



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT ELDORET**  
**CRIMINAL APPEAL NO. 106 OF 2013**

**EDITH KATHURE MUNYUA ..... APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

***(An Appeal from the Judgment of the Senior Resident Magistrate Honourable E. Tanui in Eldoret Criminal case No. 3107 of 2012 dated 30th May, 2013)***

**JUDGMENT**

1. The appellant was tried and convicted on two counts with the offence of improper use of a licenced telecommunication system Contrary to **Section 29(a)** of the **Kenya Communications Act No. 2 of 1998**.

2. In the first count, it was alleged that on the 11<sup>th</sup> day of July 2012 at Moi Teaching and Referral Hospital in Uasin Gishu District of the Rift Valley province, by means of a licensed communication system namely (YU) through mobile No. 0751 378426, the appellant sent an SMS to mobile No. 0720 755298 belonging to *Anne Chemworsio* that *“uko na watoto makabila mbali mbali utaona cha mtemakuni, utanza kutembea bila guo kwa barabara, your days are limited”*.

3. In the second count, the particulars thereof alleged that on 9<sup>th</sup> day of July, 2012 at Moi Teaching and Referral Hospital in Uasin Gishu District of the Rift Valley province, by means of a licensed communication system namely (YU) through mobile No. 0751 378426, the appellant sent an SMS to mobile No. 0728 970034 belonging to *Thomas Ngetich Kibiwott* that *“your girlfriends to enjoy your sex life, he should go for HIV test because very soon will be a victim for casualty, that hiyo mkia una erect ovyo will remain inside one of your girlfriends, it is Doctor that will separate both you when the public will be watching”*.

Upon conviction, the appellant was sentenced to pay a fine of Kshs. 20,000/- in each count in default to serve a period of six months imprisonment.

4. The appellant was dissatisfied with her conviction and sentence hence this appeal. The appeal was lodged on her behalf by he advocates *M/s Rotuk & Company Advocates*. The petition of Appeal contained nine grounds which I reproduce here below;

i. That the Honorable Magistrate erred in law and fact by holding that the accused person had the

- onus of proving allegations raised by the prosecution.
- ii. That the Honorable magistrate erred in law and fact by holding that an unregistered phone number could be identified by the use of an unregistered handset or gadget.
  - iii. That the Honorable magistrate erred in law and fact by misdirecting herself that an unregistered phone number could link the Appellant to the text message without evidence from the service provider.
  - iv. That the Honorable magistrate erred in law and fact by holding that the appellant wrote a text message through a YU line that could be traced by SAFARICOM KENYA LIMITED or AIRTEL KENYA LIMITED.
  - v. That the honorable magistrate erred in law and fact in holding that the origin of an abusive message could only be linked to an institutional re-structuring that affected the Appellant.
  - vi. That the Honorable magistrate ignored the evidence on record and based her judgment on assumptions.
  - vii. That the Honorable magistrate erred in law and fact by ignoring the evidence adduced as no ownership of the YU line was established.
  - viii. That the Honorable magistrate erred in fact and law when she ignored to consider the phone and serial numbers as testified by the prosecution witnesses.
  - ix. That the Honorable magistrate erred in fact and law in taking into consideration evidence that were tendered by third parties.

5. At the hearing of the appeal, the appellant was represented by learned counsel *Mr. Chemwok* while the Republic was represented by learned prosecuting counsel *Miss Mwaniki*.

In his oral submissions, *Mr. Chemwok* contended that the charges were defective; that the learned trial magistrate erred by shifting the burden of proof to the appellant by requiring her to prove her innocence; that there was no evidence that the complainants ever made a report to any police station as no O.B minute directing investigations to be conducted was produced in court; that the offences had not been proved beyond reasonable doubt as there was no evidence to prove that the offending messages originated from telephone lines registered in the names of the appellant or to the mobile phone handset said to belong to the appellant. He urged the court to allow the appeal.

6. The appeal is contested by the state. Learned prosecuting counsel *Miss Mwaniki* in opposing the appeal submitted that the prosecution had proved its

case against the appellant beyond reasonable doubt as there was evidence that abusive messages were sent to the two complainants using a YU line which was linked to the appellant; that the complainants reported their complaints to Eldoret Police station and this is why investigations were conducted; that the claim that the charge sheet was defective ought to be disregarded as it was not one of the grounds of appeal and lastly that the appeal ought to be dismissed for lack of merit.

7. In rejoinder, *Mr. Chemwok* submitted that the mobile phone was recovered from the appellant was a Nokia 2600 which had a Safaricom line; that the Safaricom line was not subject of the proceedings before the trial court and it was not linked to the offending messages; that the prosecution and the court relied on the assumption that the appellant owned the telephone lines used to send the offending messages and finally that the appellant did not have an obligation to prove her innocence.

8. This is a first appeal to the High Court. I am aware of my duty as the first appellate court which is to consider a fresh and re-evaluate the evidence adduced before the trial court to draw my own independent conclusions. In doing so, I should bear in mind that unlike the trial court, I did not have the advantage of seeing or hearing the witnesses and give allowance for that:

**See: *Okeno V Republic (1932) EA I; Kiilu & Another V Republic (2005) KLR 175; Simiyu & Another V Republic (2005) 1 KLR 192***

9. I have considered the grounds of appeal, the evidence tendered before the trial court, the judgment of the learned trial magistrate and the submissions made by *Mr. Chemwok* and *Miss Mwaniki*.

I wish to start by concurring with *Miss Mwaniki's* submission that the complaint that the charges on which the appellant was convicted were defective was not one of the grounds of appeal and it cannot therefore be considered on appeal.

**Section 350(2)** of the **Criminal Procedure code** expressly provides that an appellant shall not be permitted at the hearing of the appeal to rely on a ground of appeal other than those set out in the petition of appeal.

10. That said, I find that from the evidence on record, it is not disputed that the complainants in the two counts and the appellant were at the material time employees of the Moi Teaching and Referral Hospital; that on the dates stated in the charge sheet, both complainants received offending messages from their mobile hand sets and that besides noting the Yu Mobile number the messages originated from, none of them knew the person who had sent the offending messages. There is evidence to show that the complainants reported the matter at Eldoret police station and PW3 *Corporal Patrick Wandera* was tasked by the Divisional Criminal Investigations officer to investigate the matter.

11. In his evidence, PW3 admitted that the Yu line which had been used to send the offending messages was not registered under any person. He testified that the Yu service provider provided him with the serial number of the mobile phone handset in which the Yu line had been used; that in the course of his investigations, he obtained transcripts from Safaricom Ltd and Airtel Ltd which established that the same handset had used Safaricom telephone Line No. 0722 912881 and Airtel No. 0737409511 which lines he used to trace and arrest the appellant. On arresting the appellant, he recovered a mobile phone handset which he produced as Pexhibit 2.

12. The appellant in her defence gave a sworn statement and denied having sent any of the offending messages. She also denied owning a YU line.

13. Having re-evaluated the evidence adduced before the trial court and read the judgment of the trial court, I find that it is clear from the judgment of the learned trial magistrate that she was acutely aware of the law on the burden of proof and that she did not shift the burden of proof from the prosecution to the appellant.

On page 39 lines 6 – 11 the trial magistrate stated;

***“ The defence given by the accused was a mere denial. I understand that the accused person had no obligation to prove her innocence. However she didn't raise any doubt on the prosecution case.***

***Consequently, I find that the prosecution has proved both counts herein against the accused person beyond a reasonable doubt. The accused is guilty as charged on both counts and is convicted thereon under Section 215 CPC”.***

14. I however find that the learned trial magistrate erred in law and in fact in holding that the prosecution had proved the charges against the appellant beyond any reasonable doubt when the prosecution had not produced any evidence whatsoever linking the appellant to the sending of the offending text messages. It was admitted by the prosecution that the YU line on which the messages were sent was not registered in the names of the appellant and no evidence was adduced to prove that the mobile phone hand set recovered from the appellant bore the serial number of the communication gadget used to send the offending messages. The finding by the learned trial magistrate that the mobile phone handset recovered from the appellant bore the said serial number was erroneous as it was not based on any evidence. I agree with *Mr. Chemwok's* submissions that the appellant's Safaricom and Airtel numbers were not the subject of the proceedings before the trial court and they had no relevance to the charges preferred against the appellant.

15. For all the foregoing reasons, I am satisfied that the evidence tendered by the prosecution before the trial court fell short of establishing the offences facing the appellant beyond reasonable doubt. It is thus

my finding that the appellant was wrongly convicted in both counts. Her appeal is therefore merited and it is hereby allowed. I consequently quash her conviction in each count and set aside the sentence imposed by the trial court. I direct that the appellant be set at liberty forthwith unless otherwise lawfully held.

It is so ordered.

**C.W GITHUA**

**JUDGE**

**DATED, SIGNED and DELIVERED at ELDORET this 30<sup>th</sup> day of November, 2015**

In the presence of:

The appellant,

Naomi.....Court Clerk

No appearance for the state.