



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL APPEAL NO.378 OF 2000

**(From Original Conviction and Sentence in Criminal Case No.1940 of 1999
of the Chief Magistrate's Court at Nairobi)**

LUCY WARUINU MAINA }

MATHEWS MUNUPI }

ELIUD WEKESA KHAEMBA }..... APPELLANT

VERSUS

REPUBLIC RESPONDENT

JUDGEMENT

The three appellants in this appeal filed three separate appeals which were consolidated into the present appeal No. 378/2000. Mr. Khaminwa for the second appellant argued the appeal while Miss Ndirangu for the 1st appellant and Miss Sitati for the 3rd appellant concurred with Mr. Khaminwa's arguments. Mr. Monda appeared for the state (respondent).

Being dissatisfied with their conviction and sentence the appellants filed this appeal. According to the original charge sheet in the lower court the three appellants were charged with stealing by servant contrary to section 281 of the Penal Code. The particulars were that on diverse days between the 1st day of June 1999 and the 31st day of July 1999 at Industrial Area in Nairobi within Nairobi area jointly with others not before court and being servants to UB Pharma (K) Ltd. Stole from the said M/S UB Pharma (K) Ltd. various different types of human drugs valued at Ksh.336,450/=. Mr. Khaminwa argued in his submissions that the evidence relied on by the prosecution was circumstantial in nature and was weak. Apart from evidence having been adduced by P.W.1, P.W.2 and P.W.3 to prove that losses did occur there is no evidence to connect such losses to the three appellants according to Mr. Khaminwa. My perusal of the court record in so far as the evidence of P.W.1, P.W.2 and P.W.3 is concerned confirms Mr. Khaminwa's submissions and I agree with him that the evidence adduced by P.W.1, P.W.2 and P.W.3 was not adequate to prove that the three appellants stole the money or the drugs in dispute. I have perused the case of Paul Vs. Republic KLR 100 which deals with the law on circumstantial evidence. At paragraph F on page 101 the learned Judge had this to say on circumstantial evidence.

“In a case depending exclusively upon circumstantial evidence the court must before deciding upon a conviction find that the inculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other hypothesis than

that of guilt”.

The case of **James Mwangi v. Republic KLR 327 at page 331**, the case of **Karanja V. Republic (1983) KLR 501, holding No.4**, **Uganda V. Tandema 1983 IKLR 46** and also **Simon Misole V. Republic 1959 EA 715** have also been considered by me. The case of **Uganda Vs. Richard Musumba 1995 KLR 91** was also quoted in support by Mr. Khaminwa. I agree with the law on circumstantial evidence as laid out in the above cited authorities. Mr. Monda for the state did not oppose the appeals. He pointed out that it was wrong for the prosecution to have failed to solicit the evidence of a document examiner to prove that it is the appellants who wrote and prepared the questioned invoices leading to the loss of the sum in dispute. There was no direct evidence as to the exact person who wrote the invoices in issue. Miss Ndirangu and Miss Sitati are in agreement with Mr. Khaminwa and Mr. Monda that it was unsafe to convict the three appellants of the charge. I am equally convinced after a careful perusal of the lower courts proceedings that the conviction of the three appellants in this case was arrive at on unsafe grounds.

I therefore allow this appeal, quash the conviction and set aside the sentence imposed on each of the three appellants. Order accordingly.

R.M. MUTITU

JUDGE

19/3/2003 Delivered, dated and signed in the presence of Mr. Joel Marugu for Khaminwa and Miss Ndirangu for appellants (also holding brief for Miss Sitati) and in the presence Mr. Monda ofor the state.

R.M. MUTITU

JUDGE

19/3/2003

Miss Ndirangu:

I apply for release of Security deposited for bail purposes.

Order:

Security to be released.

R.M. MUTITU

JUDGE

19/3/2003