



REPUBLIC OF KENYA



KENYA LAW
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**Munyua v Republic (Criminal Appeal E040 of 2022)
[2024] KEHC 8702 (KLR) (16 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 8702 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CRIMINAL APPEAL E040 OF 2022
AM MUTETI, J
JULY 16, 2024**

BETWEEN

SAMUEL KIBE MUNYUA APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against the Judgment of the learned Honourable Principal Magistrate C. Kutwa in Githunguri Criminal Case No. 45 of 2017 Rep., Vs. Salome Gathoni Wairimi & Another delivered on 24th September 2018)

JUDGMENT

1. The appellant in this matter appeals against both conviction and sentence. The appellant jointly with another had been charged with stealing contrary to Section 275 of the [Penal code](#).
2. The facts indicated on the charge sheet are that on diverse dates between 1st September 2015 and 30th June 2016 at Gitwe Milk Collection Centre in Githunguri Sub-County within Kiambu county the accused persons jointly stole cash Ksh. 131,514.65/= the property of Githunguri in Dairy Co-operative society. At the conclusion of the trial the first accused in the lower court was acquitted whereas the appellant was convicted and sentenced to a fine of Ksh. 50,000/= in default 1 year imprisonment.
3. The appellant in his petition of Appeal to this court challenges both conviction and sentence on the following grounds:-
4.
 - a. that the conviction was against the weight of evidence.
 - b. that the sentence was excessive in the circumstances.
 - c. that the magistrate erred in law by admitting the electronic evidence.



- d. that it was not possible for the appellant to steal without complicity from the complainant and the holder of membership No. 15028 or his agent.
5. The appellant through the firm of Ngata Kamau & Co. Advocates filed written submissions which they sought to rely on at the hearing of the Appeal.
 6. In the appellants submissions, the appellant urges the court to find that the evidence tendered by the prosecution in support of the charge was not sufficient to warrant a conviction.
 7. The duty of a first appellate court is to reevaluate and analyse the evidence tendered by the prosecution with a view to drawing its own conclusions while aware that as an appellate court the judge unlike the learned Honourable magistrate has not had the opportunity to hear the witnesses nor see them. See *Okeno v Republic* [1972] E.A 32.
 8. The prosecution called a total of 3 (three) witnesses in support of the charge. The witnesses included PW 1 George Mburufrom Githunguri Dairy Farmers Co-operative Society. In his evidence PW 1 testified that while in the course of his duties as a Senior Accountant he was reviewing member's deliveries on 7th August 2015 when he noticed that member No. 15028 Samuel Njuguna Bato Bato had registered sharp decline in milk deliveries in the month of June and July.
 9. The witness stated that as a result he decided to visit the farmer (member). It was then that he learnt from the said member's mother that he did not have animals.
 10. He went back to the office, called the member who came to the officer and informed him that his employee had requested him for his membership card to use. PW 1 then summoned Salome Gathoniwho was the 1st accused in the trial court and demanded an explanation on the entries in connection with membership No. 15028 as the grader at the centre where this milk was supposedly being delivered.
 11. According to PW 1 it was the said Salome who said that the 2nd Accused (Appellant) was the person who was delivering the milk. The appellant was said to be member No. 7462. the witness went further to state the Appellant was alleged to have also been using Samuel Bato Bato's Number as well.
 12. PW1 went ahead to testify that he summoned the appellant who came to his office and allegedly "confessed" that the two accused were involved in the fictitious deliveries. He went further to testify that According to the Appellant the two accused would share the proceeds of the fictitious deliveries. The appellant was also allegedly involved in collecting items from the store together with one Wanjohi.
 13. PW 1 upon cross examination by 1st accused told the court that she was the one who used to inflate the deliveries and without her the 2nd Accused (Appellant) could not be paid.
 14. I have taken the trouble to set out the above evidence for the reason that the 1st Accused was acquitted by the learned trial magistrate and in doing so, the learned Honourable Magistrate stated:-

“.....In respect of the 1st Accused there is no evidence that she doctored the deliveries and or entered fictitious deliveries. P. Exhibit 1, 2 and 5 does not show the employee who served the thieves and or entered the entries. A duty schedule was also produced to show that it is the 1st Accused who was on duty during the period in issue. I do accept her defence that she used to work with two other employees. Without proof it is difficult to know the person who did the entries. I therefore give her the benefit of doubt.”
 15. The benefit of doubt should certainly have been extended to the appellant.



16. It is rather intriguing that the court even after concluding that it was hard to tell who made the entries proceeded to acquit the 1st Accused and ended up convicting the Appellant on account of the same evidence that she found insufficient to reveal who the thieves were and who aided them.
17. PW 1 had testified that the Appellant could not have been paid by the company without the 1st Accused making the entries. If then the trial court was not convinced that she did it, then, this court is left to wonder on what basis was the Appellant found guilty of the offence of stealing the money in question.
18. Notably, PW 1 was the star witness in the whole matter. Once the trial magistrate entertained doubt about his evidence regarding the entries, then the rest of the evidence given by him remained worthless. The appellant was thus improperly convicted against the weight of evidence.
19. Further, the learned Honourable court erred in its analysis of evidence by drawing an adverse inference against the appellant to the effect that “he therefore knew the circumstances under which the theft took place”.
the inference was drawn against the weight of evidence.
20. I have noted from the evidence of PW 1 that he alleged that the Appellant offered to refund the money.
21. The witness evidence of such an offer remained suspect considering the totality of his evidence. The manner in which PW 1 went about the inquiry into the loss, would clearly make any such offer if at all inadmissible since the witness did not qualify as an investigator and any interrogatories that he carried were not carried out in strict compliance with the rules governing the taking of confessions so as to render such evidence admissible.
22. An extrajudicial confession being a statement made out of court would require corroboration by some other independent proof of corpus de licit otherwise the same would be insufficient for purposes of establishing the guilt of an accused.
23. In this case the statement by PW 1 that the Appellant offered to refund the money remains bare and of no evidential value.
24. PW 2 being the person whose number was used to perpetrate the crime was an accomplice. The evidence of the witness could not be the sole basis of convicting the Appellant. In his Evidence he admitted that he allowed his employee to use his membership number but the money would be paid into his account. He was therefore a beneficiary of the crime and as such his evidence ought to have been received with circumspection.
25. The witness did not only aid in the commission of the offence but also participated by allowing his account to be used. The evidence of an accomplice requires corroboration. The record clearly shows that the trial court could only resort for corroboration to the evidence of PW1. The learned Honourable Magistrate having failed to find substance in that evidence could not convict the Appellant while at the same time acquitting his co-accused on account of the same evidence.
26. The witness PW 2 being a participes criminis could not then pass the test of credibility in law without independent corroboration of his evidence by another independent and reliable witness.
27. The magistrate having extended the benefit of doubt to the appellants co-accused, it was wrong to convict the appellant.
28. Further, PW 3 who stated that he gave feeds to the stores was clear that the company allowed members to collect feeds. The appellant was a member thus entitled to collect such stores. The fact of collecting feeds alone could thus not suffice to lead the court to the finding that he was guilty of theft.



29. The charge sheet stated that the theft was of cash Ksh. 131,514.65/=. It was not clearly demonstrated that the appellant stole any money. Suspicion however strong cannot be the basis of a conviction. The evidence on record therefore does not support the charge at all.
30. In view of the above, I find that the conviction of the appellant was unsafe I therefore quash the same and set aside the sentence.

It is so ordered.

DATED, SIGNED and DELIVERED VIRTUALLY at NAIROBI this 16th day of JULY 2024.

HON. A.M MUTETI

JUDGE

In the presence of:

Kinyua: Court Assistant

No appearance for the Respondent

Ms Irungu for the Appellant

