



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Criminal Appeal 238 of 2006

MUTUKU ITHIAAPPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction and sentence in Criminal Appeal No. 1512 of 2003 of the Chief Magistrate's Court at Nairobi – A. Muchelule, CM)

JUDGMENT

MUTUKU ITHIA, the appellant was charged before the subordinate court with 7 counts of forgery contrary to section 349 of the Penal Code. After a full trial, he was acquitted on counts 1 to count 6. He was however convicted with respect to count 7, the particulars of which were that on diverse dates between 24th March 2003 at Southern Credit Banking corporation in Nairobi within Nairobi area, jointly with others not before court stole Kshs. 2.5 million the property of M.S Southern Banking Corporation Ltd. He was sentenced to serve 12 months imprisonment. Being dissatisfied with the decision the trial magistrate, he appealed to this court through his counsel M/s M. M. Uuyu & Company advocates on seven grounds, that –

1. The learned trial magistrate erred in law and in fact in convicting the appellant on insufficient evidence.
2. The learned trial magistrate erred in law and in fact in failing to find enough doubt was created to secure acquittal of the appellant.
3. The learned trial magistrate erred in fact in holding that the evidence adduced proved the offence against the appellant as charged.
4. The trial magistrate erred in law and in fact in failing to find that there was enough evidence in favour of the appellant, which should have secured his acquittal.
5. The learned trial magistrate erred in law and in fact in introducing and considering extraneous matters in making her finding which were based on speculation and not supported by evidence on record.
6. the learned trial magistrate erred in law in failing to consider and or rejected the defence case which was candid and unchallenged without giving reasons thereof.
7. The sentence is manifestly excessive having regard to all the circumstances of the case.

At the hearing of the appeal Mr. Uvyu, learned counsel for the appellant submitted that the amount

received by PW7 was less than the amount stated in count 7. The dates of the offence were also not indicated. In counsel's view, the charge was defective and the prosecution should have amended the same before the close of the prosecution case, which they did not do. Counsel also argued that the particulars of the charge were not proved.

On the proof of the charge, counsel argued that PW5 and PW6 did not indicate the names of the people who took the money from the bank. In counsel's view, those must have been the people who opened the bank account and none of the people who took the money was charged in court.

Counsel also argued that the magistrate relied on extraneous matters by deciding the case on matters which were not part of the evidence adduced in court, as there was no evidence that the appellant acted irregularly, nor could the appellant have reported a non-existent loss, nor was there evidence that the appellant released any cheque or money anybody.

Learned State Counsel, Mr. Makura opposed the appeal and supported conviction and sentence. Counsel submitted that there was overwhelming evidence to support the conviction. Counsel submitted that though the amount stated in the charge sheet was not the amount testified to, this could not be a fatal defect to the charge. If that was a defect, then it was curable under section 382 of the Criminal Procedure Code (Cap. 75) Counsel contended that the theft was done in concert, therefore the appellant was a principal offender.

On the issue of extraneous matters, counsel submitted that the learned trial magistrate did not rely on extraneous matters, but merely tried to analyse the evidence and come to a finding Counsel also submitted that the absence of dates did not make the charge fatally defective.

I will first of all, deal with the issue as to whether the charge is fatally defective. I agree with learned State Counsel that the fact that the charge states that the offence was committed on diverse dates does not make it fatally defective. The same applies to the complainant on the amount of money involved. What has to be specified in a charge or information is provided under section 134 of the Criminal Procedure Code (Cap 75 of the Laws of Kenya

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“134. Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged”.

Having said the above, I am still of the view that the charge as stated is fatally defective because the charge is a charge of forgery, while the particulars of the charge relate to theft. In my view, an offence of forgery is quite distinct from an offence of theft. The particulars of the offence should have followed from the offence charged. Section 349 of the Penal Code, on which the appellant was charged is a section that covers an offence of forgery and not theft. In my view, therefore the charge is fatally defective, and the conviction of the appellant cannot stand on that ground alone.

The second reason why the appeal of the appellant will be successful is that there is no evidence that he either forged anything or that he stole anything. There is no evidence anywhere that he forged any document, there is no evidence also that he withdraw any money from Southern Credit Banking Corporation. Even assuming that he was given the cheques in question, on which there is no documentary proof, there is no evidence that he forged any document or that he took the money allegedly stolen. No doubt, and with profound respect to the learned trial magistrate, this is probably the reason why the learned trial magistrate went into conjunctive in the judgment when she stated –

“The court finds that accused's conduct proves he was part and parcel of the syndicate that stole the money from Southern Banking Corporation Ltd. by unlawfully releasing the Technoplast cheques to the other suspects and/or depositing them in the said bank and cashing the same”

There was no evidence adduced by the prosecution to establish that the appellant unlawfully released Technoplast cheques to other suspects; or that he was privy or a party to the cheques being deposited to and being cashed from the bank. On that basis also the conviction of the appellant cannot stand.

That is not all. Crucial witnesses were not called to testify. Originally one another person was charged together with the appellant. It is not clear what happened to that case of that other accused. Other than that, the complainant PW3 MAYIR SHAH is recorded as having stated thus at one point in his evidence –

“I wish to withdraw the matter from court as I have talked with the accused and he helped me get the culprits and they have been sentenced now”

Again, none of these people were called to testify as to the involvement of the appellant in the alleged offence. In addition, the investigating officer of the case, an Inspector Langat, who would be expected to tie the loose ends in the prosecution case did not testify because, as was stated by PW6 CPC DAVID YEGON – “was currently on leave.” Being on leave is a lame excuse indeed. In my view, the above witnesses who were not called by the prosecution to testify, were crucial witnesses. In **BUKENYA & ANOTHER –vs- UGANDA [1972] EA 549**, the Court Appeal for East Africa, held that the prosecution is bound to make available all witnesses to establish the truth, even if their evidence may be inconsistent to its case. Otherwise failure to do so may, in an appropriate case lead to inference that the evidence of uncalled witnesses would have tended to be adverse to the prosecution. In the circumstances of our present case, I make the inference that the evidence of the uncalled witnesses would have tended to be adverse to the prosecution. On that ground also the conviction of the appellant cannot be sustained.

For the above reasons, I find merits in the appeal and have to allow the same. I therefore allow the appeal, quash the conviction and set aside the sentence. I order that the appellant be set at liberty unless he is otherwise lawfully held.

Dated and delivered at Nairobi this 22nd October 2007.

George Dulu

Judge

In the presence of –

Appellant

Mr. Uyu for the appellant

Mr. Makura for State

Eric - court clerk