Mugo v Republic (Criminal Appeal E037 of 2023)
[2024] KEHC 7648 (KLR) (20 June 2024) (Judgment)

Neutral citation: [2024] KEHC 7648 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CRIMINAL APPEAL E037 OF 2023

DKN MAGARE, J

JUNE 20, 2024

BETWEEN

WINFRED WANGUI MUGO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the Judgment of the Principal Magistrate's Court at Karatina in Criminal Case No. 769 of 2019 delivered by Hon. V.S. Kosgei (SRM) on 31st May, 2023)

JUDGMENT

1. This is an appeal from the conviction and sentence given by V.S. Kosgei, SRM on 31/5/2023 in Karatina PMCR No. 769 of 2019. The Appellant was charged with the offence of stealing by servant. The particulars were that on the diverse dates between 6th day of February 2019 and 11th October, 2019 at Karatina town in Mathira East Sub-County within Nyeri County being a servant to one Nicholas Muiga Ndiritu stole cash and goods worthy Kshs. 568,081/= the property of the said Nicholas Muiga Ndiritu of Amars Traders Limited shop which came to her possession by virtue of her employment.

2. The matter proceeded to full hearing where 8 witnesses testified. The Appellant was placed on her defence and gave unsworn evidence. Appellant was found guilt of the offence charged and convicted to pay fine of Ksh 200,000/= in default 2 years imprisonment.

3. The Appellant was to compensate a sum of Ksh 499,813.50. If she complied with b, she was to be discharged unconditionally under section 35 of the penal code

4. The Appellant upon conviction and sentence, filed the following grounds of appeal:

    a. The learned magistrate erred in law and fact in making a conclusion not supported by evidence on the record.

b. The learned magistrate erred in law and fact in making a finding that the appellant was an employee of the complainant whereas the evidence on the record shows that the complainant was Nicholas Muiga Nderitu and the appellant's employer was Amars Traders Limited.

c. The learned magistrate erred in law and fact by finding that the Appellant stole the property of the employer, a finding that was not supported by the evidence on record.

d. The learned magistrate erred in law and fact by failing to find that the failure by the Appellant to conduct an external and independent audit was fatal to the case.

e. The learned magistrate erred in law and fact by failing to analyze the third listed element of the subject offence, which element had not been proved at all.

f. The learned magistrate erred in law and in fact in finding that the prosecution had proved their case beyond any reasonable doubt.

g. The learned magistrate erred in law and fact by making an award for compensation where such a claim was statutorily time-barred.

h. The learned magistrate erred in law and fact by making an award for compensation where no prayer for such an order had been made and where there was no justification for such an order.

i. The learned magistrate erred in law and fact by finding the defence by the appellant as mere denials and thereby disregarding it.

j. The learned magistrate erred in law and fact by failing to consider the mitigation by the Appellant.

k. The learned magistrate erred in law and fact by ordering a custodial sentence for the Appellant who was a first offender and where there were no aggravating circumstances.

l. The learned magistrate erred in law and fact by meting out an excessively harsh sentence which was not proportional to the subject charge.

5. The grounds are repetitive and prolixious with no sense of precision.

Evidence

6. The Appellant took plea on 18/11/2019 and was released on Kshs.100,000/= cash bail. The defence applied to adjourn the matter for various reasons recorded on the file. The matter finally had to proceed on 23/3/2022. On that day the defence counsel, like other days before had an emergency.

7. The first witness was Nicholas Muiga Nderitu. She was the complainant, being the owner of Amars Traders Ltd, incorporated in 2018. He stated that the Appellant applied for a job and was employed on 3/5/2016.

8. She worked for 3 years taking stocks and recording sales to make sure money was deposited in the counter. She would receive cash and successfully bank. They noticed they had difficulties paying supplies yet the stocks were moving. They engaged an auditor. They found Kshs. 568,081/= was missing. The appellant was confronted. The matter was reported.

9. PW2 Priscilla Muiga testified that she is the wife of PW1 and the managing director of AMARS traders Ltd. She stated that they engaged the Appellant to reconcile stock after delivery and sales.

10. They audited and found 28 invoices were missing. Other goods were supplied but there an amount of Kshs.266,519/= that was missing in spite of goods being supplied and paid. The Appellant was to reconcile all daily sales. She gave various names of depositors whose money could not be seen in the records. She cross examined on being a data clerk and manager.

11. PW3 Shiphra Wanjiru Muchiri testified that she is a sales person at APC, a distributor of Amars. She sold tropical products under Amars. She was employed by PW1. She was selling using a van. They could sell and bring monies to the Appellant. She stated that she took money and gave to the Appellant. She did not know what she did with the cash. She admitted that on her part she lost 5,000/=.

12. PW4 Gideon Kamundia testified that he was a sales person employed in 2015. He sold and brought money to the Appellant. She issued receipts and reconciled. He stated that he gave her the money but did not know where she took it. On cross examination he stated that reconciliation was in the evening if late in the morning.

13. PW5 Phillis Njoki was a sales representative through Amars since 2017. She knew the Appellant. She could follow up on invoices. The Appellant would collect the money and do the banking. She stated that audit was carried out and found money missing. On cross examination she stated that they would count the money before leaving.

14. PW6 Ann Ngina was an employee in Central in 2019. She knew the Appellant the distributors at Amars as the office clerk. She stated that on 25/7/2019 they reconciled to zero and gave the money to the Appellant to bank and receipt. On the day she indicated that she deposited and gave her a receipt. It is until the audit that she realized that the account number belonged to someone else, the Appellant.

15. PW7 worked with Tropical Brands Africa as a Sales Manager at Amars as their distributor in Central since 2017. The Appellant worked as a clerk. She collected goods for Ksh. 12,000/= and paid cash. The appellant gave her an account number and she deposited. The account belonged to the Appellant and not the employer. Like PW6 she was not cross-examined.

16. PW8 was the investigating officer then at the DCI Mathira. She received a complaint of stealing by servant on diverse dates between 6/2/2019 – 11/10/2019. The Appellant was banking under personal account. They found stock of 172,111/= and invoices of 266,519/= unbalanced, cash of Kshs.129,151/= totaling to 586,681/=.

17. He commenced investigations. He established that the Appellant was a permanent employee. She could receive money, stock, and distribute to representatives. The accused indicated that the name Amars was on the shop but the account was personal. He obtained various bank slips and recorded statements. He formed an opinion that she had an intention to steal. He was only cross examined about sales representatives.

18. She was put on her defence. She stated that she was a Store Keeper and Clerk managing stock. She stated it is sales representatives who interacted with customers. She stated that she did not steal the money. She was found guilty and sentenced to fine of Kshs.200,000/=, compensation for 499,813.50/=. If she completed she was to be discharged unconditionally. She appealed on the conviction and sentence.

Analysis

19. The duty of the first Appellate court remains as set out in the Court of Appeal for Eastern Africa in Pandya -vs- Republic [1957] EA 336 is as follows:-

> " On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court's own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court differing from the Judge or magistrate even on a question of fact turning on the credibility of witnesses whom the appellate court has not seen."

20. In the case of Okeno v Republic [1972] EA 32 at 36 the East Africa Court of Appeal stated on the duty of the Court on a first appeal:

> " An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya v. R., [1957] E. A. 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (Shantilal M. Ruwala v. R., [1957] E.A. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters v. Sunday Post, [1958] E. A. 424."

21. On proof in criminal cases, Proof beyond reasonable doubt was explained by Lord Denning J in Miller V Minister for Pensions (1947) A.C that: -

> " It need not reach certainty, but it must carry a high degree of probability, proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence, "of course, it is possible," the case is proved beyond reasonable doubt, but nothing short of that will suffice."

22. Where the court finds a conflict on findings of fact, the court refers to the court below to ascertain whether there is a concrete reason to differ on facts arrived at by that court. Where the finding of the court is based on no evidence the court is under duty The court of Appeal in Kiilu & Another –vs- Republic [2005]1KLR 174, stated as hereunder: -

> " An Appellant on first appeal is entitled to expect the evidence as a whole submitted to fresh and exhaustive examination and to the appellate Court's own decision on the evidence. The

first appellate court must itself weigh conflicting evidence and draw its own conclusion. It is not the function of the first appellate Court to merely scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; Only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing witnesses.

23. The issue in this case is whether the prosecution proved is case to the required standards. Most oft quoted English decision of by Viscount Sankey L.C in the case of H.L. (E) Woolmington vs. DPP [1935] A.C 462 pp 481, comes in handy in describing the legal burden of proof in criminal matters, that;

> " Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception. If at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given either by the prosecution or the prisoner, as to whether [the offence was committed by him], the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained."

24. In the case of R vs. Lifchus {1997}3 SCR 320 the Supreme court of Canada explained the standard of proof as doth:-

> " The accused enters these proceedings presumed to be innocent. That presumption of innocence remains throughout the case until such time as the crown has on evidence put before you satisfied you beyond a reasonable doubt that the accused is guilty...the term beyond a reasonable doubt has been used for a very long time and is a part of our history and traditions of justice. It is so engrained in our criminal law that some think it needs no explanation, yet something must be said regarding its meaning. A reasonable doubt is not imaginary or frivolous doubt. It must not be based upon sympathy or prejudice. Rather, it is based on reason and common sense. It is logically derived from the evidence or absence of evidence. Even if you believe the accused is guilty or likely guilty, that is not sufficient. In those circumstances you must give the benefit of the doubt to the accused and acquit because the crown has failed to satisfy you of the guilty of the accused beyond a reasonable doubt. On the other hand you must remember that it is virtually impossible to prove anything to an absolute certainty and the crown is not required to do so. Such a standard of proof is impossibly high. In short if, based upon the evidence before the court, you are sure that the accused committed the offence you should convict since this demonstrates that you are satisfied of his guilty beyond reasonable doubt."

25. According to Halsbury's Laws of England, 4th Edition, Volume 17, paras 13 and 14:

> " The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party's case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose. The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the

party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case of with separate issues."

26. The standard of proof required in such cases was addressed by Brennan, J in the United States Supreme Court decision in Re Winship 397 US 358 {1970}, at pages 361-64 stated that:-

> " The accused during a criminal prosecution has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatised by the conviction...Moreover use of the reasonable doubt standard is indispensable to command the respect and confidence of the community. It is critical that the moral force of criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned."

27. The Appellant did not refute or contest any of the evidence by the witnesses. The witness placed her in a position she has money for the company. The definition of stealing as found in section 268 of the Penal Code is:

> " A person who fraudulently and without claim of right takes anything capable of being stolen on fraudulent converts to use of any person, other than the general or special owner thereof any property, is said to steal that thing or property."

28. Section 281 of the Penal Code under which appellant was charged provides that:

> " If the offender is a clerk or servant, and the thing stolen is the property of his employer, or came into the possession of the offender on account of his employer, he is liable imprisonment of seven years."

29. In Bilali v Republic (Criminal Appeal E018 of 2023) [2024] KEHC 4998 (KLR) (13 May 2024) (Judgment) the Court stated as follows:

To secure a conviction under the above section, the prosecution must prove stealing also known as animus furandi or fraudulent conversion. It must also be proven that the stolen items belonged to the employer and that the offender is a clerk or servant.

30. On sentencing in Bilali V R (supra) the court stated as follows:

> " The offence the Appellant was charged with carries a maximum sentence of seven (7) years imprisonment. In the circumstances of the case, the sentence of five (5) years imprisonment was lenient. This court is thus not persuaded that it should interfere with the same, the appellant having failed to live up to the trust bestowed upon him to protect the property of his employer."

31. Black's Law Dictionary, 11 Edition defines stealing as: to take (personal property) illegally with the intent to keep it unlawfully.

32. In the case of Republic v Paul Odiwuor Onyango [2019] e KLR the Court stated thus:

> " In my humble view, the defence by the respondent displace the evidence adduced by prosecution witnesses as there was no evidence that conclusively established that the respondent after receiving the monies or properties of his employer, kept it unlawfully. The respondent resigned and was cleared and paid his dues. There is no reason why the employer

did not withhold the dues for the respondent until after verifying whether the respondent owed the employer any monies.

The prosecution claimed that the respondent collected monies using his mobile phone without authority and they even produced the statements of his mobile phone. The respondent did not deny receiving monies through his mobile phone but he explained that this was due to wide coverage as some customers had no access to banks. There was no contrary evidence.

33. On circumstantial evidence common in stealing by servant cases, this is indirect or circumstantial evidence. In *Benson Limantes & Another Vs. Republic CRA 102 & 103 of 2002*, the Court of Appeal stated that: -

> " In order to justify the inference of guilt, the inculpalpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of guilt."

34. Thus suspicion, however strong, cannot suffice to infer guilt. In Joan C. Chebichii Sawe V R. Cr App 2/2002, the Court of Appeal stated:

> " The suspicion may be strong but this is a game with clear and settled rules of engagement. The prosecution must prove the case against the accused beyond any reasonable doubt. As this court made it clear in Mary Wanjiku Gichira V R Cr. App 17/1998, suspicion, however strong cannot provide a basis for inferring guilty which must be proved by evidence.

35. The evidence was overwhelming. For stealing by servant the prosecution has a duty to prove that:-

    a. The thing stolen is capable of being stolen.

    b. The Appellant is an employee, agent or servant of the complainant.

    c. The theft occurred for property belonging or in the custody of the employer.

    d. The stealing occurred in the course or by virtue of access due to employment.

36. In this case the prosecution proved all the 4 elements. Money is capable and was actually stolen. The Appellant banked some of the money in her account pretending to be the complainant's account. She was employed by the complainant. She came into contact with the money by reason only of being the complainant's servant. She abused the trust, collected money from agents and kept.

37. I find that her defence is too weak to stand test of evidence. The prosecution's case was watertight. They proved the occurrence of the offence beyond reasonable doubt.

38. In this case there is no merit in the Appeal on conviction.

39. She stated that sentence was not proportional to the charge. Sentences is a question of fact. The sentencing guidelines provide that we consider the following:-

    a. In determining the appropriate sentence, courts must assess a number of issues starting with the degree of both culpability and harm.

        a. The assessment of culpability will be based on evidence of the crime provided through testimony where a trial has been conducted, or, where a plea is entered, through the prosecution summary of facts.

b. Aggravating and mitigating features surrounding the offence may be advanced by the prosecution and the accused person (or his/her representative).

c. Where an offence is committed by more than one offender a court shall ascertain the culpability of each of the offenders involved and render individual sentences commensurate to their involvement in the offence.

d. The assessment of harm may be based on testimony, or the summary of facts presented and also by a victim impact statement where that has been obtained.

e. Mitigating factors refers to any fact or circumstance that lessens the severity or culpability of a criminal act and can also include the personal circumstances of the offender.

f. Convicted offenders should be expressly provided with the opportunity to present submissions in mitigation.

g. A list of aggravating and mitigating circumstances – which is not exhaustive – is contained within the GATS along with those specific to murder, manslaughter, and wildlife cases, in Part V.

h. Having heard all relevant submissions and considered any reports advanced by either prosecution or defence, or the probation or children's officer (where applicable), and any victim impact statement, the court should:

i. Decide as to whether a custodial or a non-custodial sentence should be imposed in line with these guidelines. ii. In the case of sexual offences, before the terms of a custodial sentence are determined, the court must have recourse to relevant probation reports as required in sections 39 (2) and (4) of the *Sexual Offences Act* No.3 of 2006 that contain provisions about post-penal supervision of dangerous sexual offenders.

40. In this case the money was lost, the appellant gained. She breached her position of trust. In the circumstances the sentence was lenient. The court cannot interfere with sentence simply because it could issue a different sentence. In the case of S vs. Malgas 2001 (1) SACR 469 (SCA) where it was held that:

> "A Court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court...However, even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate court would have imposed had it been the trial court is so marked that it can properly be described as "shocking", "startling" or "disturbingly inappropriate"

41. In Mokela vs. The State (135/11) [2011] ZASCA 166, the Supreme Court of South Africa held that:

> "It is well-established that sentencing remains pre-eminently within the discretion of the sentencing court. This salutary principle implies that the appeal court does not enjoy carte blanche to interfere with sentences which have been properly imposed by a sentencing court.

In my view, this includes the terms and conditions imposed by a sentencing court on how or when the sentence is to be served."

42. The Court of Appeal, on its part, in Bernard Kimani Gacheru vs. Republic [2002] eKLR restated that:

> " It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already states is shown to exist.

43. Consequently, I find no merit in the appeal on sentence.

Order

a. The Appeal on sentence and conviction lacks merit and is accordingly dismissed.

The file is closed.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 20TH DAY OF JUNE, 2024.

JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of:-

Mr. Maina for the Appellant

Ms. Kaniu for the State

Court Assistant - Jedidah