REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NYERI

Crimnal Appeal 125 of 2004

LYDIA WANGUI KARINGITHI.....APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

(From original conviction and sentence in Criminal Case No.136 of 2004 of the Senior Resident Magistrate's Court at Karatina by J.N. NYAGAH – SRM)

J U D G M E N T

Lydia Wangui Karingithi, hereinafter referred to as "the appellant" was tried, convicted and sentenced to one year probation for the offence of stealing contrary to *section 275* of the penal code. Being aggrieved by the conviction and sentence the appellant lodged the instant appeal through **Messrs Gacheche wa Miano Advocate.** In her petition of appeal the appellant has faulted his conviction and sentence on five grounds. However in the light of the fact that the state has conceded to the appeal it is not necessary to go into those grounds in detail.

When the appeal came up for hearing, **Ms Ngalyuka**, learned state counsel conceded to the appeal on the grounds that the evidence adduced in support of the charge was insufficient to sustain a conviction. Counsel submitted that though the allegation was that the appellant was found with a banana which she claims belonged to her children, it had not been established by evidence where the banana had come from and whether it belonged to the complainant.

On his part, **Mr. Gacheche wa Miano**, learned counsel who appeared for the appellant whilst welcoming the position taken by the state in the matter went on to submit that the appellant had not moved or caused the banana to be moved for the offence of theft to be proved in terms of *section 268(5)* of the penal code. Further that PW2 never saw the appellant cut the banana. The allegation was therefore merely an assumption.

The brief facts of the case are that on the 21st January, 2004, PW2, the complainant's worker went to cut nappier grass in the shamba of his employer (PW3). He found the appellant had cut the complainant's banana. He asked her why she had done so and the appellant retorted that the banana belonged to her children. PW2 then collected the banana and kept it in the complainant's store. On the 22nd January, 2004, the complainant came home from Nairobi and PW2 reported the incident to her. In turn the complainant reported the incident at Kiamacimbi police station. PW1 **P.C. Macharia** accompanied the complainant back to shamba, collected the banana from the complainant's store, arrested the appellant and then charged her with the offence of stealing farm produce contrary to *section 8(1)* of the Farm Produce Act. At the conclusion of the trial however the learned magistrate found that the offence proved was simple theft contrary to *section 275* of the penal code and not stealing of farm produce as initially charged. Invoking the provisions of *sections 179(1)* of the Criminal Procedure Code, the learned magistrate proceeded to substitute the offence committed to one of stealing under *section 275* of the penal code.

I think that the learned state counsel was right in conceding to the appeal on the ground that the

evidence adduced was insufficient to sustain a conviction. No evidence was adduced to show that the appellant cut the banana and or that the banana cut and found in the possession of the appellant, if at all, belonged to the complainant. Further no evidence was adduced to show that the intention of the appellant in cutting the banana, if at all was to steal considering the definition of what amounts to theft under the penal code, I am satisfied that the evidence adduced by the prosecution in support of the charge fell too far short of the standard refund. The appellant on being asked why she had cut the banana, categorically responded that the banana belonged to her children. This answer was not at all countered by any other evidence, nor was it seriously challenged. It does appear that the appellant and the complainant are related by virtue of marriage. According to the appellant the father of the complainant's husband and her husband are siblings of the same father. The appellant maintains that the evidence against her was fabricated. It is not unheard of for families to use criminal courts to abid to settle family scores. This was essentially a family dispute not deserving the honour of criminal prosecution. From what is before me I doubt very much whether indeed the appellant cut the complainant's banana and even if she had done so, whether the intention was to steal. The learned Magistrate ought to have considered the charge alongside Section 268 of the penal code. There is no evidence that the appellant had, as correctly submitted by **Mr. Miano,** moved the banana with the intention of permanently depriving the complainant of its use. There is evidence that on recovering the banana, PW2 kept it in the complainant's store until 27th January, 2004 when the complainant appeared and PW2 reported the incident to her. This being the only evidence which in any event was not even corroborated, does not prove the offence of theft.

In the premises, I am in agreement with the position taken by the learned state counsel. On that basis, I would allow the appeal, quash the conviction and set aside the sentence imposed. The appellant shall be set at liberty forthwith unless otherwise lawfully held.

Dated and delivered at Nyeri this 25th day of January, 2008.

M.S.A. MAKHANDIA

JUDGE