



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 221 OF 2007

(From Original Conviction and Sentence in Criminal Case No. 1376 of 2005 of the Chief Magistrate’s Court

at Mombasa: R. Makungu – R.M.)

JOYCE WAIRIMU

KARIUKI.....APPELLANT

=VERSUS=

REPUBLIC.....RESPONDENT

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JUDGMENT

The Appellant herein **JOYCE WAIRIMU KARIUKI** has filed this appeal challenging her conviction and sentence by the learned Resident Magistrate sitting at the Mombasa Law Courts. The Appellant had together with four other accused persons been charged on five (5) counts as follows:

COUNT NO. 1

“STEALING CONTRARY TO SECTION 275 OF THE PENAL CODE”

COUNT NO. 2

“FORGERY CONTRARY TO SECTION 349 OF THE PENAL CODE”

COUNT NO. 5 and 9

“ATTEMPTED STEALING CONTRARY TO SECTION 275 AS READ WITH SECTION 389 OF THE PENAL CODE”

COUNT NO. 4

“STEALING CONTRARY TO SECTION 275 OF THE PENAL CODE”

The facts of this present appeal are similar and are on all fours with the facts in **Crim Appeal No. 213 of 2007 MICHAEL M. NGATIA –VS- REPUBLIC**. The Appellant in Criminal Appeal 213 of 2007 ‘*Michael M. Ngatia*’ was a co-accused of this Appellant in the original trial CMCC 1376/2005. It therefore would have been tidier, more experient and a great saving on judicial time if these two appeals had been consolidated and heard together. Unfortunately this did not happen – the two appeals are being heard separately necessitating an unnecessary repetition of the facts.

The prosecution case in the trial court revolved around two (2) cheques serial Nos. 072249 in the sum of Kshs.1,716,500/- and cheque No. 072251 for Kss.1,819,060/-. These two cheques were supposedly drawn on the account of the Ministry of Finance, Pensions Department and were meant for the payment of pensions to various different pensioners. As it later transpired the two cheques had been forged from a cheque book bearing serial Nos. 072001 – 072300 which cheque book had been stolen from the premises of the Ministry. The serial numbers of the stolen cheques were circulated to all Kenya Post Office Savings Bank branches from where pension payments are ordinarily made. The beneficiaries named on the stolen cheques included ‘*Joyce Wairimu Kariuki*’ who was to collect her pension in Mombasa and ‘*Alice Wanjiru Kamau*’. Evidence adduced by the prosecution showed that the Appellant had opened two accounts, one in the name ‘*Joyce Wairimu Kariuki*’ at Post Office Saving House branch in Mombasa and another account in the names ‘*Alice Wanjiru Kamau*’ at Post Office Savings Bank, Moi Avenue Branch in Mombasa. **PW1 JOSEPH KASIU** the Regional Manager Coast Province, Kenya Post Office Savings Bank told the court that on 15th April 2003 he was alerted by the Bank Manager, Savani Branch that certain individuals had gone to the bank seeking to withdraw funds from the forged cheques. **PW1** alerted police who rushed to the bank and arrested several persons who included the Appellant.

At the close of the prosecution case the Appellant was found to have a case to answer. She opted to give sworn defence. She gave her name as **PERIS WAIRIMU GITAU** and denied any involvement in the offence.

On 20th November 2007 the learned trial magistrate delivered her judgement in which she convicted the Appellant of two counts of Attempted Stealing i.e. Count Nos. 5 and 9. Being dissatisfied with both her conviction and sentence the Appellant filed this appeal.

I have considered the written submissions filed by the Appellant in support of this appeal. I have also considered the oral submissions made by **MR. ONSERIO**, the learned State Counsel opposing the appeal and in which he urged this court to uphold both the conviction and sentence of the lower court.

The fact that the 2 cheques in question were infact stolen from the Ministry of Labour cannot be in any doubt. **PW5 JEREMIAH TOMNO** confirmed that the cheque books bearing cheques serial Nos. 071001 – 073400 were issued to the Ministry of Labour on 7th November 2003. On 27th February 2004 the

Central Bank received a report from the Ministry of Labour to the effect that their cash office had been broken into and the cheques in question stolen. Action was taken immediately to stop payment of all the stolen cheques. The cheque serial No. 072251 **Pexb4** was one of such stolen cheques and was presented for payment at Postbank Savani Branch Mombasa.

Likewise the fact that the cheque was a forged document is not in any doubt. **PW6 PETER KAHARA NJOROGE** an employee of the Ministry of Finance told the court that it was his duty to authorize payment vouchers and to sign cheques. He denies having signed this stolen cheque **Pexb4**. He also pointed out other anomalies on the cheque. It did not bear the '*CFS pension number 051*' and the account number which was indicated as 010103015 was incorrect account number for the Pensions department. **PW6** also told court that the rubber stamp appearing on **Pexb4** was **not** the genuine rubber stamp for the Pensions Department – similarly **PW7 EDITH KARUNGA KENATTE** an accountant with the Ministry of Finance told the court that she was also one of the authorized signatories. She too denies having signed the cheque in question and she is categorical that this cheque did not originate from the Pensions Department. There can be no doubt that this cheque was indeed a forged document. This is where all similarity with the findings in Crim Appeal No. 213 of 2007 comes to an end.

I am in total agreement with the findings of the learned trial magistrate that no evidence was adduced to show the involvement of the Appellant in the theft of the two cheques from the Ministry of Labour. She therefore obviously could not be convicted of that offence. I am also in agreement with the learned trial magistrate that it had not been proved by the prosecution that it was the Appellant who wrote out and signed the cheques in question. As such she could not be convicted of Forgery. Can it however be said that the evidence proves that the Appellant herein was involved in an attempt to steal money meant for pensioners from the Pensions Department? The answer to this question is a resounding yes.

PW2 BONIFACE MUNYAO MUTUKU a cashier at the Moi Avenue branch of Postbank told the court that on 8th April 2005 a lady who identified herself as '*Alice Wanjiru Kamau*' came to open an account. She had all the necessary documents including an original identity card serial No. 2302953. **PW2** proceeded and opened an account No. KMOB BSA0033129 for this customer. He identifies the Appellant as Alice Wanjiru Kamau the woman whom he served on that day. Similarly **PW3 HELLEN CHEPKORIR SANG** is also a cashier with Postbank but is based at the bank's Savani House branch. She told the court that on 8th April 2005, a lady customer came to the bank to open an account. Once again the lady had all the relevant documents including her original identity card No. 1888300 in the name '*Joyce Wairimu Kariuki*'. She did open an account No. KMOMBSA 0043261 for the customer. **PW3** identified the Appellant as Joyce Wairimu Kariuki, whom she served on the material day. Both cashiers are categorical that it was the same Appellant who came before them to open the two accounts. The account opening documents were produced as exhibits in the trial court. Both have a passport size copy of the same woman affixed on it. As a court I do take judicial notice of the fact that most banks do insist that customers submit passport size photographs both to aid in identification as well as to prevent fraud. In her defence the Appellant told the court that her real names are Peris Wairimu Gitau. If that was her true name, then why did she go to two (2) different branches of Postbank, on the very same day and open two different accounts in names that she claims are not her '*real*' names? The Appellant cannot deny having opened the 2 accounts on 8th April 2005. Both **PW2** and **PW5** have positively identified her in court. She went to the bank during the daytime and as is usual spent time conversing with each cashier as they attended to her and completed the requisite forms. To each cashier she handed over an original identity card bearing the name she had given. **PW10 EMMANUEL KENGA** a gazetted document examiner told the court that he did examine and compare the signatures on both account-opening documents with the sample signature taken from the Appellant. He formed the opinion that they were made by the same hand. This is expert evidence which remains unchallenged by the Appellant. Most importantly I did (as no doubt the trial court also did) have an opportunity to compare the image on the pass-port size photos on the account opening documents with the Appellant standing before me. There can be no doubt that it is one and the same person. I therefore find as a fact that the Appellant who gives her name as Peris Wairimu Gitau (yet she responds to the names Joyce Wairimu Kariuki in court) did open the two accounts at two different branches of Postbank in Mombasa in the

names Alice Wanjiru Kamau and Joyce Wairimu Kariuki.

What then is the Appellant's true identity? **PW11 CATHERINE MURA** who is the Registrar of Persons at the National Registration Bureau. **PW11** confirmed that Alice Wanjiru Kamau is the genuine holder of ID No. 2302953 and further that Joyce Wairimu Kariuki is the genuine holder of ID No. 1888300. She produced copies of the records held at the National Registration Bureau to support her evidence. Unfortunately **PW11** however was not given the set of finger prints taken from the Appellant and thus did not confirm to court the true identity of the Appellant. This was an omission in the prosecution case. The Appellant herself insists that her true name is 'Peris Wairimu'. I have no reason to doubt that. Her defence proves that she is **NOT** Alice Wanjiku nor is she Joyce Wairimu. Why then did the Appellant open two (2) bank accounts in names she confirms are not her names? Her act in so doing cannot have been done in good faith. The fact is that the Appellant did open the two accounts and clearly they were not opened in her true names. It is obvious that the purpose for opening the 2 accounts was to use the names of the 'fake pensioners' listed in the forged cheque in order to be in a position to benefit from the funds which had all gone well were expected to be released into those accounts as a result of that fraud. S. 388(1) of the Penal Code defines an 'Attempt' to commit an offence thus:

“388(1) When a person, intending to commit an offence, begins to put his intention into execution by means adapted to its fulfillment and manifests his intention by some overt act, but does not fulfill his intention to such an extent as to commit the offence, he is deemed to attempt to commit the offence”

In this case it is manifestly clear that the Appellant in the expectation that she would benefit from the funds derived as the result of the fraud on the Pensions Department, went ahead to open two accounts in the names of the fake pensioners. This in my view is clear evidence of an overt act done by the Appellant with a clear intention to commit the theft from the Government of Kenya. The Appellant's attempt did not fail for lack of trying. She only failed because the conspiracy was discovered and thwarted by the police and bank officials. I am satisfied that the Appellant's conviction for Attempted Stealing under count Nos. 5 and 9 were sound and I do hereby uphold the same. Likewise the two (2) year term of imprisonment imposed on the Appellant for each count was lawful and I confirm that sentence. The upshot is that this appeal fails in its entirety. The convictions and sentences imposed upon the Appellant by the trial court are hereby confirmed and upheld.

Dated and Delivered in Mombasa this 15th day of July 2011.

M. ODERO

JUDGE

In the presence of:
Appellant in person
Mr. Onserio for State