



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Criminal Appeal 248 of 2005**

STEPHEN NJAU MUCHIRI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

STEPHEN NJAU MUCHIRI was found guilty and convicted by Kiambu Senior Principal Magistrate's Court of **STEALING FROM A PERSON** contrary to **Section 279(a)** of the **Penal Code**. He was sentenced to 24 months imprisonment. Being aggrieved by both the conviction and the sentence the Appellant lodged this appeal.

In the filed petition of appeal, the Appellant raised four grounds. That the learned trial magistrate erred in law in convicting him on evidence that was insufficient and unsafe to support a conviction; two, that the learned magistrate discounted the Appellant's defence, three, that the prosecution adduced contradictory evidence and finally that the alleged offence was reported four hours after its commission despite the Police Station being within a walking distance.

The facts of the case were that the Complainant boarded a public service vehicle driven by the Appellant intending to travel to Nazareth. That on noticing that the vehicle was not taking that direction, the Complainant requested to alight. That as the Complainant argued with the conductor over fare, the Appellant alighted from the vehicle, grabbed her handbag and drove off leaving her stranded. The Complainant said that among other things, the handbag had Kshs.10,000/- in it. Eventually after the Complainant reported to police and the Appellant was traced and arrested, the Appellant's father, PW4, took the bag to the police. The Complainant said that she was able to recover all she had in the bag except cash Kshs.10,000/-. PW3 one **MUNGAI** a passerby saw the Appellant take the Complainant's bag and drive off with it.

The Appellant admitted that he took the bag in the vehicle but said that it was the Complainant who gave it to the conductor, DW3 as security for Kshs.20 fare which she did not have then. That the Complainant told the conductor that she would pay the money on the vehicle's return to Raini. That they failed to find the Complainant on their return to Raini and that he took the bag home to his father, PW4. The Appellant also called witnesses but the most important was DW3 the conductor and DW4 a passenger who were present when the incident occurred. DW3 said that the Complainant alighted at Raini when she realized the vehicle was not heading towards her destination. That after the Complainant searched unsuccessfully for fair, she gave the paper bag to the driver as security so that on their way back she would pay the Ksh.20/- fare. That the Complainant was not there on their return. That DW3 saw her again 3 days later, accompanied by Police. DW4's evidence was that the Complainant placed the bag on the dashboard before the Appellant drove off.

I have carefully analyzed and re-evaluated the entire evidence adduced before the trial court as expected

of the first appellate court. (see **OKENO vs. REPUBLIC 1972 EA 32**). In this case there are four versions of the story of what happened on the material day. There were however undisputed facts which is that the Appellant carried the Complainant's bag and that the Appellant's father, PW4 took it to the Police two days later.

The prosecution witnesses' version of the story was that the Appellant came out of the driver's seat, round to where the Complainant was, grabbed her bag, went back to his seat and drove off with it. As already indicated, this evidence was given by the Complainant and corroborated by PW3, a passer by. I considered PW3's evidence as that of an independent witness. I will come to his evidence later.

The second version is by the Appellant who said that the Complainant gave the bag to DW3 when she could not get fare and told him that she would pay fare to DW3 on the return journey. The Appellant said that the conductor then placed the paper bag on the dashboard and he drove off. The third version is by DW3 who said that after the Complainant could not get fare in her bag, she gave the bag to the Appellant to keep as security for Ksh.20/-. The fourth version is by DW4 that the Complainant herself placed the bag on the dashboard after she was unable to get Kshs.20/- fare from her bag.

It is quite clear from the evidence that the Complainant was consistent to PW2 her husband, PW3 the passer by and PW5 the police officer who took her report, that her bag had been snatched with Kshs.10,000/- in it. The Complainant's evidence that the Appellant actually alighted from the vehicle to snatch the bag from her received corroboration from PW3, who was passing by at the time.

On the other hand, the Appellant's evidence was contradicted by his witnesses, DW3 and DW4. The contradiction is material as it was in regard to circumstances under which the bag found its way to the Appellant's hands. While the Appellant said that it was DW3 who was given the bag by the Complainant, DW3 said it was the Appellant who was given the bag by the Complainant, while DW4 said the Complainant placed it on the dashboard.

That variation in the Appellant's case goes to the core of the case and the charge facing the Appellant. As the learned trial magistrate very ably demonstrated at page J5, the law is clear as to circumstances under which 'taking' and 'conversion' for purposes of stealing takes place. Both ingredients were met in this case and the learned trial magistrate reasoning in that regard is without reproach. I would say that the Appellant's defence was contradictory on material particulars because the three eye witnesses, the Appellant, DW3 and DW4 were not telling the truth.

MR. MUGO for Appellant argued that the report of the loss of Kshs.10,000 was not made until 2 days later, after the Appellant had been arrested. That is far from the truth. As already demonstrated in this judgment, the Complainant reported the loss from day one, not only to the police but to PW2 and PW3 long before reaching the police station. What PW5 admitted in that regard is that the report was made on 15th but the Complainant's statement was recorded on 17th, 2 days after the theft. The admission does not amount to an admission that the report was not made and the Appellant's advocates submission to that effect is an attempt to twist the evidence.

Learned counsel for the Appellant submitted that the Appellant was convicted purely on the basis of circumstantial evidence. **MR. MAKURA** for the State submitted that the evidence against the Appellant was direct evidence and not just circumstantial.

The evidence against the Appellant is both direct and circumstantial. The direct evidence is that the Complainant and PW3 saw the Appellant grab the Complainant's bag from her and drive off with it. The circumstantial evidence is that he had the bag for 2 days and that the money found missing from the bag two days later, only he could explain where it went being the last person with the bag. The clear inference from the circumstances of the case is that it is the Appellant who stole the money.

MR. MUGO submitted that the prosecution did not prove that the Complainant had Kshs.10,000/- in her possession. From the evidence on record, the Complainant while under cross-examination by the defence, produced a withdrawal slip showing that 5 days prior to the incident, she had withdrawn

Kshs.19,000/- from her bank. That in my view is sufficient proof that she had the money she claimed to have. In fact, even without the bank slip, the court had the duty to decide whether or not to believe the Complainant's evidence that she had the money in her bag. The learned counsel for the Appellant stated that in his evaluation of the evidence the learned trial magistrate had concluded that it was 'probable' that the Complainant had such money, that in the circumstances, the standard proof applied by the trial court was on a balance of probability instead of a proof beyond any reasonable doubt. That in the circumstances the case was not proved beyond reasonable doubt. He relied on various cases which I considered.

Learned counsel for the State submitted that nowhere did the learned trial magistrate state that the case was proved on 'probability'. He stated that the word the learned trial magistrate used was 'palpable' whose meaning was perception by either eyes or the mind. I did confirm from the judgment that the learned state counsel's submission on that point is the true position and that the standard of proof applied by the learned trial magistrate in this case was proof beyond any reasonable doubt.

On the treatment of the evidence of PW3 and PW4 with caution **MR. MUGO** submitted that the court found them unreliable and yet used their evidence to convict. I understood the learned trial magistrate's analysis of the evidence of PW3 and PW4. The learned trial magistrate was right to treat the evidence of both witnesses with caution. The learned magistrate's finding that each were in a position to favour one side is quite correct, PW3 to favour Complainant and PW4 to favour Appellant. However the finding on PW3 was harsh in my view in the sense that he was passing by when he saw the incident. There is no evidence to suggest and the court did not find his evidence a creation but believed that he was there when the incident took place. PW3's evidence ought not to have been disregarded. However even without PW3's evidence, the prosecution case was strong enough to sustain the conviction. As for PW4's evidence, the learned trial magistrate's finding that he contradicted his own evidence and that his evidence was of no material use to either prosecution or defence is quite correct and cannot be faulted.

I will end by stating that the Appellant's explanation that the Complainant left the bag because she did not have Kshs.20/- fare is unreasonable and implausible and cannot be believed. Same explanation by both DW3 and DW4 was equally implausible. Why would the Complainant have left her bag with so much money and other valuables in it over Kshs.20/- debt or fare? That is not believable. The learned trial magistrate's finding that the Complainant was an honest and confident witness and that the prosecution case was proved beyond any reasonable doubt cannot be faulted. I agree with the learned trial magistrate's finding of guilt and conviction of the Appellant for the main count of **STEALING FROM PERSON** contrary to **Section 279(a)** of the **Penal Code**.

I uphold the conviction and dismiss the appeal accordingly.

On the sentence of 2 years imprisonment for the offence, I find the sentence is quite fair in the circumstances and decline to interfere with it. The sentence is confirmed.

The upshot of this appeal is that the same fails and is dismissed in its entirety.

Dated at Nairobi this 10th day of April 2006.

LESIIT, J.

JUDGE

Read, signed and delivered in the presence of;

Appellant - present

Mr. Mugo for appellant – Mr. Mwathi holding brief

Mr. Makura for State – Miss Nyamosi holding brief

Huka CC

LESIT, J.

JUDGE