



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CRIMINAL APPEAL NO 35 OF 2013

MOHAMMED MOHAMUD AKIDA.....APPELLANT

Versus

REPUBLIC.....RESPONDENT

JUDGMENT

INTRODUCTION

The charge

[1] The Appellant was initially charged with seven counts but was acquitted of counts I, II, III, IV, V & VI. He was prosecuted for Count VII on the offence of Extortion Contrary to Section 300(1) of the Penal Code, convicted and sentence thereto; placed under probation for three years. The Appellant was aggrieved by the conviction and sentence, and he filed this appeal.

The particulars of the offence

[2] The particulars of the offence were stated as follows:

MOHAMMED MOHAMUD AKIDA: On diverse dates between 1st July and 30th November 2009 at Bungoma law courts in Bungoma South District within Western Province, with intent to gain, extorted a sum of Kshs. 8075 from SATUNA NASIMIYU UKHEVI by issuing her with official receipt NO. 3087436 of Kshs. 925 instead of Ksh. 9000

The appeal

[3] The Petition of Appeal carries two grounds namely;

- 1. That the trial magistrate erred in law and fact by convicting the Appellant when the evidence of PW3 was contradicting on who gave the money to the Appellant with PW1.*
- 2. That the said conviction and sentence is contrary to the evidence adduced at the trial court.*

THE SUBMISSIONS

By the Appellant

[4] The Appellant filed written submissions and made oral submissions in court through his advocate Mr Situma that there was no evidence by the Complainant (PW1) that she gave any money to the Appellant. PW1 was the complainant in Count seven of extortion. Even PW3 denied he gave the Appellant any money. There was, therefore, no money that was given to, or received by the Appellant. Accordingly, there was absolutely no evidence to support the charge of extortion for which the Appellant could have been convicted and sentenced. The appeal should be allowed on that basis.

By the Republic

[5] The Republic was represented by M/S Leting who conceded to the appeal. Her reasons for conceding were that; Count seven stated that PW1 gave the Appellant money yet in her evidence, she clearly stated she did not give the accused any money. There was, therefore, absolutely no evidence which supported the charge of extortion. The conviction was, thus, not safe.

COURT'S EVALUATION

[6] It is the duty of the court to re-evaluate the evidence of witnesses and make its own conclusions and findings as per **OKENO V REPUBLIC**. The prosecution called a total of nine witnesses. PW1 was the complainant in Count 7. She said that she had sold shares to one Khisa who was introduced to her by one Mr Owino. The said Mr Owino at some later date brought some documents to her and asked her to sign. The documents according to Mr Owino were intended to facilitate the transfer of the shares PW1 had sold to Khisa. She signed the documents. She was later asked to attend the court over the transfer of the shares he had sold to Khisa. But, when she appeared in court, she was surprised to learn that it was about the succession of her late husband. She told the court she had never applied for any succession nor instructed any other person to apply for her. She also confirmed that she did not have any source of money and so she did not pay and could not have paid any court fees. She did not mention anywhere in her testimony that she gave any money to the Appellant. PW2 supported the claims by her mother PW1.

[7] The other witness who was material in respect of Count 7 was PW3. In examination-in-chief, he testified that Khisa paid the Appellant a total sum of Kshs. 9000 in two instalments of Kshs. 3000 and 6000 for purposes of obtaining a court order; I presume it was a grant of letters of administration. In cross-examination, he changed the evidence he had given in-chief and alleged that he had been given the money by Khisa to give to the Appellant.

[8] PW4 and PW8 were the investigating officers who gave an account of the investigations they conducted and the statements they recorded from witnesses. They relied heavily on the evidence PW5, PW6 and PW7, the judicial staff and also PW9, the SPM Julius Ngarangar in making their decision to charge the Appellant with the offences herein. Their evidence was mainly in relation to the un-procedural opening of the P&A files NOs 440/09, 453/09 and 454/09. None of them gave any evidence that the Appellant was paid or received any money from PW1.

[9] Count 7 was an offence of extortion contrary to section 300(1) of the Penal Code. Section 300(1) of the Penal Code relate to Attempts at Extortion by Threats. The offence under that section entails a situation where a person, with intent to extort or gain anything, makes accusation or threatens to accuse another person of some offence. When the offence has been laid against a person, it is immaterial whether the person so threatened has or has not committed the offence with which threatened. From the record, there is no evidence whatsoever that was led in support of the offence under section 300(1) of the Penal Code. Nonetheless, the particulars of the offence of extortion of money as stated in the charge sheet, would require proof of 1) fraudulent intention to extort or make a gain; and 2) receipt of money from the complainant. The evidence of all the witnesses herein only explains the possible underlying unlawful intention to extort money. But it does not at all disclose the Appellant received the sum of Kshs 8075 from PW1. At this point I should mention that, after the Appellant was acquitted of all the other six counts under section 210 of the Criminal Procedure Code (hereafter CPC), Count 7 was left standing alone in a vulnerable state. The evidence adduced shows that the entire state of things relating to Count 7 became totally obscured. What would have been most appropriate in law was for the trial court to have taken care to examine the probity and appropriateness of charge, and if need be, prompt the prosecution to take or takes the appropriate legal course on the matter. After the close of the prosecution case, no doubt, there was variance between the evidence and the charge, and, section 214 of the CPC would have been the best companion. That course allowed the trial court to make orders which would have served the interest of justice for all the parties. And I am sure, the situation the appeal raises would have been sorted out then. Look at the particulars of the offence as stated were that the Appellant *with intent to gain extorted a sum of Kshs. 8075 from SATUNA NASIMIYU UKHEVI-PW1*. PW1 denied she gave any money for fees. She did not even state anywhere in her testimony that she gave the Appellant any money. Indeed, she was categorical that she did not have any means to give any money. Surely, that evidence by PW1 does not support the charge whatsoever. The evidence was in total contradiction of the charge and the particulars of offence provided in the charge sheet.

[10] One more thing; the evidence of PW3 cannot also be said to have supported the charge in any way. The charge was for extortion of Money from PW1, but, according to PW3 the extortion was purportedly committed on himself or Mr Khisa. The money allegedly given to the Appellant belonged to Mr Khisa but even then, it is not clear who gave the money to the Appellant. Surprisingly, Mr Khisa was never called in as a witness and the charge before the trial court was not one of Extortion of Money from PW3 or Khisa. I also find it to be curious that PW4 stated that he concluded in his investigations that PW3 was a co-perpetrator of the offences the Appellant was facing and he had recommended for PW3 to be charged jointly with the Appellant. He was not charged. Instead he became the prosecution witness. From the evidence of PW1, PW2, PW3 and PW4, it is discernible that PW3 was an accomplice of the Appellant and his evidence should be treated with utmost caution. It is no wonder the evidence of PW3 is characterized by full of half-truths and contradictions. Such evidence was worthless evidence for the purposes of a conviction of the Appellant on Count 7. The trial magistrate, therefore, erred by relying on the evidence of PW3 as credible evidence, and more specifically that;

‘The third prosecution witness was candid in his testimony that he saw his Boss Khisa give the accused a total of Kshs. 9000/=’.

[11] The trial magistrate largely relied on the evidence of PW3 in making a finding that the prosecution had proved its case. The trial magistrate should have specifically stated that the prosecution had proved its case beyond any reasonable doubt as required in law. Perhaps the trial court could have realized the standard of proof was very high and observe it had not been attained given what I have observed above and the fact that the charge before the court was about extortion of money from PW1 whereas according to PW3 the money belonged to Khisa. The money which the Appellant supposedly received was also purportedly given to the Appellant by Khisa or PW3. These were bare contradictions. Despite the contradictions in the evidence by PW3, the trial court should have noted that the entire evidence tendered by the prosecution was at variance with the charge and, as I stated earlier, ought to have move under section 214 of the Criminal Procedure Code during the hearing. That opportunity was lost and at this stage, the Appellate court may not be able to utilize that section. With these serious evidentiary and legal pitfalls, the court has no choice than to disturb the conviction and sentence thereto.

[12] For those reasons, I allow the appeal and quash the conviction and sentence imposed herein. The Appellant shall be set free forthwith from the probation.

Dated, and signed at Bungoma this 18th day of October 2013

F. GIKONYO

JUDGE

Read, signed and delivered in open court at Bungoma this 23rd day of October 2013

H.A.OMONDI

JUDGE