brings in the question on what is stealing or what constitutes theft.

10. In order to answer this question there is need to examine the true meaning of 'stealing'. According to **Oxford English Dictionary** stealing means ***"To take another person's property secretly without permission or legal right and/or dishonestly".***

The **Penal Code** under ***Section 268 (1)*** gives the legal definition of the crime of stealing as follows:

> ***"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 the general or special owner thereof, any property is said to steal that thing or property."***

The law further goes to add the following elements or ingredients of the offence as:

(i) An intent to permanently deprive the owner of the stolen item or property.

(ii) To utilize the stolen item or property.

(iii) To use it in a manner that it cannot be returned in the same condition.

(iv) If the stolen item is converted.

Looking at the above definitions and the circumstances obtaining at the trial court in the light of evidence tendered, it is doubtful whether the action of the complainant can be termed as stealing beyond reasonable doubt.

11. I noted from the proceedings at the trial court that the Appellant and the complainant had a contractual transaction which was exhibited in court as D. exhibit 1. The complainant admitted the same and admitted that she owed the Appellant some money and that she had already paid him some deposit. The Appellant told the trial court in his defence that the complainant had paid a total of Kshs.50,000/- as deposit for the lease of a shop premise which was the subject matter in the transaction. The trial court in his judgment found merit in the claim by the Appellant that the complainant's allegation of the theft of Kshs.51,0000/- was intended to coerce the Appellant refund the amount deposited to the complainant. This finding by the trial court lends credence to ground four of the petition of appeal herein. The Appellant's contention that the charges against him were a fabrication does hold some water in the light of the above finding by the trial court. This Court finds that the trial magistrate misdirected himself because after correctly finding merits on part of the defence put forward he could not have gone ahead to find that the prosecution had proved their case beyond reasonable doubt.

12. The relationship between the Appellant and the complainant appeared to have been strong given the evidence tendered by P.W.2 who told the Court that she allowed the Appellant to take away the purse even though she had been told to take care of it by the complainant. This meant that P.W.2 trusted the Appellant and knew of the chore relationship because surely one cannot allow a stranger to walk away with a friend's purse if she was left in charge. She also told the trial court that she saw the Appellant converse with the complainant after taking the purse. I do also find it incredible that the Appellant was arrested a short distance from the bar by P.W.3 past midnight and yet from the explanation or version given by P.W.1 and P.W.2 they were drinking at 10.00 p.m. at the bar when the incident occurred. P.W.1 told the trial court that she was on her way to report the incident at the Police Station when a few metres from the bar, she realized that the Appellant had been arrested. However, P.W.3 the arresting officer, told the trial court that he arrested the Appellant past midnight when he found him drunk and staggering around with a purse in his hands. This in my view is inconsistent with the evidence adduced by P.W.1 and P.W.2 and to that extent the trial court erred by failing to direct his mind to the inconsistency in totality with the evidence tendered by both the prosecution and the defence. I also find it odd that the Police did not explain to the trial court why they arrested the Appellant if they had no prior knowledge of the crime. Whether it was a coincidence or smartness of the said officer to

detect that a crime had been committed is really a matter of conjecture but whatever the case the trial magistrate should have been left with some doubts in the face of all these.

13. I also noted from the charge sheet that the Appellant was arrested on 1st January, 2013 and arraigned in court on 2nd January, 2013. However, the same charge sheet indicates that a report on the theft was actually reported on 4th January, 2013. This fact was confirmed by the investigating officer (P.W.3) under cross-examination. The anomaly was not addressed by either the Appellant or the State in this appeal but that as it may, what is important is that the Appellant appeared to have been arrested and charged in court before a formal complaint was made which is a bit odd and this may explain the reservation expressed by the Appellant in this appeal that there was more to charge facing him than what met the eye. This Court is unable to establish whether it was a question of a relationship gone sour or the issue of transaction and the attendant obligations. Whatever the case what is clear in this appeal is that it has merit. The prosecution failed to prove the case beyond reasonable doubt. There were many doubts demonstrated above which should have benefitted the appellant at the trial.

14. I also find that the defence put forward by the Appellant really created doubts whether there is any offence committed in the first place.

The upshot of the above is that I find merit in this appeal. I allow it.

The conviction is quashed and the sentence is set aside. The Appellant is set free unless otherwise lawfully held. The security shall be returned to the surety. It is so ordered.

Dated and delivered at Kerugoya this 24th day of June, 2015.

R. K. LIMO

JUDGE

24.6.2015

Before Hon. Justice R. Limo

Court Clerk Willy Mwangi

Appellant present

Muthike holding brief for Wangechi for the appellant present

Omayo for State present

COURT: Judgment signed, dated and delivered in the open court in the presence of the appellant and Mr. Muthike holding brief for Wangechi and Omayo for Director of Public Prosecutions.

R. LIMO

JUDGE

24.6.2015