



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

MISC. APPLICATION APPEAL NO. 496 OF 2011

ELIZABETH OKETCH MWITA.....APPELLANT

VERSUS

REPUBLICRESPONDENT

(From original conviction and sentence in criminal case Number 2057 of 2009

in the Chief Magistrate's court at Kibera – Mrs. U P Kidula (CM) on 2/9/2010)

RULING

1. This case started off with three accused persons charged jointly with offences as follows:

Count I: Conspiracy to defraud contrary to **Section 317** of the **Penal Code**.

Count II: Forgery, contrary to **Section 349** of the **Penal Code**.

Count V: Attempted stealing contrary to **Section 275** of the **Penal Code** asread with **Section 389** of the **Penal Code**.

In addition, the appellant before court was also charged alone as follows:

Count III: uttering false documents contrary to **Section 353** of the **Penal Code**.

Count IV: Personation contrary to **Section 382** of the **Penal Code**.

2. Subsequently the 2nd Accused person was acquitted under **Section 210** of the **Criminal Procedure Code**, on all the charges that he was facing while the third accused person passed away during the trial. That left the appellant alone to tender her defence.

3. At the close of the trial the learned trial magistrate convicted the appellant on **count 2, count 3, count 4** and **count 5**. She was sentenced to pay a fine of Kshs.300,000/- in default to serve one year imprisonment for each of the charges in **counts 2, count 3** and **count 5**. On **count 4** she was sentenced to pay a fine of Kshs.100,000/= in default 6 months imprisonment. She was acquitted on **count I**.

4. The appellant was dissatisfied with the verdict of the court and filed a Chamber Summons application

under certificate of urgency, urging the court on several points which I have amalgamated below. She urged that the court be pleased:

1) To consolidate the case No. Kibera CM Cr. 2057 of 2009, but she did not state with what other case, the aforementioned case is to be consolidated.

2) To quash or waive the fine imposed upon her, being a total of Kshs.1.3 million, because she is not capable of paying it. I however note that the sum total of the fine as set out above comes to Kshs.1 million only and not Kshs.1.3 million.

3. To order the sentences to run concurrently commencing from the time she was committed in custody on 9th May 2009. If possible to be released on compassionate, humanitarian and health related grounds after being diagnosed with leukemia making her chances of living for over two years are very slim. I note however that she was fined on each of the four counts on which she was convicted and sentenced. Sentence of fine cannot therefore be ordered to run concurrently.

5. From her application the appellant did not contest the convictions. Indeed she came to court by way of Chamber Summons with prayers as set out above, even though her reasons presented more like grounds of appeal than reasons for review. In view of the fact that the appellant is unrepresented, and in the interest of justice I have gathered her grounds and submissions which are scattered all over the various documents submitted to court, and set them out in a coherent form.

6. The reasons are that:

1)The prosecution witnesses contradicted themselves.

2) Only copies of the documentary evidence were produced in evidence.

3) The arresting officer testified without having recorded a statement.

4) The handwriting and signatures produced in evidence were not from the same person.

5) The sentence that was passed against her was in bad faith.

6) That secondary evidence was allowed in the case, in breach of Section 64 and 68 of the Evidence Act.

7) And that her mitigation was not considered,

7. In her written submissions she added that the prosecution did not explain to the court, why there were two inventories in court regarding the exhibits. One dated 11th March 2009 duly signed by herself and the other dated 13th March 2009, and not signed by herself. She submitted further that her signed inventory did not bear her ID card number 1808106.

8. Further that the prosecution did not even verify the testimony of **PW5** which states clearly that the ID copy produced before court was not what was used during the account opening at Family Bank. She also took issue with the none production of the CCTVs as exhibits in court since **PW6** and his team were acting on information and testified that an ambush had been laid.

9. The State opposed the appeal through learned counsel, Mr. Mulati. Mr. Mulati submitted that the Prosecution witness's evidence pointed irresistibly to the Appellant as having committed the offence she was charged with. He Submitted that the Prosecution proved its case against the Appellant herein beyond reasonable doubt and urged this court not to interfere with the findings of the trial court. He urged the court to dismiss the appeal, confirm conviction and uphold sentence.

10. The prosecution called a total of 9 witnesses to prove the case against the appellant, and I have analysed and re-evaluated their testimonies together with that of the Appellant, who gave unsworn testimony and called no witness. The fresh analysis of the evidence on record was meant to enable me to draw my own conclusions, as the 1st appellate court. I however kept in mind that I did not have the opportunity to observe any of the witnesses on record as they testified.

11. PW1 the complainant testified that she works in Nigeria and holds a Safari Savings Account No. 01513701982000 with the Standard Chartered Bank, Koinange Street in Nairobi – Kenya, whence she is a sole signatory. Her testimony was that on 27th August 2009, she was contacted while in Nigeria by the Investigating officer in the case, seeking to know whether she had opened a new account with Family Bank, and whether she had given instructions affecting the two Accounts, in the Standard chartered Bank, and Family Bank respectively.

12. In her testimony in court, she denied having opened any Account with Family Bank, and stated that she had no knowledge of the documents that were used to open the said account, when they were shown to her.

13. The cashier/Teller at Standard Chartered Bank Kakamega branch testified as **PW2**. He stated that the Cash Manager brought some transaction papers to him for processing on 9th May 2009. As he was processing the transaction, he realised that the particulars on the identification document differed from those in their system. The signatures on the submitted documents differed from what was already in their system.

14. He went to enquire from the client who was in the Managers office about the anomaly, but realised that the client's physical appearance too looked different from the Photo of their client that had appeared on the screen. He put all those concerns to the appellant who remained adamant that she was their client by the name Dorcas Aketch Kotonya.

15. PW3 was the branch Manager who set out to assist the appellant as a bank client. She noted that appellant's forms had already been filled although the client was required to fill them in the presence of bank personnel. The appellant's explanation was that she had filled them before the bank staff at the Standard Chartered Koinange branch. **PW3** called in the police when **PW2** came with his concerns. The police informed her that they were already aware of the fraudulent transaction that was going on, on the very account the Appellant wanted to withdraw the money from. The police arrested the appellant.

16. From the evidence of **PW2, PW3 and PW5**, the Appellant had presented herself as Dorcas Aketch Kotonya when her true names were Elizabeth Aketch Mwita. **PW4**, a fingerprint expert investigated this aspect and tendered his evidence in confirmation, that the appellant is indeed Elizabeth Oketch Mwita.

17. PW5 an employee of Family Bank, confirmed that the Appellant did open the Account No. 05858095510100378 at Family Bank. She identified the appellant as the person whom she assisted to open the said account on 20th March 2009, and produced in court Exh.2 (d) which was a photocopy of the ID No. 18088106 used by the appellant in opening the account. **PW5** testified that the appellant presented herself as Dorcas Aketch Kotonya.

18. The Appellant's contention that the CCTV cameras were not exhibited in court appears to be an afterthought. Throughout the proceedings, the issue of the CCTV cameras never arose either in cross-examination nor in her own testimony. It cannot arise now on appeal.

19. The Appellant alleges that **PW7** claimed that he recorded a statement on her behalf and should have explained to court why he did so. The evidence of **PW7** was that he interviewed the appellant and recorded the statement. Even if this did not reflect the true position, then the appellant had a chance through the proceedings during the trial to raise the issue through Cross-Examination of **PW7** and even through her defence. She did not do so.

20. An analysis of the evidence on record shows that the rightful owner of account No. 01513701982000 at Standard Chartered Bank Koinange Street is **PW1**. She testified that she did not complete the Telegraphic Transfer forms or the withdrawal slips that were presented to Standard Chartered Bank Kakamega branch, on 9th May 2009.

21. The evidence also shows that although the appellant presented herself to **PW5** at Family Bank as Dorcas Aketch Kotonya the photocopy of ID that she presented did not bear the ID number or particulars of Dorcas Aketch Kotonya who is **PW1**. As pointed out elsewhere in this judgment, **PW1** denied having opened the account at Family Bank.

22. The appellant denied presenting the Telegraphic Transfer forms to the Standard Chartered Bank at Kakamega and stated that she had only gone to the bank to get information on how to transfer cash to the 2nd accused whose plot she wanted to buy. The learned trial magistrate wondered, and rightly so, why the appellant did not disclose what her account number or that of the vendor was, nor in which banks those accounts were, to be found.

23. To believe this testimony from the appellant, and further that it is **PW2** and **PW3** who ought to know where the documents comprising the Telegraphic Transfer forms came from, would be illogical. There is no basis from the evidence to make a finding that the two witnesses from the bank had any pre-existing ill-will towards the appellant, for them to conspire to frame her. The evidence of **PW2** and **PW3** interlocked in a consistent manner, and was further lent credence by the evidence of **PW8**, P.C. Amboko. **PW8** testified that when **PW3** called him to her office, he sat next to the appellant and listened in on their conversation for a while, before he introduced himself as a police officer and arrested the appellant.

24. I respectfully agree with the learned trial magistrate finding that the offending documents, by which a Telegraphic Transfer was meant to be effected from Account No. 01513701982000 held by **PW1** in Standard Chartered Bank Koinange Street to account No. 05858095510100378 Family Bank were brought in by the appellant and not any of the witnesses. The appellant had a set of already filled forms which she explained, were filled by her daughter to assist her.

25. **PW3** informed her of the bank's requirement that such forms be filled in front of bank personnel. The appellant filled the second set of Telegraphic Transfer forms in the presence of **PW3**, presenting herself as Dorcas Aketch Kotonya, holder of account No. 01513701982000 from which the funds were to be drawn.

26. I am therefore of the opinion that the learned trial magistrate was correct in finding that the prosecution's case had been proved against the appellant beyond reasonable doubt on **count II**, for the offence of forgery contrary to **Section 349** of the **Penal Code**, and on **count 3** for the offence of uttering false document contrary to **Section 353 Penal Code**. The Telegraphic Transfer application forms were uttered to **PW3**, and **PW2** respectively. The prosecution's case had also been proved against the appellant on **count 5** for the offence of attempting to steal contrary to **Section 275** of the **Penal Code** as read with Section 389 of the same Act, for by the transactions set out in **count 2** and **count 3**, she attempted to steal a total of Kshs.5.2 million the property of Standard Chartered Bank.

27. On count No. 4, the evidence shows that appellant who is **Elizabeth Oketch Mwita** as was the testimony of **PW4**, the finger print expert, and as she presented herself to court, passed herself off as **Dorcas Aketch Kotonya**. She passed herself off as such to **PW2** the bank Teller, and **PW3** the branch Manager at the Kakamega branch of the Standard Chartered bank. She also passed herself off as such, to **PW5** the employee of Family Bank, who helped her open the account into which the money from **PW1**'s account was to be siphoned.

28. Further she had an ID card that carried the particulars of **PW1** but into which she had inserted her photograph.

29. I am therefore of the opinion, that the learned trial magistrate was correct in her findings that the

appellant did personate herself as Dorcas Aketch Kotonya.

30. Having re-evaluated the evidence on record I find that there are no substantial contradictions in the prosecution evidence whose benefit could be availed the appellant.

31. The copies of evidence produced in evidence were produced by the witness to whom the appellant had handed the evidence (**PW5**). The evidence of **PW5** was therefore not in breach of the evidence Act. The evidence of the arresting officer was specifically that of arrest and recovery of documents. The fact of arrest was not contested and documents recovered had already been introduced in evidence by witnesses such as **PW2**, **PW3** and **PW5**. No prejudice was therefore suffered by the appellant, even though the proper thing for the prosecution to do, would have been for the arresting officer also to record his own statement.

32. On the sentences, I note from the evidence of **PW8** that very many documents were recovered from the appellant, and those documents bore names of different persons. It would therefore appear that the appellant had made it her life's occupation to steal from other people's accounts through supermarket and bank cards.

33. In the circumstances of this case, I discerned no bad faith in the sentence passed against her, on any of the accounts for which she was convicted, by the learned trial magistrate. I also note that in her mitigation before the trial court she brought up all the personal issues which she raised before me.

34. The trial court did weigh her mitigation against the circumstances of the case, and observed that her actions showed meticulous planning on her part. The court was therefore right in sentencing her as it did. I also note that there is no sign of remorse in her application which would have been an acknowledgment that what she did was wrong.

35. I therefore find no reason to interfere with the convictions on record or the sentences inflicted by the learned trial magistrate.

36. Reasons wherefore the application is dismissed in its entirety.

SIGNED DATED and **DELIVERED** in open court this *20th* day of *March* 2012.

L. A. ACHODE
JUDGE