



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
CRIMINAL APPEAL NO. 2 OF 2014

BETWEEN

JANE KARIMI MUCIRA APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the original conviction and sentence from original conviction and sentence in Runyenjes Criminal Case No. 616 of 2013 by Hon. J.P. Nandi - Ag SRM on 10th January, 2014)

JUDGMENT

1. The appellant was charged and convicted of the offence of stealing contrary to **section 275** of the ***Penal Code (Chapter 63 of the Laws of Kenya)***. The particulars were that on 20th November, 2013 at Runyenjes District Hospital, Embu County, she stole one mobile phone make Tecno and cash amounting to Ksh 4,000/= the property of Roseline Wanja. She was convicted of the offence and sentenced to serve two years in prison.
2. The evidence against the appellant was as follows: On 20th November 2013, the complainant, PW 1 was at the hospital to take her child to the clinic. While waiting, a lady came and sat next to her. PW 1 then went to see the doctor while leaving her bag with the child. When she came out, she realized her handbag was open and her phone and Ksh 4,000 was missing. The people there informed her that the lady she was speaking to is the one who opened the bag. The appellant was spotted by PW 1 on 3rd December 2013 when she was arrested.
3. PW 2, another lady was with PW 1 on the line at the hospital on the material day. She testified that she saw the appellant place her handbag on top of PW 1's handbag. She saw PW1 remove money and the phone. She put it in her handbag and went away. PW 1 came later and complained that her money and phone were missing.
4. PW 5 a security officer testified that he was informed by PW 1 that her money and phone had been stolen. They searched for the suspect but in vain. On 3rd December, 2013 at about 11.00 PW1 informed her that she had spotted the appellant. They went up to where she was. She tried to vomit but she did not and when questioned, she said she was waiting for her test results but when PW 3 went to check at the laboratory, she had not paid for any tests. When she saw police, she dashed to the clinical officers room where she was arrested.
5. PW 4 an officer at Runyenjes Police Station, testified that on 20th November 2013 at 2 pm he received PW1's complaint and booked the report. On 3rd December 2012 at about 11.00, PW 1

came to the station and informed her she had seen the appellant at the hospital. He proceeded to hospital to arrest the appellant. When she saw that, she rushed to the clinical officer's office. PW 4 confirmed that the appellant did not have any document to show she was sick. A search at her house did not yield any of the stolen items.

6. The appellant in her defence denied that she was at the hospital on 20th November, 2013. On 3rd December, 2013, she was at the hospital for treatment when she was arrested.
7. The learned magistrate was convinced that the evidence of PW 1 and PW 2 clearly showed that PW 1's phone and cash were stolen by the appellant and that the appellants did not challenge these facts. He also concluded that the fact that the appellant tried to run away when she saw the police and when she was not unwell was evidence of her guilt.
8. While the State supports the conviction, the appellant in her written submissions states that the only dispute is her participation in the offence of which she was charged. She submits that the prosecution did not prove the offence beyond reasonable doubt.
9. As this is a first appeal, the court is required to conduct an independent review of all the evidence and reach its own conclusions having regard to the fact that it did not hear or see the witnesses. As this is a case based on purely circumstantial evidence, the trial magistrate had to be satisfied that all the evidence pointed to the appellant as the one who stole the money and phone.
10. I have reviewed the evidence and I conclude that the appellant's conviction is unsafe. First, as the appellant points out, the theft was only reported on 3rd December 2013. There is no evidence that PW 1 gave a description of the appellant, if indeed she reported the theft on 20th November 2013. The only evidence that we have to connect the appellant on both days is the testimony of the PW 1. Second, PW 1 testified that she left the bag with her other child. PW 2 in her evidence does not make reference to the other child but rather that the appellant placed her handbag on top of PW1's handbag. This inconsistency cannot be wished away as the child who was left with her mother's handbag would have done or said something if a stranger tried to open the bag.
11. In my view, the evidence falls short of that required to sustain a conviction consequently the appeal is allowed. The conviction and sentence are quashed and the appellant is set free unless otherwise lawfully held.

DATED, SIGNED and DELIVERED at EMBU this 30th day of April 2014

D.S. MAJANJA

JUDGE