REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU

Criminal Appeal 75 of 2005
(From original conviction and sentence in Criminal Case No. 740 of 2001 of the Principal Magistrate, Nakuru –Mrs. Stella Muketi, Esq.)

GEORGE KIHARA NDUNG'U…….....APPELLANT

VERSUS

REPUBLIC……...RESPONDENT

JUDGEMENT

The Appellant has appealed against the conviction and sentence in Nakuru Criminal Case No. 740 of 2001 by Mrs. Stella Muketi – then Principal Magistrate, Nakuru.

In that case, the Appellant had been charged for three counts of Stealing by servant, contrary to section 281 of the Penal Code. In addition to the above, the Appellant had also been charged for three counts of obtaining by False Pretences, contrary to section 313 of the Penal Code. After a full trial, the learned Magistrate found the Appellant "Guilty" as charged in Count 2, 4 and 6.

Consequently, she sentenced the Appellant to serve 1 year imprisonment on the above counts. She also ordered that the sentence should run concurrently. During the hearing of the appeal, Mr. Karanja Mbugua - for the Appellant submitted that the case had ***not*** been proved upto the required standard. According to Mr. Mbugua, the 92 bales of wheat flour were recovered in a building belonging to a lady teacher – whose relationship to the Appellant was not established. Besides the above, he also recalled the evidence of the PW2 who confirmed that no goods were found on the Appellant and that it was only the maid who implicated the latter. Despite the above, she was ***not*** called to give evidence.

Apart from the above, Mr. Mbugua also recalled the evidence of the PW3 who also confirmed that ***no*** goods had been recovered from the shop of the Appellant. In addition to the above, he also referred the court to the evidence of the PW8 – Joseph K. Langat, the Credit Controller at the Milling Corporation who knew the Appellant as a customer.

Apart from the above, the PW8 had testified that he had nothing to show that the Appellant had taken the goods. Similarly, the PW10 – Jeremiah Musyoki also stated that though they had recovered 92 bales from a store in Nyahururu he never had any documents to confirm the ownership of the store. Later, he conceded that the store belonged to the Accused 3 viz, Simon Mwangi who was subsequently "***Acquitted***".

In support of his submissions, the counsel quoted the case of :-

Anditi Kojewi Vs Republic

Kenya Law Report Pg. 306

and

Silumu & Another Vs Republic

Kenya Law Reports [1986] Pg. 259.

In the above case, it was held that the making of the pretence as stated in the indictment and where there is a substantial variation between the false pretence as alleged in that indictment and the pretence proved in the case this will be fatal to a conviction.

Apart from the above, Mr. Mbugua also submitted that the learned magistrate had shifted the burden of proof on the Appellant. In conclusion, Mr. Mbugua submitted that the judgement by the learned magistrate never complied with section 169(2) of the Criminal Procedure Code in that the points of determination were ***not*** set out and the reasons for the decision. On the other hand, the state through Mr. Gumo, Asst. DPP did ***not*** support the conviction because the evidence and facts never tallied up.

Secondly, Mr. Gumo also lamented that the case was ***not*** properly investigated since there were many loose ends which should largely have been resolved in favour of the Appellant. This Court has carefully perused the above submissions together with the record of appeal. At the outset, it is apparent that the state does not support the conviction for reasons which have been explicitly shown.

Secondly, it is very obvious that the learned magistrate erred in law by shifting the burden of proof on the Appellant. That is clearly demonstrated by her statement in Pg. 4 of the judgement where she stated as follows:

> ***" 2nd Accused (read the appellant) is that he was not involved, though under no obligation to prove - anything did not cost any doubt in the prosecution evidence."….***

It must be stated clearly that the prosecution's duty was to prove the case beyond any reasonable doubt. The Appellant here had no obligation to fill in the gaps of the prosecution case.

Thirdly, it was also clear that the learned magistrate had failed to frame the issues at stake. Apart from the above, she also failed to give any reasons for her decision. On that score, I hereby concur with Mr. Mbugua that the judgement never complied with section 169 of the CPC which state as follows:

> ***(1) Every such judgement shall, except as otherwise expressly provided by this Code, be written by or under the direction of the presiding officer of the court in the language of the court, and shall contain the point or points for determination, the decision thereon and the reasons for the decision, and shall be dated and signed by the presiding officer in open court at the time of pronouncing it.***
>
> ***(2) In the case of a conviction, the judgement shall specify the offence of which, and the section of the Penal Code or other law under which, the accused person is convicted, and the punishment to which he is sentenced.***

In view of the above, it is very apparent that the conviction is ***not*** safe and well-merited. The upshot is that I hereby ***"Quash***" the convictions for counts 2, 4 and 6. I also set aside the sentence of 1-year imprisonment for each count.

The Accused should be released forthwith unless lawfully held.

MUGA APONDI

JUDGE

Judgement read, signed and delivered in open Court in the presence of Mr. Mbugua and Mr. Koech, Senior State Counsel.

MUGA APONDI

JUDGE

8TH JULY, 2005