



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI (NAIROBI LAW COURTS)
Criminal Appeal 412 of 2005

ELIZABETH GATHONI KIBIKUAPPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction and sentence in Criminal Case No. 403 of 2004 of the Senior Principal Magistrate's Court at Kikuyu- Mrs. M.W. Murage)

JUDGMENT

ELIZABETH GATHONI KIBIKU was charged before the subordinate court with the offence of stealing by servant contrary to Section 281 of the Penal Code. The particulars of the charge were that –

“On diverse dates between 3rd July 2004 and February 12th 2004, at Rukubi in Kiambu District, within Central Province, being a servant to Grace Wanjiru Nguru, stole from the said Grace Wanjiru Nguru an assortment of animal feeds all valued at Kshs.47,360/=”.

After a full trial, she was convicted of the offence and sentenced to serve two (2) years probation sentence. Being dissatisfied with the decision of the learned trial magistrate, she has appealed to this court.

At the hearing of the appeal, Mr. Alex Karanja, appeared for the appellant while, Mr. Warui, appeared for the state (respondent).

Learned counsel for the appellant, Mr. Karanja, submitted that the particulars of the charge were that the offence was committed between 3.7.2004 and 12th February 2004. Given that the charge was filed in court in March 2004, it was apparent that at the time of placing the charge in court, the offence had actually not been committed. The confusion of the dates prejudiced the appellant and the learned trial magistrate should not have convicted the appellant. He sought to rely on the case of **YOZEFU AND ANOTHER – vs – UGANDA [1969] EA 236**.

Counsel for the appellant further submitted that the learned trial magistrate should not have convicted on the evidence of PW3, whose qualifications and experience as an expert were not given. The the learned trial magistrate did not satisfy himself as to whether the witness was a Certified Public Accountant. He sought to rely on the case of **MUTONYI – vs – REPUBLIC (1982) KLR 203**, in which he submitted that the Court of Appeal set out the criteria to be used in determining whether a witness was an expert.

Thirdly, he submitted that the testimony of the prosecution witnesses was full of contradictions, and could not sustain a conviction. He sought to rely on the case of **JASAN YONGO – vs – REPUBLIC (1982 – 88) 1 KLR 167**. Counsel abandoned ground 8 of appeal, which was on sentence.

Learned State Counsel, Mr. Warui, conceded to the appeal. He submitted firstly, that the charge was defective. The dates in the charge sheet for commission of the offence were between 3.7.2004 to 12.2.2004. The charge was on the other hand filed in court on 31.3.2004. The learned trial magistrate also stated that the complainant started complaining on 2.1.2004. In his view, as no attempt was made to amend the charge, during proceedings, there was prejudice on the appellant and therefore the conviction cannot stand.

His second ground for conceding to the appeal was that the appellant was charged with theft of an assortment of animal feeds. However, the evidence of prosecution witnesses related to irregularities in accounting and failure to record some sales. In his view, that could only amount to fraudulent false accounting and not theft. In addition, the evidence was that three people used to record sales. None of the other two were charged. That was also a fatal defect. He sought to rely on the case of **NJUGUNA – vs – REPUBLIC [2003] 1 EA 206**. He contended that the defect in the charge sheet could not be cured under Section 382 of the Criminal Procedure Code.

I have considered the appeal and the submissions of counsel for the parties. I have perused the charge sheet, the proceedings as well as the judgment.

Both the counsel for the appellant and learned State Counsel contend that there is an irregularity in the dates in the charge sheet. Indeed, I observe that the offence is alleged to have been committed between 3.7.2004 and 12.2.2004. The charge sheet was filed in court on 31.3.2004. Clearly, the date of 3.7.2004 cannot be correct. It was an error. It was after the date when the charge sheet was filed in court on 31.3.2007.

Learned counsel for the appellant has relied on the case of **YOZEFU AND ANOTHER – vs – UGANDA [1969] EA 236** for his contention that the error in the dates made the charge fatally defective. In my view, that case is not applicable in our present case. It is distinguishable. It dealt with failure to allege an essential part of the offence. It did not deal with an error in the dates of the alleged offence.

In Kenya, the statutory position with regard to irregularities in a sheet is provided for under Section 382 of the Criminal Procedure Code (Cap.75) and is as follows –

“382 subject to the provisions hereinabove contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this code, unless the error, omission or irregularity has occasioned a failure of justice. Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could or should have been raised at an earlier stage in the proceedings”.

From the above provisions of law there are two requirements to be satisfied before an error in a charge sheet can be enough reason to alter a judgment on appeal. The first requirement is that the error occasioned a failure of justice. Secondly, the court has to consider whether the objection to the irregularity could or should have been raised at an earlier stage in the proceedings.

The appellant herein was represented by counsel during the subordinate court’s proceedings. No objection was recorded as having been raised before the learned trial magistrate during proceedings. Counsel for the appellant has not stated that any objection was taken. The counsel for the appellant participated fully in the proceedings and cross-examined witnesses. In my view, the error in the dates did not prejudice the appellant in any way. He and his counsel fully participated in the trial without any indication of prejudice. In my view, the defect is a minor defect. It was not objected to at the trial. It did not confuse the defence case, and therefore cannot be said to have caused prejudice. It is curable under Section 382 of the Criminal Procedure Code (Cap. 75). That ground fails.

Learned Counsel for the appellant has argued that the learned trial magistrate should not have convicted

on the evidence of PW3, who did not give his qualifications and experience. PW3 did not qualify to be treated as an expert witness. I have perused the record of proceedings. PW3, in his evidence, stated –

“Njogu Kanyara. I am an accountant in Nairobi. I am CPA 2 holder Grace Wanjiku requested me to do some statement of account. She brought receipt book and other books. I was to check and make a report. I went through the report. I prepared a statement”

In **MUTONYI – vs – REPUBLIC [1982] KLR 203**, at page 210, the Court of Appeal stated –

“So, an expert witness who hopes to carry weight in a court of law, must, before giving his expert opinion:

- 1. Establish by evidence that he is specially skilled in his science or Art.**
- 2. Instruct the court in the criteria of his science or art, so that the court may itself test the accuracy of his opinion and also form its own independent opinion by applying these criteria to the facts proved.**
- 3. Give evidence of the facts on which may be facts ascertained by him or facts reported to him by another witness”.**

PW3 stated in evidence that he was a CPA 2 holder. It can be said that he was a part qualified certified public accountant. He however, did state what skills he had that qualified him or gave him experience to carry out an audit of books and make the report that he made. He also did not give the criteria of how he carried out the audit to test the accuracy of his opinion. That, in my view, was a fatal error as his report could not be treated as an expert report. I agree with learned counsel for the appellant that the learned trial magistrate should not have relied on the evidence of PW3 to found a conviction. The error was fatal to the conviction.

I agree with learned State Counsel that the evidence on record was relevant to a charge of fraudulent false accounting rather than theft of animal feeds. There is no evidence that the appellant stole any quantity of animal feeds. The evidence is about failing to record sales or recording wrong amounts of sales. In addition there is evidence which was uncontroverted by the prosecution that the entries in the books were made by more than one person. No hand writing expert was called to verify and establish the entries that were made by the appellant. Therefore, the evidence on record could not safely sustain a conviction.

Consequently, I allow the appeal, quash the conviction and set aside the sentence. The appellant appears to be under probation, but if she is in custody because of this case, I order that she be released unless otherwise lawfully held.

Dated and Delivered at Nairobi this 11th day of May 2007.

DULU

JUDGE

In the presence of -