



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL APPEAL NO 458 OF 2002

(From original conviction and sentence in Criminal Case no. 3289 of 2000
of the Senior Resident magistrate's Court at Kibera)

JOHN KIRISIET OLE MUSEI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

The appellant John Kirisiet Ole Musesi was originally charge with one count of stealing by agent C/s 283(c) of the penal code four counts of forgery C/s 349 of the Penal Code and one count of uttering a false document with intent to defraud C/s 357 (a) of the Penal Code.

Having denied the charges, a full trial followed whereupon, he appellant was acquitted of all other charges except that of stealing by agent C/s 283(c) aforesaid. On conviction of the said charge, the appellant was sentenced to serve one year imprisonment. This is an appeal arising from the said conviction.

As the first appellate court, it is my duty to re-evaluate the entire evidence adduced before the learned trial magistrate and arrive at an independent conclusion. This I have done. I have also considered the submissions made by both counsel. I shall confine myself to the evidence that relates to eh charge upon which the appellant was convicted. The appellant was the Chairman of Saikeri water Project. The project had a management committee which comprised among others, the appellant as Chairman, one Ipanoi Ole Tira as the treasurer and Kennedy Kamaet as secretary.

This project was funded by donors and a Bank account opened. There were three signatories to the account whose signatures must appear on any cheque drawn against that account for money to be paid out.

It was the prosecution case that the appellant borrowed some money from one Joseph Maina Mathenge on the pretext that the same would be used to complete some project for the benefit of the community. However, that money was never used to complete the said project. That notwithstanding, the appellant is said to have used a cheque drawn on the account of Saikeri water project to repay the loan and knowing very well that the said money was not used for the intended purpose. That was the basis for the theft charge aforesaid. The appellant denied the charge and in his defence said he was framed by the treasurers and secretary of the project who wanted to remove him as the chairman and prevent him from contesting a seat as a councilor in the elections.

The learned trial magistrate found that the appellant was guilty of stealing shs. 462,000 whereas the charge alleged that he stole shs. 600,000 . I know some defects in criminal charges may be corrected but in a case of this nature, involving money, it was upon the prosecution to prove beyond any reasonable

doubt that the appellant did steal and that the sum stolen was Kshs. 600,000 unless the charge was amended. Be that as it may, I do not wish to involve myself with any figures in this judgment. It is enough to observe that the amount found to have allegedly been stolen by the appellant did not tally with what was reflected in the charge sheet.

The learned trial magistrate in the final two paragraphs of her judgment had this to say;

“ One final note, I find that this case was poorly investigated by the police, which resulted in poor prosecution of the accused in court. The charges in the charge sheet also contained improper particulars. Had the police been more diligent in their work, probably the result in this entire case would have been different.

The most logical conclusion I draw from these observations is that the appellant was subjected to poor prosecution and if that be the case, a miscarriage of justice had resulted. The question that arises then, is, why was he convicted?

The amount allegedly borrowed by the appellant was with the knowledge of pw6 Laisa Ole Ntei. This is the man who introduced the appellant to pw5 M. Maina the contractor who drilled the borehole and purchased the generator for the water Project after winning the tender. A generator house had to be built and there was no money available.

There was evidence that the generator house was completed and the generator installed (pw5). Although the completion according to Pw6 was by the new committee of which he is the patron, he (pw6) did not tell the court where he new committee got the money from to complete the same. According to the appellant the money borrowed was used to construct the generator house. Who is telling the truth?? It will be recalled that the appellant was cleared of the charges of forgery. It is clear that there was more to this case than meets the eye and a reasonable doubt ran all through the prosecution case. That should have been accorded to the appellant.

In my judgment, the case was not proved beyond reasonable doubt and conviction was unsafe. This appeal must be allowed. It is so ordered. Accordingly the conviction is quashed and sentence set aside. The appellant shall be set free forthwith unless otherwise lawfully held.

Orders accordingly.

Dated and delivered at Nairobi this 19th day of June, 2002.

A. MBOGHOLI MSAGHA

JUDGE

Mr Muthami for appellant.

Mr Obuor for the state