



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Criminal Appeal 70 of 2013

TERESIA WANJIKU NJOROGE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the original conviction and sentence in Criminal Case No. 49 of 2007 of the Chief Magistrate's court at Nairobi by Ms. L. Nyambura (Principal Magistrate))

JUDGMENT

The appellant, **TERESIA WANJIKU NJOROGE**, was convicted for the offence of Conspiracy to defraud **contrary to section 317 of the Penal Code**. She was then sentenced to a fine of Kshs.2,000,000/- or in default imprisonment for one (1) year.

The particulars of the offence were that on diverse dates between 19th and 30th April 2008, the appellant, jointly with others not before court, conspired, at an unknown time, to defraud Standard Chartered Bank of Kshs.9.9Million.

The appellant had also been charged with 3 counts of stealing. On count 1, she is said to have stolen Kshs.3,400,000/- on 19th April 2008. On count 2 she is said to have stolen Kshs.6,500,000/- on 30th April 2008. And on count 3 she is said to have stolen Kshs.9,900,000/- on 30th April, 2008.

In challenging her conviction, the appellant submitted that the said conviction was founded on nothing more than presumption.

Mr. I. Onyango, the learned advocate for the appellant, submitted that the conviction could not hold after the trial court had acquitted his client for the offences of theft.

The appellant insisted that everything she did was in accordance with the laid down procedures of the bank.

She sought and obtained the requisite authority before she approved the transactions, she said.

Secondly, the appellant emphasized that there was no evidence of any conspiracy.

In any event, the appellant believes that it was wrong to prefer criminal charges against her long before the Investigating Officer had obtained the report of the document examiner.

And although the trial court concluded that the appellant was up to mischief by not writing out the complainant's full names on the various documents, the appellant pointed out that she did write all the complainant's names in all the documents, save for only two (2). Secondly, she pointed out that none of

the prosecution witnesses testified that the use of one initial (instead of the full name) was either un-procedural or wrong.

Contrary to the finding by the trial court, that it was the appellant who had identified the complainant, the appellant submitted that the evidence showed that she did not know the complainant and she therefore phoned **PW 3** to seek her authorization to serve the complainant.

And after the appellant had sought the necessary authorization, she only acted after the same was provided. Therefore, if **PW 3** failed to get the complainant on phone, to verify if he is the one who was being served by the appellant, it was the appellant's submission that she cannot be faulted for the failure by **PW 3** to talk to the complainant before authorizing the appellant.

The appellant also faulted the trial court for holding that she applied pressure on **PW 3** to give effect to the process of "breaking -up" the fixed-deposit account of the complainant. She was only doing what was required of her by relaying to **PW 3**, the disappointment expressed by the client, in carrying out his instructions.

The appellant notes that the trial court expressly found that the bank managers were negligent. Therefore, the appellant believes that if any money was lost by the bank, it was due to the said negligence, and not due to any conspiracy.

By serving the customer at Yaya Centre Branch of Standard Chartered Bank, instead of sending him back to his domicile branch, at Westlands, the appellant says that he was giving effect to the mandate given to her when serving the special category of customers in which the complainant was. She pointed out that the said category of customers could be served at any branch of the bank; and that all the bank staff who testified at the trial, confirmed that fact.

In answer to the appeal, Mr. Job Mulati, learned state counsel, submitted that the issues raised by the appellant were justified. Therefore, the respondent conceded the appeal.

I have carefully re-evaluated the evidence on record. I find that the respondent was right to have conceded the appeal.

Indeed, I find it somewhat strange that the appellant faced 3 separate counts of theft, when the particulars of count 3 were the aggregate of counts 1 and 2. In effect, there should never have been a separate count 3. That is not just because the said count 3 refers to the amounts cited separately in counts 1 and 2, but also because (from the particulars in count 1) the theft of Kshs.3,400,000/- was effected on 19th April 2003, whereas the further sum of Kshs.6,500,000/- was allegedly stolen on 30th April 2008.

When a conspiracy is mooted, it means that the conspirators have put in place a plan or a conspiracy to enable them achieve their goal. The "Oxford Advanced Learner's Dictionary" defines the word conspiracy as follows;

"A secret plan by a group of people to do something harmful or illegal."

When the secret plans are carried out, the group of people would have done that which they had planned. At that stage, they would not simply remain as persons who had conspired.

If they had conspired to steal, they would have stolen. If they had conspired to overthrow a government, they would have done so.

If they were arrested before their plans succeeded, the persons who had conspired, could be charged with the offence of conspiracy.

Thus, in this case, if the conspiracy to defraud the bank had failed, the conspirators could have been charged with conspiracy.

But if the conspiracy to defraud had succeeded, the persons concerned should have been charged with the offence of Obtaining by false pretences or Stealing.

The evidence on record shows clearly that the bank lost Kshs.9,900,000/-. That loss did not happen simply because some people conspired to steal it. The money was lost because the money was stolen from the bank.

The learned trial magistrate expressly found that;

“There was no evidence to confirm if it was

accused person who took the amount of money i.e.

Kshs.3,400,000/- or Kshs.6,500,000.

There was evidence from one Chrisna B.

Shah, from the Chase Bank, that the amount

of 70,000 USD was paid to the James Njoroge.”

It was for that reason that the trial court acquitted the appellant of the offences of stealing.

In those circumstances, it is indeed very curious that the appellant conspired with other persons to steal from the bank, but then she did not steal, although the money was stolen!

If the appellant was one of the conspirators, it would appear that she was relying on other bank employees, to fail to discharge their duties diligently, if her plan was to succeed.

She did ensure that when the relationship manager at the bank's branch at Westlands phoned the complainant, the two could not talk. I say so because had **PW 3** phoned **PW 1** and talked to him, she would have been told that **PW 1** had not originated the instructions to “break-up” his fixed deposit account.

Secondly, the description which the appellant gave of the complainant, persuaded **PW 3** that the person whom the appellant was attending to was the complainant.

It would have been useful to have the photograph of the alleged impostor produced in court, to show that the appellant's description was not descriptive of the complainant, but the impostor. The person whom I am referring to as an impostor is the one who opened an account at Chase Bank. He made available his photograph to the bank, when he was opening the account.

If his photograph was different from the features he described to **PW 3**, then it would have been clear that the appellant was simply trying to pass-off another person as the complainant.

None of the prosecution witnesses accused the appellant of either failing to take steps which she ought to have or of acting in a negligent manner during any of the stages. It follows therefore, that the appellant's actions were in line with the laid down procedures.

PW 3 confirmed that the appellant did not transfer any of the money that was stolen from the bank.

PW 4 confirmed that he too verified the signature of the customer before he gave his authorization.

PW 6 said that the Yaya Branch of Standard Chartered Bank, where the appellant worked, only had the customer's signature. They did not have his photograph.

PW 10, the bank's senior, Investigating Officer said that all the money which was stolen was for the benefit of **PW 1**; not the appellant.

And **PW 12** said that the cashier who paid out the money was at large. He also added that there were other bank officers who effected the transactions, other than just the appellant.

In the circumstances, the conviction was not sound. It appears that the appellant was singled out to carry the cross on behalf of the bank.

There is no evidence of any conspiracy to which the appellant was a party. Therefore, I allow the appeal, quash the conviction and set aside the sentence.

Dated, Signed and Delivered at Nairobi, this 25th day of February, 2013.

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FRED A. OCHIENG
JUDGE