



REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAIROBI

MILIMANI LAW COURTS

Criminal Appeal 436 of 2009

JOSEPH WAWERU KAMAUAPPELLANT

VERSUS

REPUBLIC RESPONDENT

JUDGMENT

The appellant was convicted of one count of making a document without authority contrary to Section 357 (a) of the Penal code, nine counts of obtaining goods by false pretences contrary to Section 313 of The Penal Code and one count of stealing contrary to Section 275 of the Penal Code. He was then sentenced to a fine of Kshs. 50,000/= in default to serve 12 months imprisonment on each of the 11 counts and the sentences were ordered to run consecutively. This is an appeal against both the said conviction and sentence.

The summary of the evidence adduced before the learned trial magistrate is that on or about 21st January, 2007 the appellant applied for a Nakumatt smart card which was issued. Subsequently, the appellant is said to have accumulated points which he redeemed at Nakumatt Lifestyle and applied for a gift card. Nakumatt stores have an agreement with several outlets whereby if the smart card is used the points are accumulated. Evidence was adduced to the effect that the appellant's smart card was used to purchase several items some of which appeared suspicious. This led to the blocking of the appellant's smart card.

Investigations followed and in one occasion the said card was said to have been used to purchase fuel products worth Kshs. 19,770,000/= from a petrol station in Westlands. It then transpired that the appellant used to work as a security guard at an A.T.M. station next to this petrol station. At no time did the appellant report that his card was missing. Indeed, when his card was blocked he was asked to report to the issuing office but he did not. The learned trial magistrate believed the evidence of the prosecution and convicted the appellant.

In his grounds of appeal the appellant faults the learned trial magistrate for convicting him on evidence where the complainants did not appear. He also alleges that his defence was never considered and that his rights were violated because he was detained in police custody for more than the required time by law. As the first appellate court, it is my duty to consider, evaluate and assess the evidence adduced before the trial court and come to independent conclusions.

In convicting the appellant the learned trial magistrate had the following to say

“The issues that need to be determined are if there any inconsistencies that go to the core of the case, if the case has been proved in respect of the offences facing any of the accused persons or if any doubt has been cast on the prosecution evidence.

There exist no major inconsistencies in this case that go to the core of the case. The differences with regard to the card numbers having additional digits in certain instances in the opinion of the court have been adequately explained. There is no doubt as to which Nakumatt card and gift card is in issue.

Is there evidence connecting the first accused person to offences he faces? A smart card was applied for in the name of the 1st accused person. He was therefore the holder of the smart card in issue. The same is loaded with value that signify that it had purchased good worth Kshs. 19,770,000/= at a petrol station where the 1st accused person works. This in the opinion of the court gave the 1st accused person the evidence of opportunity to commit this offence. Opportunity per se cannot be the basis of conviction, there must be other facets of evidence. This accused person’s conduct cannot also be said to be consistent with innocence. He is called by Nakumatt that his card has a problem he does not present himself and waits till he is arrested. This is not the conduct of an innocent man. There is no report of loss of neither the card nor an explanation as to the whereabouts of his card. That is not conduct that is consistent with innocence.

Items were purchased using the gift card emanating from the same card. This court is of the opinion that this accused person was right in the middle of the scam. Whether he personally picked the items through the super market chain or sent somebody, he is a principal offender in the context of Section 20. His defence that he used to leave his wallet in the common changing room is illogical. Why would one leave their documents in a public place easily accessible by so many people? Particularly so given the scenario as explained by the accused person that these people were from several establishments. This is also an afterthought as it was not laid down during cross-examination.

Though in law the accused person is not under any obligation to prove anything his defence did not cast any doubt on the prosecution evidence and is rejected and is found guilty as charged in all counts except count No. 11 where the person named as the complainant Eric Mokora did not testify”

I have carefully considered the written submissions filed by the appellant. It is true that the owner of the Mobil Petrol station in Westlands one, Mohamed Bashir or the pump attendant Elphas Mulongo, were not called to give evidence. It is also true that there were some discrepancies in the number alleged to belong to the appellant’s smart card and one used at Nakumatt Lifestyle. It is also in evidence that the gift card showed some discrepancy in respect of the serial numbers. That notwithstanding, the genesis of the charges laid against the appellant is to be found in the smart card issued in his name and used to obtain several goods set out in the charges laid against him.

I am of the view that there was both direct and circumstantial evidence pointing to the guilt of the appellant and find that the learned trial magistrate was justified in arriving at the decision that she did. The appeal against conviction is therefore dismissed.

All these offences were committed between the 1st and 18th day of April, 2007 within the Nairobi area. Practice would have demanded that whatever sentences were handed down would be ordered to run concurrently. The offence in count one attracts a sentence of seven years. On the other hand the offences relating to obtaining by false pretences and that of stealing attracts a sentence of three years imprisonment. In view of the foregoing, I am minded to interfere with the sentences imposed by the learned trial magistrate. The appellant was sentenced on 5th June, 2009. He was said to be a first offender and following the charges he was dismissed from employment. Up to now he has served just over three

years imprisonment. In my judgment I consider this to be sufficient punishment. Accordingly, I substitute the sentence handed down by the learned trial magistrate to a period already served by the appellant on each count such that he shall be released forthwith unless otherwise lawfully held.

Orders accordingly.

Dated and delivered at Nairobi this 12th day of June, 2012.

A. MBOGHOLI MSAGHA
JUDGE