



IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPLICATION NO.1 OF 2000

(From Original Conviction and Sentence in Criminal Case No.2348 of 1998
of the Senior Principal Magistrate's Court at Nairobi)

**ABDULLAHI ALI
KORICHA.....APPELLANT**

Versus

**REPUBLIC.....RES
PONDENT**

11-10-2000:

Appellant present

Gikonyo, State Counsel for Respondent

Appellant

I was wrongly convicted. The evidence was not reliable. Pray allow the appeal.

Gikonyo:

I do not support the conviction. Accomplice evidence. No contradiction.

J U D G M E N T

The appellant (2nd accused in the court below) was charged jointly with two other accused for obtaining money by false pretences, contrary to section 313, P.C. He was convicted of it while accused Nos. 1 and 3 were acquitted.

In the particulars of the charge it was alleged that on 3rd June, 1998 all the three accused jointly with others not before the court at Kenya Commercial Bank, Moi Avenue Branch, Nairobi, with intent to defraud obtained Shs.91,200/- from Patrick Asangi Kemoli by falsely pretending that a stolen cheque No.295471 which they produced and presented to the cashier was a good and valid order for the payment.

The above named Patrick (P.W.6) was the cashier and he testified that it was the appellant, who worked as a messenger in the said Bank at the material time presented the said cheque to him on 4-6-98 saying that the payee named on the cheque was his relative and was ill in a vehicle outside the Bank. He added that the appellant asked him to cash the cheque to enable his relative to go to hospital.

Continuing his evidence, Patrick said that he did not doubt the appellant and went with him to their cash officer called Nancy and informed her about the appellant's request and she thereupon asked the appellant to ask their Security Officer to guarantee the cheque by signing on the reverse thereof.

According to Patrick their security officer called Simon K. Koech (P.W.4) signed it, the cash officer then authorised the payment, the appellant signed on the reverse of the cheque, wrote his I/D Card No.985521 on it and then he (P.W.6) paid cash Sh.91,200/- for the appellant. The name of the payee on the cheque was Fatuma Roba.Guyo. According to Patrick (P.W.6) it was after several months that he learnt that the cheque was a stolen one and the payee (Fatuma had died before it was cashed.

It be noted here that the appellant, a messenger had denied the charge and maintained all along that he knew nothing about the cheque, had never signed on its rear or written the I/D number and never received the money.

Inspite of that the prosecution did not present an expert witness to prove the alleged signature and the writing of the I/D number. A clerk at the bank can get the I/D number of any staff from the staff list of the Bank. Even Nancy, the cash officer was not called to testify.

Simon K. Koech the Security Officer at the Bank, gave evidence as P.W.4. In her judgment the learned Magistrate stated that the said Koech told the Court that he endorsed the cheque when the appellant, who was a messenger with the Bank, requested him to guarantee the cheque for his sick relative who was outside the Bank. I have looked up the evidence of Koech (P.W.4) and note that in it Koech actually said,

“He (appellant) assured me that relative is in the banking hall.”

It was not in dispute that the cheque was a crossed one and the name of the payee on it was of Fatuma. She worked at Ministry of Tourism at the P.C.'s Office, Mombasa. She died on 13-2-98 and was buried in Mombasa.

That the cheque was fraudulently encashed after her death. The issue was who did it?

In her judgment the Magistrate said that the evidence of Martin Mutunga, P.W.5 was that the cheque in question was sent to their offices in Mombasa but since he knew that the payee (Fatuma) of the cheque was dead he returned the cheque to SACCO HEADQUARTERS i.e. their head office in Nairobi. Saying so the Magistrate concluded that the cheque (the subject matter of this case) must have been stolen from Harambee SACCO offices in Nairobi.

Having perused the actual testimony of Martin Mutunga (P.W.5) I note that he spoke therein only about a cheque No.287838 for Sh.11,200/- made out in the name of Fatuma (the deceased). He was not asked by the court Prosecutor about the cheque No.295471 for Sh.91,200/-, the subject matter in this case nor did he (P.W.5) speak about it.

The appellant worked as a messenger at K.C.B., Moi Avenue, branch as stated earlier. Indeed the Magistrate found that there was no evidence to prove that any of the three accused, i.e. the appellant and the two others, stole the cheque.

In convicting the appellant of obtaining money by false pretences the learned Magistrate relied on the evidence of Patrick (P.W.6, the Cashier) and Simon Koech (P.W.4, the Security Officer) accepting their evidence as truthfuul. She said -

“There is no evidence of ill-will or any grudge the two witnesses had against accused -2 that would lead them to tender false evidence against him.

This court is conviced and finds that this sum of Ks.91,200/- was paid out to Accused - 2, and he received the money.”

It is clear from the above that the learned lady Magistrate found that the evidence of P.W.4 and P.W.6 was cogent and coherent.

However, soon thereafter she started entertaining real serious doubts about the veracity of the said two witnesses as she immediately thereafter said:

“In Court’s view it is very suspicious that P.W.4 agreed to endorse the cheque to a payee he did not know and P.W.6 accepted to pay cash to Accused - 2 on behalf of a payee he did not see. Neither P.W.4 nor P.W.6 made any attempt to confirm what the accused- 2 told them and neither of them went outside the bank to check and confirm whether the payee was actually there. In its view this was a plot involving P.W.4 and P.W.6 together with accused-2 to steel this money. The court finds that the behaviour of the two witnesses leaves no doubt that they were involved in the theft of this money from the bank. There is no other reason why P.W.4 will endorse his own account for a payee he claims he did not know and why would P.W.6 encash a cheque when he has not seen the payee yet bank rules require that a cashier must see a payee before paying out the money. The court feels that P.W.4 and P.W.6 were conspirators with accused-2 conspirators in this offence.”

It is manifestly clear that the Magistrate concluded that the two witnesses she relied upon were accomplices. She should have, therefore, looked for corroboration as a matter of practice. She did not.

An accomplice is one who has to a larger or lesser degree participated in the commission of the crime. If so, his evidence is suspect.

If the evidence of an accomplice is believed, the court would normally look for corroboration of his evidence. Such corroboration must be in some independent testimony linking the accused with some material particular and tending to show that not only the offence has been committed but that the accused committed it.

There may be cases where no corroborative evidence is available and in such cases court will decide whether to reject the accomplice evidence. It must be stressed that only in very exceptional cases where the accomplice evidence is so very cogent and reliable that the court, after warning itself, would be prepared to base a conviction on it.

In the instant case the Magistrate found the evidence of P.W.4 and 6, the security officer and the cashier full of doubts and declared that they were conspirators and yet she failed to direct her mind on the need for the required corroboration, which in fact was not there.

For this reason and the others I have mentioned in this judgment, the conviction against the appellant cannot stand.

In result, the appeal is allowed. The conviction is quashed and the sentence is set aside.

Dated and delivered at Nairobi this 11th October, 2000.

V.V. PATEL

JUDGE