Kimani v Republic (Criminal Appeal E045 of 2023)
[2024] KEHC 8288 (KLR) (11 July 2024) (Judgment)

Neutral citation: [2024] KEHC 8288 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CRIMINAL APPEAL E045 OF 2023

RN NYAKUNDI, J

JULY 11, 2024

BETWEEN

LUCY NDUTA KIMANI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal from the Judgment of Hon. P.N. Areri (SPM) in Eldoret Law courts Criminal Case No. E1126 of 2022)

JUDGMENT

1. Lucy Nduta Kimani was charged with four counts of stealing contrary to Section 268 as read with Section 275 of the *Penal Code*. The particulars of the offence were that on 27th June, 2022 between 1242-1300 hours, at Kimumu Ndogo estate in Kapseret sub-county, being the M-Pesa operator of Jamog Holdings Moi's Bridge Junction, unlawfully and without authority transferred cash to Benard Mutai of mobile No 072xxx Kshs 29,583 the property of Joel Mwangi.

2. The second count was that of stealing and the particulars were that on the same day, time and place being an agent of Jamog Holdings Moi's Bridge Junction, unlawfully and without authority transferred cash to Jackson Mwangi of mobile No 076xxx an amount of Kshs 69,411, the property of Joel Mwangi.

3. The appellant equally faced the charge of stealing in the third count. The particulars were that on the same day, time and place being an agent of Jamog Holdings Moi's Bridge Junction, unlawfully and without authority transferred cash to Titus Nyongesa Kshs 60,230, the property of Joel Mwangi.

4. Count 4 was yet another charge of stealing whose particulars were that on the same day, time and place being an agent of Jamog Holdings Moi's Bridge Junction, unlawfully and without authority transferred cash to John Kimani of mobile No 076xxx an amount of Kshs 69,411, the property of Joel Mwangi.

5. The Appellant was found guilty as charged, convicted and sentenced to 1 year imprisonment. The appellant was dissatisfied with both conviction and sentencing and as such filed the present appeal, relying on the following grounds:

   i. That the trial magistrate erred in Law and fact in convicting and sentencing the Appellant to a fine of Kshs 51,000/= for each (4) count and in default 1 year imprisonment.

   ii. That the Learned Trial Magistrate erred in law by failing to independently analyze and/or evaluate the evidence before drawing conclusion as by law required.

   iii. That the learned Trial Magistrate erred in law and in fact in holding that the prosecution proved its case beyond any reasonable doubt.

   iv. That the learned trial magistrate erred in law and in fact by failing to consider that the Appellant did not convert the money to her own use thus the essential element of the offence of stealing was not proved beyond reasonable doubt.

   v. That the learned trial magistrate erred in law and in fact by failing to consider that there is no evidence to prove that the Appellant fraudulently took the money or converted the money with a fraudulent intent.

   vi. That the learned trial magistrate erred in law and in fact by failing to note that the Appellant had the authority to transact and/or move monies as an Mpesa agent to any customer(s) and no predetermined list of customers to transact with has been given by the Complainant.

   vii. That the learned trial magistrate erred in law and in fact by failing to note that the Appellant did not require any authority from the Respondent for each and every transaction prior to transacting and/or moving monies to customers.

   viii. That the learned trial magistrate erred in law and in fact by arriving at a conclusion that the prosecution had proved its case beyond reasonable doubt.

   ix. That the learned trial magistrate erred in law and in fact by closing the defence case and trashing the appellants right to a fair defence and representation by an advocate of her choice.

   x. That the trial magistrate erred in law and in fact be failing to note that the Exhibits produced by the Respondent who is not the maker were copies.

   xi. That the learned trial magistrate erred in law and in fact by not complying with section 200(3) of the Criminal Procedure Code by thrashing the Application by the Appellant to recall witnesses thus forcing the Appellant to proceed with the matter from where it had reached.

   xii. That the learned trial magistrate in law and in fact by admitting exhibits (Mpesa statements, agreements and cashbook) whose origin and state defied all laws of evidence.

   xiii. That the learned trial magistrate erred in law and in fact by failing to consider the contradictory evidence of the complainant in the entire proceedings.

   xiv. That the learned Trial Magistrate erred in law in fact by relying on and convicting the appellant on the doubtful and inconclusive evidence of the prosecution witness.

   xv. That the learned trial magistrate erred in law and fact by imposing a very harsh and improper sentence in the circumstances.

xvi. That the Learned Trial magistrate erred in law and fact by convicting and sentencing the appellant on flawed procedures.

xvii. That the learned trial magistrate erred in law and fact by failing to find that the prosecution had not proved its case beyond reasonable doubt.

Appellants submissions

6. The appellant started by reminding the court of its mandate in analysing and re-evaluating the evidence afresh. She cited the decision in *Odhiambo v Republic* Cr. App No 280 of 2004 (2005) 1 KLR. She identified the following issues for determination:

   a. Whether the Charge sheet was incurably defective.

   b. Whether the prosecution proved its case beyond reasonable doubt;

   c. Whether or not the sentence was harsh, severe and manifestly excessive in the circumstances of the case herein.

7. As to whether the charge was incurably defective, the appellant submitted that the charge was defective incurably. She cited the provisions of Section 134 of the *Criminal Procedure Code*, which provides as follows:

> " Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged."

8. The Appellant in support of her submissions cited the decision in *Isaac Omambia v Republic*, (1955) eKLR, where the Court of Appeal considered the ingredients necessary in a charge sheet. The court stated as follows:

> " In this regard, it is pertinent to draw attention to the following provisions of S. 134 of the *Criminal Procedure Code* which makes particulars of a charge an integral part of the charge: every charge or information shall contain, and shall be sufficient if it contains a statement of the specific offence offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence."

9. According to the Appellant, looking at the charge sheet in question, it is clear that the she was charged with stealing contrary to section 268 of the *Penal Code*. The evidence given was of her employers making her their servant. This therefore means the charges should have been stealing by servant contrary to section 281.

10. The appellant equally cited the decision in *Peter Ngure Mwangi v Republic* (2014) eKLR where it was stated that a charge can be defective if it is in variance with the evidence adduced in its support.

11. On the second issue. It was submitted for the appellant that the prosecution did not prove its case beyond reasonable doubt for the following reasons:

   a. The appellant had full authority to transact to any client in the period of employment.

   b. The Appellant was not in possession of the stolen money.

c. The prosecution only called a husband and wife being the PW 1&2 as the witnesses and the police officer who only relied on the evidence of PW – 1&2 without any forensic or audit of the accounts.

d. The prosecution did not call the persons who were allegedly recipients of the funds in the statements of M-pesa.

e. The trial magistrate relied on hearsay evidence of PW-2 stating that one Kimani who allegedly received money from Lucy to send to her mother.

12. The appellant submitted that from the foregoing, the prosecution did not prove its case beyond reasonable doubt and the trial court fell into the error and made unjust judgment against the appellant.

13. As to the sentence, the appellant submitted that the same was harsh, severe and manifestly excessive in the circumstances. She invited the court to look at the circumstances and the evidence afresh to establish that the accused person conviction was severe.

Respondent's Submissions

14. The Respondent pointed out in its submissions that when the appellant was granted a chance to cross-examine the prosecution witnesses. When she was placed on her defence, she admitted that indeed she was an employee of the complainant and that the money was lost. She told the court that she could not account for how the money got lost and said it was either by bad luck or witchcraft.

15. The Respondent too a different trajectory by submitting that in as much as the appellant's petition raises 17 grounds of appeal, it would be otiose to respond to those grounds because the trial court judgment did not comply with Section 169 of the *Criminal Procedure Code*.

16. In the Respondent's view, a perusal of the judgment strongly indicates that the learned trial magistrate regrettably did not heed to those mandatory obligations imposed upon by the law. There is no indication of the points(s) of law for determination and the reasons for the decision. Granted, the Appellant did not contest the evidence when given the chance in cross-examination. Similarly, in her unsworn statement, she seems to admit to the committing the offence, albeit blaming it on absent-mindedness and/or sorcery. That nevertheless, the law required the learned trial magistrate to sum up the evidence, determine what were the issue(s) for determination and his findings regarding that/those issues for determination. For that reason, the Respondent conceded to the appeal and sought for a re-trial.

17. To support its agitation for a re-trial, the Respondent cited the decision in *Fatehali Manji v Republic* (1966) EA 343 and *Muiruri v Republic* (2003) KLR 552.

Decision

18. I have read through the appeal, the rival submissions and the trial court record thereof. The trial court decision has been challenged by both parties. The Respondent has taken issue with its form whereas the Appellant's ground of appeal entirely speak to the learned magistrate's failure to analyse the evidence presented before drawing a conclusion.

19. Section 169 of the *Criminal Procedure Code* provides that:

1. Every such judgment shall, except as otherwise expressly provided by this code, be written by or under the direction of the presiding officer of the court in the language of the court, and shall contain the point or points for determination, the decision thereon and the reasons for

the decision, and shall be dated signed by the presiding officer in open court at the time of pronouncing it.

2. In the case of a conviction, the judgment shall specify the offence of which, and the section of the Penal code or other law under which, the accused person is convicted and the punishment to which he is sentenced.

20. In *Fatehaldi Nanji v Republic* (1966) EA 345 the Court of Appeal for Eastern Africa held that:

> " In general, a retrial will be ordered only when the original trial was illegal or defective. It will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purpose of enabling the prosecution to fill gaps in its evidence at the first trial, even where the conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame it does not necessarily follow that a retrial should be ordered. Each case must depend on its peculiar facts and circumstances and an order for retrial should only be made where the interest of justice require it and should not be ordered where it is likely to cause any injustice to the accused person"

21. Without a doubt, at face value of the trial court decision, it has not complied with the mandatory provisions of Section 169 of the Criminal Procedure Code in that it does not contain the point or points for determination, the decision thereon and the reasons for the decision.

22. This court has been torn between ordering a re-trial and allowing the appeal in its entirety. The principles governing matters which can be referred for retrial were set out in the case of *Ekimat v Republic* CA Criminal Appeal No 151 of 2004 (Eldoret) (unreported) where the Court of Appeal reiterated the principles that:

> " In the case of *Ahmed Sumar v Republic* [1964] E.A. 481, at page 483, the predecessor to this court stated as follows:
>
> > 'It is true that where a conviction is vitiated by a gap in the evidence or other defect for which the prosecution is to blame, the court will not order a retrial. But where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame it does not in our view follow that a retrial should be ordered.'

23. In meeting the ends of justice, the basic principle to consider is the facts of the case and the circumstances of the case as well as the ends of justice. Evidence was led that connected the appellant to the offence as charged. The trial court however did not look into evidence and the testimonies of the prosecution witnesses in-depth to identify the contentious issues, nor did it look at the ingredients of the offence of stealing. Justice must not only be done but must be seen to be done. The interests of the victim should also be considered because allowing the appeal translates to letting the appellant scot free whereas the ictim suffers monetary loss. Therefore, given the gaps in the impugned decision and the fact that the evidence was not evaluated at all, it is then proper to allow a re-trial.

24. The appellant therefore shall stand a re-trial in the Chief Magistrate's Court at Eldoret before a different magistrate other than P.N. Areri, the judicial officer who presided over the initial trial. In the meantime, the appellant shall abide by the bond terms as per the ruling of this court dated 19th July, 2023.

25. The matter shall be placed before the Chief Magistrate Eldoret Law Courts on 22nd July, 2024 for purposes of allocation.

26. It is so ordered.

DATED AND SIGNED AT ELDORET THIS 11TH DAY OF JULY, 2024

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R. NYAKUNDI

JUDGE