



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Criminal Appeal 386 of 2004

LUCY WANGARI NGUGIAPPELLANT

VERSUS

REPUBLIC RESPONDENT

**(From the original decision in Criminal Case No. 1688 of 2003 in the
Chief Magistrate's Court at Nairobi – Mrs. M.A. Mlanga SRM)**

J U D G M E N T

LUCY WANGARE NGUGI, the Appellant was charged in the subordinate court jointly with two others, with theft from a locked room contrary to section 279(g) of the Penal Code. The particulars of the offence were that on 6th July 2003, at JERRY CITY HOTEL along Duruma Road in Nairobi within Nairobi jointly stole four thousand two hundred (4,200) US DOLLARS (Kshs.318,360) the property of WILLIAM MAINGI KARAYA and in order to commit such theft opened a locked room using a key. After a full trial, the two co-accused were acquitted. However the appellant was convicted and sentenced to serve 5 years imprisonment. Being aggrieved by the decision of the trial court, she has appealed to this court through his counsel Wandugi & Company advocates challenging both the conviction and sentence. Before the appeal was heard, the appellant was on 4th October 2004 released on bond pending appeal.

When the appeal came up for hearing Mr. Wandugi appeared for the appellant. Counsel argued that the prosecution did not prove the charge against the appellant. Counsel argued that the evidence was not sufficient to sustain a conviction. Firstly, there was no evidence to establish that the complainant had 4,200 dollars in his bag, as after withdrawing money from the bank, he travelled on business both Dubai and South Africa before coming back to Kenya. Secondly, he did not tell the appellant that he had money in the bag, but merely informed her that he had some important documents in the bag. If indeed he had the money he should have said so. The fact that the appellant went to the room to change towels did not make her a thief.

Secondly, counsel argued that there were contradictions in the prosecution evidence regarding the time of events in the hotel. The benefit of the contradictions should have been given to the appellant. Counsel also argued that the 5 years imprisonment was excessive.

The learned State Counsel, Mr. Mkura opposed the appeal and supported both conviction and sentence. Counsel argued that though the conviction was based on circumstantial evidence, the evidence was such that the irresistible conclusion was that the appellant was the thief. Counsel contended that it was the appellant who allocated the complainant room 308 and then went into the room secretly thereafter purportedly to change towels without informing the complainant or getting his permission. There was

also evidence that the complainant had withdrawn some money earlier, therefore all the circumstances pointed to the appellant as the thief. Counsel submitted that the contradictions on time were minor and did not go to the root of the prosecution case.

I have evaluation the evidence on record, as I am required to do in a first appeal. Indeed, as submitted by learned state counsel, the conviction of the appellant is predicated on circumstantial evidence. It is trite that a conviction in a criminal case can be based on circumstantial evidence. However, as was held in **KIMEU –VS- REPUBLIC [2002]1 KLR 756 ?**

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6. The court can only act on circumstantial evidence to support the conviction of an accused person if the evidence points irresistably at the accused’s guilt to the exclusion of everybody else.

7. Before drawing the inference of the accused’s guilt from circumstantial evidence, the court must be sure that there are no other co-existing circumstances which would weaken or destroy the inference of guilt of the accused”.

In our present case, there was a lapse of a number of days after the withdrawing of money by the complainant (PW 1) from the bank, to the date of the alleged theft. In addition, the complainant, after withdrawing moneys, traveled first to Dubai and then to South Africa before coming back to Kenya. It is not clear how much money he actually spent on those trips and from what source the money spent on the trips came. Secondly, when the complainant met PW1 on the date of the alleged crime, he did not tell the appellant that he had money in the bag but valuable documents. Therefore, it is not certain from the appellant’s own statement that he had money in the bag. Thirdly the bag having been broken into, no attempt to take fingerprints was done to establish whether any fingerprints could be found on the broken bag or scattered documents. Lastly, the appellants was not the only person who handled the key to room 308 during the time in question. She was not therefore the only person who had access to the room. In my view, the evidence in record does not lead irresistibility to the interference that there was the alleged money in the bag, and that the person who took that money must have been the appellant and no one else.

Indeed, the circumstances of the case point to strong suspicion against the appellant. That suspicion is hinged on the fact that she knew that the complaint was looking for petrol pumps, and therefore must have had some money. Suspicion also in that she went to open the hotel room 308 purportedly to change towels without the consent or information of the complainant and that, shortly thereafter, the bag of the complainant in the same room was found to have been broken and items scattered. However, in criminal cases, suspicion per se, however strong cannot be a basis of interfering guilt in a criminal which has to be proved by evidence beyond reasonable doubt. **See SAWE – VS- REPUBLIC [2003] KLR 364.**

In my view, from the evidence on record, the conviction of the appellant is unsafe and cannot be sustained. I will allow the appeal and quash the competition and set aside the sentence.

Consequently, and after above reasons, I allow the appeal quash the conviction and set aside the sentence. I order that the appellant be set at liberty, unless otherwise lawfully held.

Dated and delivered at Nairobi this 13th February 2008.

George Dulu

Judge

In the presence of –

appellant.

Mr. Wandugi for appellant.

Mr. Makura for state.

Mr. Mwangi – court clerk