



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

APPELLATE SIDE

HIGH COURT CRIMINAL APPEAL NO. 215 OF 2002

(From Original Conviction (s) and Sentence(s) Criminal Case No. 1867 of 1999 of the Chief Magistrate's Court at Nairobi

SIMON CHEGE WAWERU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

The appellant Simon Chege Waweru was convicted of three counts of obtaining money by false pretences C/s 313 of the Penal Code. On each of the three counts, the appellant was sentenced to pay a fine of Kshs. 150,000 in default to serve 11/2 years in prison. The record is silent as to whether the default sentences were to run concurrently or consecutively.

Being aggrieved by the said conviction and sentence, the appellant lodged an appeal. It is my duty as the first appellate lodged an appeal.

It is my duty as the first appellate court to evaluate the entire evidence adduced before the lower court and arrive at an independent conclusion and or finding.

The three alleged offences were committed on 23rd December, 1997 7th January, 1998 and 16th January, 1998 respectively. The appellant on all the three occasions was said to have, jointly with others not before court and with intent to defraud, obtained various sums of money from one faith Mutindwa who was a bank cashier at Akiba bank Fedha Towers Branch in Nairobi. In so doing, the appellant is said to have pretended that he was one Allan Njoroge Ngugi the genuine account holder of the three drawn accounts held at the East African Building Society Fedha towers Branch.

The charge sheet indicates that the appellant was arrested on 23rd July 1999 and arraigned in court on 31st July, 1999. this was about one and a half year since the last withdrawal of money from the bank.

The prosecution proved that one Allan Njoroge Ngugi ws the genuine account holder of the three accounts from which various sums of money were withdrawn. There is evidence also that it was not Mr. Ngugi who withdrew the said money. Other than the said Mr. Ngugi, only he bank and Mr. Ngugi's secretary knew of the particulars of the said accounts. It was conceded by the prosecution witnesses hat there was a bank insider who facilitated these transactions. The question that remained was, who is the person who withdrew the said sums of money??

The prosecution said it was the appellant. The appellant denied this and said it was a case of mistaken identity. Before the alleged transactions, both pw1 faith Mutindwa and pw3 peter Kabaya had not known the appellant. It is common knowledge that bank cashers dealt with many customers on a daily basis. Unless a customer has particular physical features it may not be easy to remember each and every one who is paid at the bank.

Both pw1 and pw3 aforesaid identified the appellant as the person they dealt with on the three occasions when the money was withdrawn. But that was dock identification coming almost after two years from the date of the alleged offences. Mistaken identity, cannot, in my judgment be ruled out. This is a case that clearly required an identification parade to be conducted. It beats reason why this was not done.

Further to the foregoing, several documents were mentioned in the proceedings yet not a single one was verified as to its authenticity. No specimen signatures were taken from the various witnesses that were said to have authored the said documents. The absence of the evidence of a document examiner in a case of this signature prosecution case.

A reasonable doubt ran throughout the case and with respect, the same should have been accorded to the accused person. The conviction, I find, was unsafe.

Having elected to impose a fine in excess of Kshs. 10,000/- the learned trial magistrate was wrong to order a default sentence of 11/2 years. That was ultra vires the provisions of section 28 of the Penal code. Default sentence where the fine exceeds kshs. 10,000/- is 12 months imprisonment. The learned trial magistrate should also have indicted whether or not the default sentences were to run either concurrently or consecutively.

I note that the learned counsel for the Republic concedes the appeal. On the facts and evidence, she is right.

In the end, this appeal is allowed, conviction quashed and sentences set aside. The appellant shall be set free forthwith unless otherwise lawfully held.

Orders accordingly.

Dated and delivered at Nairobi this 31st day of May, 2002

MBOGHOLI MSAGHA

JUDGE