Mugera v Republic (Criminal Appeal 16 of 2018)
[2023] KEHC 2185 (KLR) (9 March 2023) (Judgment)

Neutral citation: [2023] KEHC 2185 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KIAMBU

CRIMINAL APPEAL 16 OF 2018

JM CHIGITI, J

MARCH 9, 2023

BETWEEN

MARY WAMBURA MUGERA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

Brief Background:

1. The Appellant was charged with the offence of stealing contrary to section 281 of the *Penal Code*. The case proceeded into hearing after which the Trial Court found the Appellant guilty. He lodged a Petition of Appeal dated March 1, 2018. When the appeal came up for hearing, the parties agreed to proceed by way of submissions.

Analysis and Determination

2. The Court of Appeal case of Bernard Kimani Gacheru vs. Republic [2002] eKLR stated as follows:

> " 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 stated is shown to exist."

3. An appellate court will not interfere with the sentencing of the trial court unless it is satisfied that the trial court misdirected itself. In the case of *Ogolla s/o Owuor vs. Republic,* [1954] EACA 270, pronounced itself on this issue as follows: - "The court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors."

4. The Charge Sheet read as follows;

> PW3 told the Court that she could not recall if another witness withdrew that day. She talked of MFF signature.
>
> PW4 talked of an electronic register that was not produced. She had a report analysis that she produced during cross examination. The witness told the Court that, she has no evidence to prove that user No. 21F was assigned to Mary Mugera.

5. The computer used was not produced. The witness did not produce any machine identifier the machine names or the logs of the activities. She did not examine the hard discs of the computer used. She said that she examined the main server in Nairobi. She furnished the court with any report or finding.

6. The above would have helped the court to know the person who accessed the machines, where, what they did and for how long. The nature of the crime is one that would have been proven beyond doubt using such electronic evidence. She confirmed during cross-examination that digital evidence if not well presented loses value.

7. She testified that, she doesn't know when the fraudulent activities were established. She confirmed that, some of the fraudulent transactions were done in June, 2013 while she joined the bank in January, 2015. She testified that although there were three relevant servers, she only accessed the 2nd server. One is left to wonder why she did a selective approach to the servers.

8. What evidence was in server 1 and server 3? One is left wondering, what the un-accessed data in the two servers would have generated for the court. No doubt the gaps and doubts which the prosecution was under duty to fill up remain gaping at the court.

9. She further testified that she accessed the server alone without the appellant.

10. During cross examination, she confirmed that she did not examine the hard disc. She confirmed that, various information is kept at different levels. She confirms that, information doesn't leave the server.

11. The failure by this which to access the 3rd server, the hard disc leaves a lot to be desired. No explanation is tendered as to why she failed to access these critical electronic platforms. This leaves a lot of doubts as to the veracity of the prosecution evidence as produced by this witness since it is incomplete.

12. PW5 Joseph Mwaura, the investigating officer narrated how the appellant used to transact with the bank fixed deposit accounts and how she credited interest to accounts belonging to her mother, how she opened dubious accounts and interfered with suspense accounts for employees.

13. These transactions carried out by the appellant on different dates and branches to benefit different accounts being:

    A. The accounts were 01109xxxxxxxx for Erick Thiongo Wametero who received Kshs. 356,310 on 17th October, 2014.

    B. An account 00110xxxxxxxxx in the name of the Appellant's mother in Kerugoya.

    C. Account No. 01109xxxxxxxx for Rose/Erick/Ruth domiciled in Kiambu branch.

D. Account No. 01109xxxxxxxx for Roselyn Njeri that received Kshs. 731,481.

E. Accounts 01109xxxxxxxx and 011090xxxxxxxx in the name of Roselyn Njeri and Erick Mutero. She was the contact person.

14. According to which she generated various applications for funds transfers vide:

A. Voucher for Kshs. 250,000 of April 9, 2014 – Roselyn Njeri

B. Voucher for Kshs. 85,900 of July 21, 2014 – Roselyn Njeri

15. The witness prepared an exhibit memo for the signature of the Appellant as exhibit.

16. During cross-examination, the witness told the court that, the account opening entries could not be traced to any teller. He also told the Court that, no statements were recorded from the account holders. He testified that, he did not have any logs. He testified that, though the account opening was approved by the appellant, she is not the one who opened the account.

17. Certain issues remain unclear to the court.

a. What did the unproduced logs contain?

b. Which tellers transacted?

c. Did the investigating officer receive statements of the account holders who were affected to confirm that their accounts were interfered with?

d. Which of the officers opened the accounts?

18. It was the duty of the Prosecution to tender this evidence. It failed to do so. Had these gaps been filled, then the prosecution's case would have been water tight and in keeping with section 107 and 109 of the *Evidence Act*.

19. The witness PW5 did not tell the Court what the results of the handwriting and the signatures meant or translated into. He just told the Court that he received the memo. It ended there.

20. Had the prosecution led the witness into linking the appellants signature to the alleged numerous banking transactions, then the same would have helped the prosecution's case.

21. The witness, PW5, told the court during cross examination that, he did not secure the computer system involved. He said that it was not necessary. I am at a loss as to why the investigating officer who was investigating a complex case of fraud would have failed to secure and analyse the electronic data in the computer that was used by the Appellant.

22. The court is not in a position to ascertain what the computer contained. The failure on the part of the Prosecution to avail and ensure that the electronic evidence contained in the computer is a fatal omission.

23. It is very likely that the computer would have generated a lot of information that would have bolstered the prosecution's case or the evidence would have helped the appellant mount her defence. This was a wasted opportunity.

24. The witness goes ahead to tell the court that, the IT personnel did not bring the logs to show that the appellant carried out the transaction. He said that, the computer was not removed or disconnected from the system. This is a credible and honest witness whose evidence has helped this court to identify and appreciate the gaps in the prosecution case.

25. PW6 John Muinde, Senior Superintendent of Police, the Forensic document examiner testified that, upon examining the handwriting and signatures of the Appellant, he formed the opinion that the document entries were made by the same author and signature by the same author. He produced the report as exhibit No. 16.

26. During cross-examination, the expert told the court that, he could not tell who the specimens were for. This does not help the prosecution much. He simply confirmed the doubts in regard to the owner of the specimen signature and the handwriting. He did not create any link nor connection between the crime to the appellant.

27. PW7 testified that the appellant had signed for the user. This evidence is not consistent with the evidence of PW6 who told the court that, he couldn't tell the owner of the specimen, signature and handwriting. There are glaring doubts as to whether the appellant signed for the user or whether she credited the account.

28. He further confirms that, he did not isolate any of the computers. He told the court that, the appellant would verify accounts by hand whenever the system failed. The evidence of PW6 would have corroborated this evidence had PW6 nailed or created a link between the Appellant's handwriting and signature to the specimen which he failed to do.

29. The appellant must not be tasked to explain the gaps and the host of lacunae created by the prosecution witnesses since the burden of proof in criminal cases rests on the shoulders of the prosecution to prove their case beyond reasonable doubt.

30. The witness went ahead to testify that, the appellant would verify the signatures of the customers using a stamp and a manual book. The prosecution did not make any attempt to produce the stamp and a manual book as evidence to support this crucial process. This lapse piles on the gaps that have mounted at the prosecutions doorstep. The appellant opted to remain silent. She did not tender any evidence.

Disposition:

31. I have reanalysed, reviewed and re-evaluated the evidence as tendered by the witnesses, the exhibits and the rival submissions, I have come to the conclusion that, the prosecution failed to prove that, the appellant committed any crime. The prosecution bears the burden of proving that, the offence was committed to the standard of beyond reasonable doubt.

32. The Court of Appeal case of *Bernard Kimani Gacheru vs. Republic* [2002] eKLR stated as follows:

> " 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 stated is shown to exist."

33. I find that, the prosecution's case is riddled with many incurable gaps. The prosecution did not prove its case beyond reasonable doubt and I am satisfied that the appeal has merit.

Order:

34. The appeal succeeds.

DELIVERED AT KIAMBU THIS 9TH DAY OF MARCH, 2023.

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JUSTICE CHIGITI, SC

JUDGE