



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT ELDORET
CRIMINAL REVISION NO. 11 OF 2011

REPUBLIC:.....PROSECUTOR

VERSUS

JANUARIS KILILE:.....ACCUSED

REVISION

Januaris Mutua Kilile (hereinafter “the 1st accused”) and **David Ruto Chebet** (hereinafter “the 2nd Accused”) were charged before Eldoret Chief Magistrate’s Court (Criminal Case No. 1034 of 2008) with the offence of stealing contrary to Section 275 of the Penal Code. The accused persons were alleged to have, on divers dates between 27th November, 2007 and 9th February, 2008, jointly with others not before the court stolen “U” club card points valued at Kshs. 14,000.00 the property of **Uchumi Supermarket**.

At the end of the case for the prosecution, the Learned Trial Magistrate (**A. Alego**, Senior Resident Magistrate) found that both accused persons had a case to answer. The 1st accused, who was represented at the trial by **Mr. Nyamweya** Learned Counsel, was not satisfied with the ruling that he had a case to answer. His counsel therefore intimated to the court that he would appeal against the said ruling. He, accordingly, sought directions of the court. The Learned Magistrate then stated as follows:-

“Defence hearing proceeds with accused 2. Accused 1 is at liberty to do what is legally binding to him.

Accused 1 Januaris Kilile through his counsel, avers that he is aggrieved by the ruling by this court putting him on his defence. This court is not barred by an order so far from the High Court to stop its proceedings. Since there were two accused persons on the matter I will proceed with the defence hearing of accused 2 to its conclusion. I will deliver my judgment accordingly thereafter accused’s absence notwithstanding unless otherwise directed by the High Court.”

The Learned Senior Resident Magistrate indeed heard the defence of the 2nd accused and his counsel’s submissions. On 22nd July, 2011 she delivered her judgment in which she found both accused persons guilty as charged. He convicted them and fined the 1st accused to pay Kshs. 50,000/- in default to serve 2 years imprisonment. This turn of events provoked counsel for the 1st accused to complain to the Deputy Registrar of this court in his letter dated 22nd July, 2011 that he was not expecting a judgment for the 1st accused, since he had intimated that the 1st accused wished to appeal against the ruling finding him with a case to answer.

The complaint was placed before me and I called for the Lower Court record. I have perused the record and agree with the 1st accused that he may not have expected the judgment which was delivered on 22nd July, 2011. I say so, because the Learned Trial Magistrate, in deciding to proceed with the defence of the 2nd accused, gave the impression that the 1st accused's intimation to appeal had been favourably received. She did not direct that the 1st accused's defence be given. There is indeed no indication that the 1st accused refused to participate in the proceedings.

In her judgment, the Learned Magistrate stated as follows:-

“Having heard the evidence on record it is clear that the offence was culminated (sic) as an inside job. The complainant herein is Uchumi Supermarket who realized an anomaly on U-Card No 31211375. I am taking into account both accused persons herein albeit even for Accused 1, who averred that he had appealed against my ruling but never tendered any evidence on the same that he truly had an appeal. Under the circumstances, this judgment considers evidence against both accused persons.....”

With all due respect to the Learned Trial Magistrate, the cited passage contains serious misdirection. She proceeded to deliver a judgment without hearing the testimony of the 1st accused who had not refused to participate in the proceedings. Indeed no effort was made to find out whether the 1st accused had any witnesses. Besides, the 1st accused had indeed appealed (**Criminal Appeal No. 47 of 2011**) against the finding of a case to answer against him. That appeal is pending before the High Court. It cannot be gainsaid that the 1st accused's right to appeal is a constitutional one and should not be denied in a perfunctory manner.

In the premises the proceedings and/or absence thereof leading to the conviction of the 1st accused were improper and irregular. I am therefore justified to intervene under Section 364(1) of the Criminal Procedure Code. The conviction of the 1st accused is hereby set aside and the sentence of Kshs. 50,000/- hereby quashed and so is the default sentence of 2 years imprisonment which default sentence, in any event, contravened the provisions of section 28(2) of the Penal Code. Under that section the default sentence is six (6) months. If the 1st accused has already paid the said fine the same should be refunded to him.

Further proceedings with respect to the 1st accused in Eldoret Chief Magistrate Criminal Case No. 1034 of 2008 are stayed pending the hearing and disposal of his appeal or until further orders of the Court.

To expedite the hearing of the appeal, I hereby admit the same to hearing before a single judge at Eldoret High Court. Let the 1st accused's counsel serve the petition of appeal, prepare and serve a record of appeal and seek directions in the said Criminal Appeal Number 47 of 2011 (**Januaris Kilile -VS- The Republic**)

Orders accordingly.

**DATED AND DELIVERED AT ELDORET
THIS 25th DAY OF OCTOBER, 2011**

**F. AZANGALALA
JUDGE**