REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NO 50 OF 2012

ELIZABETH WAITHIEGENI GATIMU…...….APPELLANT

VERSUS

REPUBLIC……..……RESPONDENT

(Appeal against Judgement, sentence and conviction in Criminal case number 254 of 2011, Republic vs Elizabeth WaithiegeniGatimu at Karatina, delivered J. M. Omido, S.R.M. delivered on 2.3.2012).

JUDGEMENT

On 21.3.2011, **Elizabeth Waithiegeni Gatimu** (hereinafter referred to as the appellant) was arraigned before the Senior Resident Magistrates court at Karatina charged with the offence of stealing by servant contrary to Section **281** of the Penal Code.[1]

The particulars of the offence were that on the 17th day of March 2011, at KaratinaTownship in Mathira East District withinNyeri County, being a servant to Margaret Wambui Mithamo, stole from the said Margaret WambuiWambuiMithamo cash Ksh. 366,400/= which came to her possession by virtue of her employment.

After evaluating the evidence and the law, the learned Magistrate found the appellant herein guilty and sentenced her to serve 2 years imprisonment.

In determining this appeal, this court fully understands its duty as stated in the case of **Okeno v. R**[2] which is to subject"*the evidence as a whole to a fresh and exhaustive examination*[3]and this court to arrive at its own decision on the evidence and that as a first appellate court, this court must itself weigh conflicting evidence and draw its own conclusions[4]must make its own findings and draw its own conclusions making allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses.[5]"

In other words, the first appellate court must itself weigh conflicting evidenceand draw its own conclusions[6]and also scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses.[7]

PW1 No. 232056 IP Geoffrey Chania,a forensic Document examiner examined documents sent to him relating this case and confirmed that they were written under the same hand and produced the report marked exhibit 4.

PW2 Margaret Wambui Mithamo testified thaton 17.3.2011 he gave the appellant Ksh. 98,400/= to

bank in her account at the Co-operative Bank of Kenya Ltd and Ksh. 268,000/= at Kenya Commercial Bank Ltd. At 12.30 pm the appellant called her and told her worker at home had fallen sick and was injured and that she was taking her to hospital. She further testified that at about 3pm the same day she was called from the Co-operative Bank and informed that there were no sufficient funds in her account to cover a cheque she had issued, and that Ksh. 220,000/= was required. She phoned the appellant and asked her why she had not banked the money and said it was because of the emergency she had and that she was in hospital. Shortly her phone went dead. At 4pm she went to her husband's place of work. The husband said he was not aware that the worker was in hospital. At 6.30pm she went to the police station and reported. A Mr.Mureithi phoned her and told her the appellant had called and said she was on her way to her shop. She proceeded to the shop with two police officers and found the appellant there. She explained to her that she was greeted by someone at the Co-operative Bank and does not know what happened but found herself following the said person and he left her at Othaya and that he said person went away with the money.

On cross-examination **PW2** confirmed that the appellant had on many occasions banked money for her and even larger amounts than the amount in question and that she did not believe that the appellant lost the money to a stranger because she had switched off her phone.

PW3 David Kinyua Mbuian employee of the Co-operative Bank of Kenya Ltd confirmed that the appellant went to the bank and said the complainant had sent her to collect a statement which he gave to her after confirming with the complainant on phone and that she did not carry on any other transaction.

PW4 Virginia Nyaguthii Mithamoa co-worker confirmed that she witnessed the appellant being given money to take to the bank.

PW5 No. 63524 PC Julius Mbaluka was at the police station when the complainant reported the incident. He accompanied the complainant to her shop and found the appellant, interrogated the appellant and charged her. He also produced the exhibits.

At the close of the prosecution case the trial magistrate was satisfied that a *prima facie* case had been established and put the accused person on her defence. The provisions of section 211 of the Criminal Procedure Code were complied with and the appellant herein opted to give sworn evidence.

In her defence, the appellant stated *inter alia* as follows:-

> *"……..…While at the queue, a man came and told me he had booked the place behind me and then there was a woman calling me outside the bank. I went outside the bank. I had been in the line for one or 2 minutes. I did not know the woman outside. She asked me if I knew Wanjira. I said I did not know her. She then said Wanjira was my worker, Mama Njoki and told me that she had fallen in the house. She said that Mama Njoki was at Mathai Supermarket. A month before then, Mama Njoki had fallen in the house and injured herself. I went with the woman to Mathai. She told me Mama Njoki was behind a vehicle that was at the parking. We neared the car. The door was opened and I was pushed into the rear seat. In the vehicle there were 2 men. She entered the vehicle and sat next to me. She closed the door. I asked where she was taking me. She said she was taking me to see my worker at Karatina hospital. I do not know what happened thereafter. I regained consciousness at a place near Mukuruweini in a thicket near Gatigi Bridge. The complainant then phoned me and I told her where I was and that I was heading back to my work place. I found myself only with my bag, the bank statement and phone. I told her I would explain to her what happened……. I got to work and the complainant came with police. I did not steal……I do not know where the money went……..I walked from Gatigu bridge. The police did not want to hear my side of the story… I did not scream or raise an alarm when I was pushed into the car……"*

Upon cross-examination she said she could not know the registration number of the vehicle nor could she recall the colour of the vehicle. She also confirmed that she followed the person even though she did not know her and that she had left a 3 ½ child in the house and that she regained consciousness at 3.30pm and

was feeling week

After evaluating the prosecution and the defence case, the trial magistrate found the appellant guilty and sentenced her to serve 2 years imprisonment.

Aggrieved by the said finding, the appellant appealed to this court against the conviction and sentence imposed and raisedthree grounds of appeal, namely; **(i)** that the learned magistrate erred in law in concluding that the prosecution had proved its case beyond reasonable doubt, **(ii)**that the learned magistrate erred in concluding that appellants' defence was a fairy tale, **(iii)** that the sentence meted was excessive.

I have carefully considered the submissions by the appellants' advocates and submissions by the learned state counsel and the relevant law and authorities. I will address grounds one and two together.

To my mind the rule that the prosecution may obtain a criminal conviction only when the evidence proves the defendant's guilt beyond reasonable doubt is basic to our law. It is necessary that guilt should not only be rational inference but also it should be the only rational inference that could be drawn from the evidence offered taking into account the defence offered if any. If there is any reasonable possibility consistent with innocence, it is the duty of the court to find the defendant not guilty.

The key question that this court seeks to answer is whether or not the appellant offered any other explanation that could exonerate her from the offence or whether there exists any other co-existing circumstances which could weaken or destroy the inference of guilt which is a necessary test before arriving at a conviction on the evidence tendered. This calls for close examination of the defence offered by the accused. Her testimony was that while at the queue someone told her a lady was calling her outside, she went out and found a lady who told her worker had fallen in the house and led her to a car where she was forced in and was told that she was being taken to the hospital where her worker was. She had left a 3 ½ year old baby in the house. She woke up later abandoned somewhere without the money and feeling sick. She walked along distance and arrived at her employers' shop after 6.30pm only to be arrested and her explanation on the ordeal she had encountered fell on deaf ears.

The key question is, does the defence offered raise doubts as to her guilty? Is it reasonable in the circumstances? In my view, whatever is thought to be the purpose of criminal punishment, one fundamental principle seems to have evolved in the jurisprudence of the common law legal tradition; that, before an accused person can be convicted of a crime, his/her guilt must be proved beyond reasonable doubt. Perhaps the most eloquent statement of reason for this is to be found in the opinion of **Brennan J** in the United States Supreme Court decision in **Re Winship**[8] where the court stated:-

> *"The accused during a criminal prosecution has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatised by the conviction……Moreover use of the reasonable doubt standard is indispensable to command the respect and confidence of the community. It is critical that the moral force of criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned"*

The existence of the principle of proof beyond reasonable doubt is unchallenged in the common law world. In the English common law, it was elegantly affirmed by the House of Lords in the celebrated judgement of **Viscount Sankay** in **D.P.P vsWoolmington.** The United States Supreme Court in the above cited case of ***Re Winship*** held that the reasonable doubt rule has constitutional force under the due process provisions of the United States Constitution.

The explanation given by the appellant was reasonable and in my view meets the test laid down in the above cited cases. The Supreme Court of Nigeria in the case of *Ozaki and another vs The State*[9]stated that *"it is settled law that the defence of alibi raised by an accused person is to be proved on a balance of probability"* and that for it to be rejected it must be incredible and that the defence of alibi must be weighed against the evidence offered by the prosecution.

In **Uganda vs. Sebyala& Others**,[10] the learned Judge citing relevant precedents had this to say:-

> *"The accused does not have to establish that his alibi is reasonably true. All he has to do is to create doubt as to the strength of the case for the prosecution. When the prosecution case is thin an alibi which is not particularly strong may very well raise doubts"*

On whether the appellants defence raised reasonable doubt on the prosecution case, I find useful guidance in the case of *Victor Mwendwa Mulingevs Republic*[11]the court of appeal rendered itself on the issue of alibi thus:-

> *"It is trite law that the burden of proving the falsity, if at all, of an accused's defence of alibi lies on the prosecution; see Karanjavs Republic**[12]**this court held that in a proper case, a trial court may, in testing a defence of alibi and in weighing it with all the other evidence to see if the accused's guilty is established beyond all reasonable doubt, take into account the fact that he had not put forward his defence of alibi at an early stage in the case so that it can be tested by those responsible for investigating and thereby prevent any suggestion that the defence was an afterthought"*

An alibi must be raised at the earliest opportunity in answer to the charge and once a defence of alibi is promptly and properly put up, the burden shifts to the prosecution to investigate it and rebut such evidence in order to prove the case against the accused beyond reasonable doubt. In the case of *Adedejivs The State*[13] it was held that *"failure by the police to investigate and check the reliability of alibi would raise reasonable doubt in the mind of the tribunal and lead to the quashing of a conviction imposed."*[14] The accused has only what is referred to as the evidential burden which means the duty of adducing evidence or raising the defence of alibi.[15] Once an accused person discharges the evidential burden of adducing evidence of alibi, it's the duty of the prosecution to disprove it. The duty of the court is to test the evidence of alibi against the issue adduced by the prosecution and if there is doubt in the mind of the court the same is resolved in favour of the accused.

In the present case, the appellant after the ordeal went straight to her employer and found her with the police, she narrated her ordeal but her explanation fell on deaf ears. It has not been shown that the police did any investigations to disapprove her story. They instead opted not to believe her. Her explanation in court was not and cannot be said to have been an afterthought. Right from the time of the arrest the police knew her alibi.

The onus on the prosecution to prove the charge against the accused beyond reasonable doubt never shifts and there is no onus on the accused to prove the alibi beyond that of introducing the evidence of alibi. Where the accused gives conflicting stories as to his whereabouts at the material time under consideration, there is no duty to investigate the alibi. In such a case, no alibi is established. To raise the defence the accused must give particulars of his hereabouts at the particular time just like the appellant did in the present case.

To me the alibi offered by the appellant raises doubts as to whether she committed the offence. A trial court has a duty to weigh the evidence adduced in court by all the parties in totality and make a finding on the culpability or otherwise of the accused. Choosing to analyse the prosecution evidence and leave out that of the accused is a fatal mistake. It's a duty bestowed in every court to weigh one set of evidence (prosecution) against another (defence) before arriving at a conclusion. This is the basic calling of every court without exception.[16] In the present case it was improper for the magistrate to dismiss such an ordeal as a fairy tale. In fact there was no basis for so finding bearing in mind the history and admission by the complainant that the appellant had on many occasions been trusted with much larger amounts of money and that the ordeal in question could befall anyone.

The South African case of *Ricky Gandavs The State*[17]provides useful guidance. In the said case it was held:-

> *"The acceptance of the evidence on behalf of the state cannot by itself be sufficient basis for*

rejecting the alibi evidence. Something more is required. The evidence must be considered in its totality. In order to convict there must be no reasonable doubt that the evidence implicating him is true……the correct approach is to consider the alibi in light of the totality of the evidence in the case and the courts impression of the witnesses….it is acceptable in totality in evaluating the evidence to consider the inherent probabilities….

The proper approach is to weigh up all the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and having done so, to decide whether the balance weigh so heavily in favour of the state as to exclude any reasonable doubt about the accused's guilt"

Having considered the circumstances of this case, the prosecution evidence and the defence offered by the appellant, I am not persuaded that the conviction was justifiable and that this is a case where the accused ought to have been given the benefit of doubt. To give an accused person the benefit of doubt in a criminal case, it is not necessary that there should be many circumstances creating the doubt(s). A single circumstance creating reasonable doubt in a prudent mind about the guilt of an accused is sufficient. The accused is entitled to the benefit of doubt not a matter of grace and concession, but as a matter of right.

An accused person is the most favourite child of the law and every benefit of doubt goes to him regardless of the fact whether he has taken such a plea.

Reasonable doubt is not mere possible doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence leaves the mind of the court in that condition that it cannot say it feels an abiding conviction to a moral certainty of the truth of the charge.[18] In 1997, the Supreme Court of Cananda in *R vsLifchus**[19]*** suggested the following explanation:-

"The accused enters these proceedings presumed to be innocent. That presumption of innocence remains throughout the case until such time as the crown has on evidence put before you satisfied you beyond a reasonable doubt that the accused is guilty. …….the term beyond a reasonable doubt has been used for a very long time and is a part of our history and traditions of justice. It is so engrained in our criminal law that some think it needs no explanation, yet something must be said regarding its meaning.

A reasonable doubt is not imaginary or frivolous doubt. It must not be based upon sympathy or prejudice. Rather, it is based on reason and common sense. It is logically derived from the evidence or absence of evidence.

Even if you believe the accused is guilty or likely guilty, that is not sufficient. In those circumstances you must give the benefit of the doubt to the accused and acquit because the crown has failed to satisfy you of the guilty of the accused beyond a reasonable doubt. On the other hand you must remember that it is virtually impossible to prove anything to an absolute certainty and the crown is not required to do so. Such a standard of proof is impossibly high.

In short if, based upon the evidence before the court, you are sure that the accused committed the offence you should convict since this demonstrates that you are satisfied of his guilty beyond reasonable doubt"

In the present case and after carefully considering the defence and prosecution evidence, I find that there were reasonable basis for creating reasonable doubts as to the guilty of the accused. I allow grounds one and two of the appeal. I see no reason to discuss ground three. The upshot is that this appeal succeeds. I hereby quash the conviction and set aside the said sentence.

Right of appeal 14 days

Dated at **Nyeri** this **27th** day of **November** 2015

John M. Mativo

Judge

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[1] Cap 63, Laws of Kenya

[2] {1972) E.A, 32at page 36

[3] See Pandyavs Republic {1957}EA 336

[4] See Shantilal M. Ruwalavs Republic {1957} EA 570

[5] See Peter vs Sunday Post {1958}EA 424

[6]Shantilal M. Ruwala V. R (1957) E.A. 570

[7]see Peters V.Sunday Post (1958) E.A. 424

[8] 397 US 358 {1970}, at pages 361-64, see also the more recent elaboration of the rationale of the principle in R VS Oaks 25 D.LR (4^{TH}) 200 {1987} at pp 212-214

[9] Case No. 130 of 1988

[10]{1969} EA 204

[11] {2014}eKLR

[12] {1983}KLR 501

[13] {1971}1All N.L.R 75

[14] See Onafowakanvs The State {1987}7 SC, 3 N.W.L.R. Page 538

[15] See OrteseYanor& Others vs The State {1965} N.M.L.R. 337

[16] John Matiko& Another vs Republic, Criminal Appeal No. 218 of 2012

[17] {2012}ZAFSHC 59, Free State High Court, Bloemfontein

[18]Duhaime, Lloyd, Legal Definition of Balance of Probabilities, Duhaime's Criminal Law Dictionary

[19]{1997}3 SCR 320