



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Criminal Appeal 561 of 2009

ELIUD KARENGE NJUGUNA.....APPELLANT

VERSUS

REPUBLICRESPONDENT

(From original conviction and sentence in criminal case Number 418 of 2003 in the Chief Magistrate's Court at Nairobi – Mr. L. Mutende (SPM) on 07/01/2009)

JUDGMENT

- 1. Eliud Karengi Njuguna** was tried on eleven counts of stealing contrary to **Section 275** of the **Penal Code**. He was convicted in counts No. **I, II, IV, VI, VII, X & XI** and acquitted in count No. **III, V, VIII, & IX** respectively.
- 2.** The brief facts in the counts for which he was convicted were as follows:

Count I: that between 23rd and 31st October 2002, he stole cheque No. 00024 for Kshs. 46,995.50 the property of M/s. Walia Supermarket.

Count II: that between the 31st October and 26th November 2002, he stole cheque No. 004904 for Kshs. 6,171.30, the property of M/s. Kitale Club.

Count IV: that between the 31st October and 9th December 2002, he stole cheque No. 00870 for Kshs. 37,760 the property of M/s. Wine Products Limited.

Count VI: that between the 15th and 16th December 2002, he stole cheque No. 000013 for Kshs. 156,517, the property of M/s. Bestnine Supermarket Limited.

Count VII: that between the 15th and 16th December 2002, he stole cheque No. 003092 for Kshs. 16,898/25, the property of Bestnine Supermarket Limited.

Count X: that between the 16th and 21st January 2003, he stole cheque No. 005105 for Kshs. 20,150/25, the property of M/s. Kitale Club.

Count XI: that between the 30th October 2002 and 17th February 2003, they stole Kshs. 817,175/70, the property of M/s. K-Rep Bank Limited.
- 3.** It was alleged that all the offences set out above were committed at an unknown place in Nairobi within Nairobi Area, jointly, with others not before court.

4. Upon conviction the appellant was fined Kshs.50,000/= and in default to serve 6 months imprisonment on each of **counts I, II, IV, VII, and X**, Kshs.150,000/= in default to serve 1 year imprisonment in **count VI**, and Kshs. 200,000/= in default to serve 1 year imprisonment on count **XI** respectively.

5. The appellant subsequently filed an appeal, advancing 25 grounds which were argued together by learned counsel Mr. Nyabena Nyakundi on his behalf.

6. The learned state counsel Mr. Kadebe opposed the appeal on behalf of the respondent and supported both the convictions and the sentences. Mr. Kadebe submitted that the Appellant faced charges for distinct offences and was rightfully convicted and sentenced for those offences which he was found guilty of, as provided under **Section 14(1) of the Criminal Procedure Code**.

7. I have analysed and re-assessed this evidence afresh as the court of first appeal, to make my own findings and draw my own conclusions. In line with **Odhiambo vs Republic Cr. App No. 280 of 2004 [2005] 1 KLR**. In so doing I bear in mind that I did not have the advantage of seeing or hearing the witnesses as they testified.

Double Jeopardy

8. On this ground the Appellant argued that he was convicted and sentenced twice for the same offence, effectively suffering double jeopardy. He contended that the total amount of money he is alleged to have stolen in counts **I to X** is Kshs. 817,175.70 which is the same amount he is alleged to have stolen in count **XI**, and further that the offences in the said counts all arose from the same facts. That he was therefore, convicted and sentenced twice for the theft of this money.

9. **Section 14(1) Criminal Procedure Code** reads as follows:

“That when a person is convicted at one trial of two or more distinct offences, the court may sentence him for these offences, to the several punishments prescribed therefor which the court is competent to impose; and those punishments when consisting of imprisonment shall commence the one after the expiration of the other in the order in which the court may direct, unless the court directs that the punishment shall run concurrently.”

10. The question that arose was whether the various counts with which the appellant was charged were made up of separate and distinct offences or of the same offence.

Section 4 of the Penal Code defines “**offence**” to mean:

“an act, attempt or omission,

punishable by law.”

From the evidence the charges were made up of different acts committed against different complainants by the same appellant although the facts were similar. In each of counts **I, II, IV, VI, VII and X** the appellant was tried and convicted for the theft of different cheques from different complainants. He was not on trial nor was he convicted for the theft of the sums of money indicated in those cheques.

11. The charges involving the theft of the cheques were therefore, distinct and complete offences even without the theft of the money that followed in count **XI**. Count **XI** was an amalgamation of the sums of money said to have been stolen by use of the cheques stolen in the counts stated above. Black’s Law Dictionary defines “**same offence**” as follows:

“For double-jeopardy purposes, the same criminal act, omission, or transaction for which the person has already stood trial.”

It was therefore, not irregular or unlawful under the law to convict and pass separate sentences for the various counts, since the act of stealing each cheque constituted a separate and distinct offence and was also distinct from the theft of the cash in count **XI**.

The manner in which the evidence was considered.

12. It was argued for the appellant that the learned trial magistrate considered the evidence of the Prosecution and defence in isolation instead of as a whole, convicted the appellant on insufficient evidence, and shifted the burden of proof to the Appellant. A summary of the prosecution evidence was that the Appellant, Eliud Karengi Njuguna, holder of account number 0311000072 at K-Rep bank Kenyatta Avenue branch, in the name of Premier Food Industries, fraudulently received and deposited monies in the said account that were meant for Premier Food Industries Limited on account of supply of goods to various customers.

13. **PW3**, Ngethe Chege an accountant at Premier Foods Industries Limited testified that they delivered their products to various supermarkets in 2002, and did not receive the payments due. They discovered later that payments had been remitted by cheque and that those cheques had been banked in someone else account at K-Rep Bank and the cash subsequently withdrawn.

14. **PW4**, a sales executive at Premier Food Industries Ltd, recalled that they made deliveries of their products to Kitale Club, Kapsowar wholesalers, and Kisumu region but did not receive the payments due although their customers claimed to have sent the cheques to them.

15. In count **I**, there was proof of payment by **PW9** Sanjiv Walia owner of Walia Supermarket, to Premier Food Industries Limited after the latter supplied food to them. The payment was made vide cheque No. 00024 drawn on Kenya Commercial bank and dated 23rd October 2002 for Kshs. 46,995.50 payable to Ms. Premier Food Industries Ltd. It was later established that this cheque had been fraudulently deposited in the Appellant's account number 0311000072 at K-Rep bank Kenyatta Avenue on 31st October 2002, and was reflected in the Appellants statement of account as at that time.

17. This evidence was not disputed and neither was it displaced during cross examination. **PW9** had, in the past 15 years, been making payments by way of cheques, without incident, to Premier Food Industries Limited for goods received from them.

18. In count **II**, **PWI** an accountant at Kitale Club, confirmed that he paid for goods delivered by Premier Food Industries Limited vide cheque number 004904 dated 31st October 2002 for Kshs. 6,171.30 which was produced in evidence. The supplier did not receive this cheque, and it was later found to have been deposited at K-Rep bank Kenyatta Avenue in account number 0311000072 in the name of Premier Food Industries, which account was held by the Appellant as the Director of Premier Food Industries.

19. The Appellant did not dispute the fact that this cheque was indeed deposited in his account, instead he only queried the role played by **PWI** in this transaction, part of which was to verify and confirm that payments were made to their suppliers.

20. In Count **IV**, **PW5** the Financial Controller at Wines Products Ltd, testified that cheque No. 008107 for Kshs. 37,750/- drawn on Standard Chartered bank, dated 31st October 2002 by Ms. Wines Products Ltd in favour of Premier Food Industries Limited, was not received by them. The cheque which was marked in court as exhibit 26 was instead found having been deposited at K-Rep bank Kenyatta Avenue on 9th December 2002 in account No. 03110000712 of Premier Food Industries.

21. There was evidence in exhibit 28 and exhibit 64 that money was debited from account number 01060-020091-00 Standard Chartered Bank held by Wines Products Ltd and credited into the Appellant's account on 13th December 2002, as reflected on his statement of account. The Appellant did not dispute this fact or evidence but elected to query the role that **PW5** played as the Financial Controller at the Wine Products Ltd.

22. In count **VI** and **VII**, **PW7** Ashwin Kumar Jakharia of Bestnine Enterprises Kisii, testified that he received supplies from Premier Food Industries Limited, and issued two cheques being cheque no. 003092 dated 15th December 2007 for Kshs.16,898.25 and cheque no. 00013 dated 16th December 2002 for Kshs.156,517.85 drawn by Ms. Bestnine Supermarkets Limited in favour of Premier Foods Industries Limited. He sent the cheques by post, but they did not reach their destination. They were instead diverted and deposited into account number 0311000072 held by the Appellant at K-Rep bank on 20th December 2002 as seen in exhibit 36.

23. In count **X**, evidence was adduced to the effect that cheque number 005105 for Kshs. 20,150.25 issued by Kitale Club and payable to Premier Food Industries Ltd did not reach the intended recipient. It was subsequently found to have been deposited on the Appellant's account number 0311000072 at K-Rep bank Kenyatta Avenue.

24. **PW2**, Rose Taabu a bank officer at K-rep bank, testified that she knew the Appellant as a customer who used to deposit cheques in his account number 0311000072 in the bank, using his National Identity card No. 1910273. Her evidence was corroborated by that of **PW8**, Erick Tucha the Operations Manager of K-Rep Bank Limited at Nakuru, who also identified the Appellant as a client who held an account with K-Rep Bank and who used to present cheques, receive and withdraw money at the bank in the period 2002 to 2003 while **PW8** worked as a teller at their Kenyatta Avenue branch.

25. **PW6**, the Operations Officer at K-Rep bank at the material time, testified that he knew the Appellant as an account holder in the name of Premier Foods Industries, whose account had been frozen on suspicion of fraudulent activities. Police investigations revealed that other suspicious cheque clearances had occurred through the same account. **PW6** assisted the Banking Fraud officers to arrest the Appellant when he went to the bank on 15th February 2003.

26. I have analysed and reassessed the evidence on record in totality bearing in mind that this being a criminal case there, was no burden whatsoever on the appellant to explain his innocence. The appellant didin his sworn defence, admit that he deposited the cheques in question in his account but denied that he stole them. He stated that he carried out the transactions in good faith.

27. I examined the defence evidence alongside and in the context of the evidence from the prosecution. It was not disputed that the appellant was the sole proprietor of Premier Foods Industries the holder of account no. 03110007 in which the diverted cheques were deposited.

28. There was no evidence that he could have come into possession of the various cheques that belonged to Premier Food Industries Limited, the intended beneficiaries whose account reposed in a different bank, in the normal course of business. There was no evidence that he too carried out business with the different complainants who made out cheques to Premier Food Industries Limited and whose cheques were diverted.

29. His explanation was not reasonable in light of all the evidence on record. I concur with the learned trial Magistrate's finding that the Appellant took money without claim of right, effectively depriving the complainants from having rightful possession of their monies.

30. The learned trial magistrate did consider the evidence of the Prosecution and defence as a whole and not in isolation as urged by the Appellant. The appellant's contention that the trial magistrate shifted the burden of proof and therefore found him guilty of the offense of stealing is not supported by the evidence on record.

31. On the sentence

On this ground it was contended for the appellant that the sentence imposed was manifestly harsh, excessive and undeserved. The proceedings show that the appellant was tried in 11 counts under **Section 275** of the **Penal Code**, out of which he was convicted in seven counts and acquitted in 4 counts. The law provides for a maximum sentence of 3 years imprisonment upon conviction under this section.

32. Upon conviction the appellant was fined Kshs. 50,000 in default to serve 6 months imprisonment on each of **counts I, II, IV, VII and X**, Kshs.150,000 in default to serve 1 year imprisonment in **count VI**, and Kshs. 200,000/= in count **XI** in default to serve 1 year imprisonment. The sentences were ordered to run consecutively. In total therefore, he would pay a fine of Kshs.600,000/= in default to serve 4 years and 6 months imprisonment.

33. In the premises, and in the circumstances of this case, where the appellant helped himself to the proceeds and enjoyed the fruits of other person's labour without a second thought as to the effects of his actions on their businesses, these sentences cannot be said to be harsh or excessive.

34. **Ownership of the stolen Kshs. 817,175.70.**

The appellant contended that his conviction for theft of Kshs. 817,175.70 was erroneous and so was the finding by the trial magistrate that this money was the property of K-Rep Bank Limited. The proceedings show that the learned trial Magistrate rightly convicted the appellant of stealing Kshs. 695,873/= and not Kshs. 817,175.70. This was the sum total in the charges which were proved against the appellant because he was acquitted on some counts.

35. I am satisfied that the prosecution proved their case against the appellant beyond reasonable doubt on each of the counts in which he was convicted. The defence by the appellant was a bare denial and did not manage to create any doubt in the otherwise strong prosecution evidence.

36. In sum therefore, I find that the appeal is lacking in merit and is hereby dismissed. I uphold the convictions as entered on each count and affirm the sentences imposed in regard to each count by the learned trial magistrate.

It is so ordered.

SIGNED DATED and DELIVERED in open court this **18th day of April 2013.**

L. A. ACHODE
JUDGE