REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION
CRIMINAL APPEAL NO. 326 OF 2004
(From original conviction(s) and Sentence(s) in Criminal case No. 67227 of 2002 of the Senior Resident Magistrate's Court at Kibera (Ms. Mwangi – S.P.M.)

PETER CORNEL MSANDO ……..……...…….…..APPELLANT

VERSUS

REPUBLIC…… ……..……....RESPONDENT

CONSOLIDATED WITH

CRIMINAL APPEAL NO. 294 OF 2004

(From original conviction(s) and Sentence(s) in Criminal case No. 6559 of 2002 of the Senior Resident Magistrate's Court at Kibera (Ms. Mwangi – S.P.M.)

LAWRENCE KIUNGA NDEGWA…….…..APPELLANT

VERSUS

REPUBLIC…… ……....RESPONDENT

J U D G M E N T

PETER CORNEL MSANDO and **LAWRENCE KIUNGA NDEGWA** were jointly charged with others not before Court with three counts. The 1st count was **STEALING GOODS IN TRANSIT** contrary to **Section 279 (1)** of the Penal Code, count 2 **FORGERY OF REVENUE STAMP** contrary to Section 352 (a) of the Penal Code and Count 3 of **MAKING A DOCUMENT WITHOUT AUTHORITY** contrary to Section 357(a) of the Penal Code. They were convicted in all three counts and sentenced to three years each, on each of the three counts with the prison terms running concurrently. Being aggrieved by the conviction and the sentence, they both lodged their Appeals.

The Appellant No. 1 raised 11 grounds of Appeal while the 2nd Appellant raised six grounds. Not all the grounds were argued during the hearing. I will consider each issue as solicited for by the Appellants.

The Appeal was unopposed. **MISS NYAMOSI,** learned counsel for the State conceded the Appeal on technical grounds. She however, urged the Court to order for retrial.

The facts of the Prosecution case were that some goods were imported into the country. The goods were 272 kilograms of Medicines. Global Freights were the Clearing Agents. PW3, a Clerical Officer from Global Freights got a fax from Germany on 26/7/02 informing him of the arrival of the drugs. He said that he obtained the Release Order and other documents from **BAYER E. A. Co. Ltd.,** the importers, so as to

be able to clear the same. That on 1st August when he went to clear the goods, he was informed that they had been cleared and collected some days before. It is the Prosecution case that the 2nd Appellant was the agent who with another, cleared and collected the goods. It is the Prosecution case that the 1st Appellant paid PW2 for the transportation of the goods from JKI Airport to Jogoo Road, K.C.B.

I have re-valuated the evidence adduced before the trial Court and the learned trial magistrate's findings. The first issue I will consider is the one conceded to by the Respondent. This issue is contained in ground 2, 3 and 4 of the Petition of Appeal filed by the 1st Appellant. It is submitted that the learned trial magistrate recorded the proceedings of the Court haphazardly and that no ruling was written as provided under Section 210 and Section 211 of the Criminal Procedure Code. On the issue of the Court record being haphazard, learned counsel for the State did not address me on this point. Having considered the proceedings at pages 33, 35, 36 and J6, I do not agree with MR. NGUGI for the 1st Appellant that the proceedings were recorded in a haphazard manner. It is clear from the record what the Court did on each day the Appellants appeared before it. It may have been brief but nevertheless it is clear what transpired on each day. I see no merit in this submissions together with the one on the 3rd ground of Appeal in which the 1st Appellant contends that the Court relied extensively on the evidence of the 2nd Appellant. There is nothing wrong with relying on the evidence of a co-accused against a co-accused as long as the applicable law will be observed. This includes considering the weight that can be given to such evidence. It is noted that both Appellants were convicted and therefore, even if the Court used the evidence of 2nd Appellant to convict both Appellants, that per se would not justify a finding that the Court erred in law in relying on such evidence. The key issue raised of the three grounds cited above is the fourth ground of the Petition of Appeal by the 1st Appellant. He contends that the Court did not comply with Section 210 and Section 211 of the Criminal Procedure Code and that no ruling was made in the case. MISS NYAMOSI for the Respondent conceded the same.

> ***I will reproduce the part of the record in issue which is to be found at page 33 of the proceedings thus: -***
>
> ***"Prosecutor. Close of the Prosecution Case."***
>
> ***MISS MWANGI***
>
> ***S.P.M.***
>
> ***<u>RULING:</u>***
>
> ***Section 211 CPC complied with. Defence hearing on 11/11/03. mention on 24/10/03 for 1st accused – bond extended.***
>
> ***Mention on 8/10/03 for 2nd accused – remand in custody.***

MS. MWANGI

S.P.M.

> ***Section 210 and 211 of the Criminal Procedure Code states: - "Section 210. If at the close of evidence in support of the charge, and after hearing such summing up, submission or argument as the prosecutor and the accused person or his advocate may wish to put forward, it appears to the court that a case is not made out against the accused person sufficiently to require him to make a defence, the court shall dismiss the case and shall forthwith acquit him.***
>
> ***Section 211(1) At the close of the evidence in support of the charge, and after hearing such summing up, submission or argument as may be put forward, if it appears to the court that a case is made out against the accused person sufficiently to require him to make a defence, the court shall again explain the substance of the charge to the accused, and shall***

inform him that he has a right to give evidence on oath from the witness box, and that, if he does so, he will be liable to crossexamination, or to make a statement not on oath from the dock, and shall ask him whether he has any witnesses to examine or other evidence to adduce in his defence, and the court shall then hear the accused and his witnesses and other evidence (if any).

(2) if the accused person states that he has witnesses to call but that they are not present in court, and the court is satisfied that the absence of those witnesses is not due to any fault or neglect of the accused person, and that there is a likelihood that they could, if present, give material evidence on behalf of the accused person, the court may adjourn the trial and issue process, or take other steps, to compel the attendance of the witnesses."

Section 210 of the Criminal Procedure Code is invoked by the Court to either acquit an accused person or to put him to his defence at the close of the Prosecution case or both as the case may be. If the Court finds that no case has been made against him sufficiently to require him to make a defence, it declares him acquitted. If not, he is required to defend himself. That section was not invoked by the learned trial magistrate to either require the Appellants to answer to the charge(s) or to acquit them.

Section 211 of the **Criminal Procedure Code** was invoked by the learned trial magistrate just as a passing reference. After the Prosecution closed its case on the 24th September 2003 the record shows that the Court straight away went into the ruling stage of the proceedings. Even though the 1st Appellant was represented during the trial, no opportunity was extended to him to make any address on the Prosecution case upon the Prosecution closing its case. The same goes for the 2nd Appellant. He was unrepresented. Nevertheless, the Court had a duty to inform the two Appellants of their right to address the Court before it made its ruling if they so wished.

After giving the defence an opportunity to address it, if the defence wished to do so, the Court would then have proceeded to make a ruling. The ruling should have been made in clear terms and should have been recorded in the Court record. Under **Section 210** of the **Criminal Procedure Code,** the learned trial magistrate had two options. If she was satisfied that the Prosecution had not adduced sufficient evidence to require the Appellants to answer to the charges preferred, it ought to have acquitted them. If on the other hand the Court was of the new that the Prosecution had made out a case sufficient to require the Appellants to answer the charge, then the Court would have ruled so indicating to the Appellants on the record, in which of the three counts they were required to defend themselves. The second step the Court was required to comply with was to inform the Appellants the methods of defence available to them and to proceed to give them an opportunity to defend themselves using the method chosen by them

The record indicates that the learned trial magistrate failed to give the defence an opportunity to address it after the prosecution closed its case and before the Court made its ruling. The record is silent as to whether the Appellants were informed in respect of which offence or offences they were required to defend themselves. It is also clear from the record that there was a lapse of over four months between the time the Prosecution closed its case and the time the Appellants defended themselves. During that period none of the requirements of either Section 210 or Section 211 of Criminal Procedure Code were complied with except the one informing them of the methods of defence available and the fact that they could also call witnesses.

MR. NGUGI has relied on a persuasive authority **WANJIKU vs. REPUBLIC [2002] 1 KAR 825** in which my brother, **ONYANCHA, J.** ruled that failure to comply with Section 210 and **Section 211** of Criminal Procedure Code was incurable and fatal to the case. **MISS NYAMOSI** has sought a retrial but did not rely on any authority in her said submission. In the circumstances of this case, it is my view that the failure to comply with the aforementioned provisions of the law were incurably defective. The two provisions are mandatory and leave the trial Court with no discretion as to whether to comply or not. Further, the Appellants were highly prejudiced in their defence and they were also embarrassed since they did not know in which counts they were required to defend themselves. That also means that they were prejudiced in their defence since they may not have known how to prepare for their defence in the circumstances. That failure to comply with mandatory provisions of Section 210 and 211 of Criminal

Procedure Code could not be cured under Section 382 of the Criminal Procedure Code. That rendered the entire trial a nullity and the convictions entered therein cannot be allowed to stand.

The issue of whether or not to order a retrial will be dealt with a little later.

The first ground of Appeal raised by the 1st Appellant really cut across all other grounds argued. It is that the learned trial magistrate erred in law and fact in convicting the Appellant on the evidence of the Prosecution. It was **MR. NGUGI's** contention that the evidence of PW2, one of the key witnesses in this case in my view, was contradicted by PW14. Whereas PW2 said that he carried goods in question from the Airport in company of both the Appellants, PW14 on the other hand said that the 2nd Appellant travelled alone with PW2 from the Airport and only managed to call the 1st Appellant at Haile Selassie Avenue in order that he could join them. MR. NGUGI contended that PW14's evidence was hearsay and should not have been admitted in evidence since the source was never disclosed.

PW14 was an investigating officer and was called as a witness in order to disclose the results of his investigation. However, the evidence of an investigating officer should be limited to admissible evidence and the Court is not discharged from applying the rules of evidence. From the record of the proceedings the investigating officer's evidence contradicts sections of PW2's evidence. The role of an investigation is not to adduce fresh evidence which cannot be supported in the evidence adduced. Such evidence should be used to compliment the prosecution evidence and to lay the basis of the arrests of suspects and the reasons of them being charged. PW14 seems in my view to have exceeded his role and therefore, created a controversy in the Prosecution evidence. I therefore, agree with counsel for the 1st Appellant that any part of his evidence which received no support from the rest of the Prosecution case should have been treated as hearsay and therefore ought not to have been admitted in evidence. There is a qualification to this rule, which is if it is shown that any particular witness was not telling the truth. In that light, PW14's evidence that the 2nd Appellant called the 1st Appellant from a booth along Haile Sellassie Avenue contradicted PW2's evidence. As will be highlighted later in this judgment, PW2 himself was not clear in his evidence on that point.

That brings me to the other point raised by the 1st Appellant which is that the evidence of PW14 that Sim Card No. 0722-517755 belonged to the 1st Appellant was not substantiated. That the 1st Appellant had given his sim card as No. 0722-517755 and that the said evidence stood unchallenged by the Prosecution. That evidence was meant to prove that the 1st Appellant had received a call from a booth Tel No. 246655 situated along Haile Sellasie Avenue as per evidence of PW6. PW6 was from Extelcoms (k) Ltd. and produced a print out to prove that a cell phone No. 0722-517765 received a call from 246655, a booth along Haile Selassie Avenue. The learned trial magistrate did not resolve this point in her judgment. In my own assessment of the evidence adduced, there was no cogent proof that the sim card alleged to belong to the 1st Appellant was truly his. Besides, that bit of evidence contradicted that of PW2. I will come to PW2's evidence a little later.

The 1st Appellant raised issued with his conviction on the basis of the prosecution evidence. That is the issue also raised at length in the 2nd Appellant's written submission. I will deal with both their submissions on the issue simultaneously. Both Appellants have questioned whether the role they played in this case proved their guilt as thieves and principle offenders in this case. I will narrate each of their roles as emerged in the evidence.

The 2nd Appellant did not deny having asked PW2 to carry the goods in question from the Airport to Jogoo Road. According to the Prosecution evidence, which the 2nd Appellant did not deny, he was a Clearing Agent at the Airport. He was known to PW10, a Custom Preventive Guard at JKI Airport as such and PW11 a porter at same Airport. It is his contention that he ought to have been treated as a witness for the Prosecution and not as an accused since his involvement was innocent. Likewise it was the 1st Appellant's contention that his involvement in the case was not criminal.

I have re-evaluated this case. It is clear from the record that the 2nd Appellant went to African Cargo Handling and obtained the release of the goods.

The documents used were adduced as exhibits. They were found to have been forged by super imposing the correct Airway bill Number for the goods. PW10 is clear in his evidence that the 2nd Appellant took to him a person not before Court, who signed for the release of the goods as the owner. That person was also mentioned by other witnesses including PW2 who carried the goods from the Airport warehouse to Jogoo Road, PW4 a Security Officer at African Cargo Handling who also dealt with the 2nd Appellant on the day the goods were released and PW11 the forklift driver who carried the goods in question from the warehouse to the point where the 2nd Appellant and his colleague carried them.

From that evidence, the role of the 2nd Appellant comes out clearly as that of one who helped to clear the goods through Custom. The man he called when PW10 insisted that the 2nd Appellant could not sign for the goods was recognized as the owner of the goods. The 2nd Appellant comes through as one who was even paid by PW2 a commission of 500/- for getting him the transportation business.

Since the evidence against him was circumstantial, the evidence that he received on 500/- is not proof of him being a principle offender in this case. That evidence did not irresistibly point to his guilt as required and was capable of explanation upon other hypothesis other than that of guilt.

As for the 1st Appellant, the only person who saw him from the evidence adduced was PW2. Deducing from the evidence of those who saw the 2nd Appellant clear the goods, PW4, PW10 and 11, none of them saw the 1st Appellant. That means that at the time PW2 collected the goods at the warehouse and carried them up to Mombasa Road, the 1st Appellant was not there. PW2 does not come out clearly in his evidence on this issue, a fact which can be blamed in part on the Prosecutor of the case and also the Court. Whereas he is clear that the 1st Appellant was not in his company and that of the 2nd Appellant as they collected the goods, he talks of him having alighted from his vehicle at Jogoo Road (PW2's vehicle) to direct him. PW2 does not say at what point the 1st Appellant found them in the vehicle. Then he said that 1st Appellant paid him 2000/- for the transport and yet left with PW2 in his vehicle after dropping off the goods.

Considering the 1st Appellant's explanation that he was lending money to his friend for the transportation and from his conduct of leaving the goods behind, that explanation was plausible and ought to have been accepted.

To sum up on this ground, I found that the evidence of the Prosecution was indeed very weak and fell below the required standard of proof in criminal cases.

On the last two counts again no evidence was adduced to prove the two offences against them. The 1st Appellant did not come into contact with the documents. The 2nd Appellant came into contact with them as a Clearing Agent.

He, assisting in helping trace the perpetrators of this offence. Cleary the evidence against both Appellants was insufficient to prove the case against them as required.

On the aforementioned grounds, I find that it would not meet the interest of justice to order a retrial in this case. The evidence adduced in the case is insufficient to sustain a conviction, in my view as an appellate Court. It would therefore, prejudice the Appellants to order for a retrial. I quash the conviction and set aside the sentence.

For the reasons given above, the Court declines to make such order. I order rather that the Appellants be set at liberty unless they are otherwise lawfully held.

Dated at Nairobi this 6th day of December 2004.

LESIIT

JUDGE