Pasiliano v Republic (Criminal Appeal E051 of 2022)
[2023] KEHC 17237 (KLR) (8 May 2023) (Judgment)

Neutral citation: [2023] KEHC 17237 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAKAMEGA

CRIMINAL APPEAL E051 OF 2022

SC CHIRCHIR, J

MAY 8, 2023

BETWEEN

JOAB SIMIYU PASILIANO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. The Appellant herein was charged with stealing by servant contrary to section 281 of the Penal Code. It is alleged that on 10/1/2020 at Tumaini Area, Kakamega North sub-county within Kakamega jointly with others not before the court being an asset recovery officer to WATU CREDIT stole one motorcycle registration number KMEY 711U TVS 150, blue in colour the property of Watu credit which came into his possession by virtue of his employment.

   He was convicted after a full trial and sentenced to pay a fine of ksh. 150,000 or serve 18 months in jail in default.

2. Aggrieved by the Judgment the Appellant proffered this Appeal and filed several grounds which I have paraphrased as follows:

   a. That the trial Magistrate treated the evidence and submissions before him superficially and consequently coming to a wrong conclusion on both conviction and sentence

   b. That the Trial Magistrate erred in making a finding that an agreement between the complainant and martin shitanda in respect of motor cycle registration No. KMEY 711U was produced when such a document was never produced.

   c. That the trial Court erred in making a finding that martin shitanda confirmed that the motor cycle had been repossessed when the said Martin never testified.

d. That the Trial Court erred by ignoring the evidence of the Appellant which was not controverted in respect to whom the motor cycle was released to.

e. That the Trial court erred by ignoring the evidence which showed that the motor cycle was released to Enock.

f. That the trial Magistrate erred by making a finding that money in to the subject transaction was through periodic payments

g. That the trial court erred in holding that the Appellant entered into another transaction with Enock when the evidence show that the transaction was between Martin shitanda and Enock

h. That the trial Magistrate erred in shifting the burden of proof on the Appellant

i. The Trial court erred by holding that the case was proved beyond reasonable doubt when the prosecution evidence was wholly controverted.

j. That there were gaps , and doubts attendant t to the prosecution's case

k. That contrary to the assertion by the trial court the price of the motorbike was not ksh. 150,000 but ksh. 108,900

l. That the fine of ksh. 150,000 went against the sentencing policy guidelines and general practice principles applicable to sentencing.

m. That the Trial Magistrate ignored the Authority cited by the Appellant.

Appellant's submissions

3. The Appellant has formulated two issues for determination:

   a). Whether the prosecution proved its case beyond reasonable doubt and

   b). Whether the essential elements of the charge of stealing by servant were proved.

4. The Appellant admits that he was an employee of the complainant. He submits that there was no evidence presented to the court to show that the Appellant stole the motorcycle. The Appellant further contends that the complainant acknowledged receiving Ksh. 8,000 being part- repayment for the motorbike. The Appellant further argues that his testimony as to what happened after he repossessed the motorbike was not controverted.

   He further submits that PW1 and PW3 acknowledged that the complainant received Ksh. 8,000.

5. That, Martin Shitanda, the owner of the motorbike whose testimony was crucial on what happened to the motorbike failed to testify. The Appellant further points out that failure to call "Enock" who allegedly paid for the motorbike, and took it as a lien, was never called to testify.

6. The Appellant submits that "theft" was not proved as no witnesses saw the Appellant stealing the motorbike. It is further submitted that the trial court convicted him on the basis of suspicion, yet suspicion, however strong cannot be the basis of inferring guilt.

7. On sentencing it is submitted that the trial magistrate grossly erred for stating that the fine of Ksh. 150,000 was equivalent to the value of the motorbike, yet there was evidence that the motorbike was valued at Ksh. 110, 600 and that the sentence in any event, went against the sentencing policy guidelines and general principles of sentencing.

Respondent's submission

8. The Respondent submits that the fact that the Appellant was an employee of the complainant was proved by the production of the Employment contract, and by the Appellant's own admission in court. It is further submitted that the Appellant had gone to recover the motorcycle in his capacity as the enforcement officer in the complainant's company

9. On sentencing, the Respondent admits that the term of imprisonment should not have exceeded 12 months.

Summary of the lower court evidence

10. PW1 was an employee of the complainant, working as an Asset Risk Officer. His work involved following up on lost motorbikes. He told the court that in January/February 2021, he visited a client and his guarantor, going by the names Martin Shitanda and Nelson Juma respectively. Martin Shitanda told him that a team from the company had already repossessed the motorbike. And the Appellant was one of them. He showed the court an agreement between Martin Shitanda and the complaint. He identified the motorcycle as KWEY 711U.

11. On cross-examination, he told the court that he used to work with the Appellant. That the tracker for the motorbike stopped functioning in December. That while repossessing the motorcycle, a negotiation on possible payment would ordinarily be held first with the client.

12. PW2 told the court that he was at his home in Kaka Mukhonje when Martin Shitanda came to his house while pushing a motorbike. He requested to leave the bike at the witness's premises as it had ran short of fuel. He then left. That thereafter, 2 people came to his homestead and told him that the mptorbike looks like one of their own. While he was with the two, Martin came back. The 2 people demanded arrears of Ksh. 8,000. Then three left with the motorbike. Martin later came back and told him that the motorcycle had been confiscated. He identified the motorcycle as KWEY 711U and identified the Appellant as one of the 2 people who had come to his home.

13. On cross-examination, he told the court that the two people identified themselves as WATU CREDIT employees. He never got to know their names or could not remember.

14. PW3 was the person who stood as a guarantor to Martin Shitanda when the later purchased the motorbike. He told the court that he was called by the Appellant through phone number 0797xxxxxx, and informed him that he had repossessed Shitanda's Motorbike on account of non- payment

15. On cross-examination, he told the court that Martin is his father-in-law. That he was told by the Appellant that there was a person called Enock who had paid Ksh. 8,000 and the motorcycle was released to him. That he never met the Appellant physically. That the Appellant told him to go to the police to report the theft of the motorbike so that the Insurance can pay.

16. PW4 was the Investigation's officer. He told the court that he recorded statements from the employees of Watu Credit and from the Martin shitanda.

    On cross-examination, he told the court that a theft report of the motorbike was made under OB No. 27/7/3/2021.

17. At the close of the prosecution's case, the Appellant was put on his defenc and opted to five a sworn statement.. He told the court that on 20/1/2020, he was assigned the task of recovering the subject motorcycle from one Martin Shitanda. That when he traced the client, a friend of the client, by the

name Enock offered to offset the arrears. The said Enock paid Ksh. 8,000 and took the motorcycle. That PW4 confirmed payment of Ksh. 8,000. The Appellant was not cross- examined.

Determination

18. I have considered the record of appeal, the parties' submissions and the Authorities relied on.

    This is the first appeal and the mandate of this court is to relook at the evidence, re-assess it and arrive at its own conclusion. (See Oneko vs. Republic (1972) E.A 132 and Kiilu & Ano vs Republic (2005)1 KLR

19. In my view, there are two issues for determination:

    a). Whether the prosecution's case was proved beyond reasonable doubt.

    b). whether the sentence was lawful.

Whether the case was proved beyond reasonable doubt.

20. The Appellant herein was charged with the offence of stealing by servant contrary to section 281 of the Penal Code.

21. Stealing is defined under Section 268 as follows:

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

22. If stealing is by a servant, it is covered by Section 281. It provides as follows:

    " Stealing by clerks and servants;

    If the offender is a director or clerk of a corporation or company, and the thing stolen is a property of the corporation or company, he is liable to imprisonment for 7 years."

23. To establish the charge of stealing by servant, the prosecution must prove the following:

    a). That the Appellant was an employee of the Complainant,

    b). that the property came to the possession of the Appellant in the course of his employment and

    c) The employee dishonestly appropriated the property, consequently defrauding the employer of the same.

24. In the present case, there is common ground that the Appellant was an employee of WATU CREDIT, the complainant. There is equally common ground that the stolen property, motorcycle registration number KMEY 711U TVS 150, was the property of the employer. And finally, it is admitted, no less by the Appellant, that, at the time of the alleged theft, he had gone to repossess the motorcycle from a client who had defaulted in payment. The Appellant was therefore in the cause of duty at the time of the alleged offence.

25. The only contentious issue is whether the Appellant dishonestly appropriated the motorcycle.

26. PW1 told the court that sometimes in January/February 2021, the borrower, one Martin Shitanda and his guarantor (PW3) during the purchase of the motor cycle, went to the complainant's office upon being summoned by the complainant, and informed them that a team from company's offices had

earlier visited the borrower and repossessed the motorcycle. Thy further reported that the Appellant was one of those who had made that earlier visit.

27. PW2 saw the motorcycle, as it was pushed to his homestead and later when being taken away by the borrower, the Appellant, plus one other unidentified man.

28. PW3 was called by the Appellant and informed him (pw3), he had repossessed the motorcycle on account of non-payment.

29. Thus from the evidence of PW1, PW2, PW3 and the Appellant, it is the Appellant and Martin Shitanda, the borrower cum purchaser who know what happened to the motorbike. PW2 saw the motorbike, but once it was taken away by Martin Shitanda and his companions, he could not tell what happened to it. On the other hand Martin the co-owner/ borrower of the motorbike did not testify. According to the Appellant, in his submissions, martin demanded for money before he could testify. The record however does not reflect this. The record only reflects that this particular witness was sworn but apparently refused to testify.

30. Thus the only evidence available that could explain, directly, what happened to the motorbike was that of the defence, the Appellant herein.

31. What did the Appellant tell the court? A recap of some portions of his testimony is necessary. He stated: "We traced the client Martin Shitanda who had a friend who accepted to pay the arrears. The friend was Enock who agreed to pay Ksh. 8,000 and took the motorcycle. I later made a follow up on recovery of the balance. I called the guarantor who stated that the motorcycle had been repossessed. I advised the guarantor to make a report to the police".

32. A number of questions arise from Appellant's testimony. Firstly, what happened to the Ksh. 8,000 which was allegedly paid by Enock? Being the representative of the company in the "transaction" or negotiation, he would have been the one receiving the money, or making sure it had been paid to the company before releasing the motorbike, whether to the purported Enock or back to the borrower. His allegation that PW1 acknowledged receiving the money in his testimony is not true as PW1's testimony does not have such acknowledgement. The onus was on the Appellant to demonstrate that he delivered the money to his employer.

33. Secondly, how could the Appellant release a vehicle that was on hire purchase terms to a third party, yet he knew that the subsisting contract was between the his employer and the borrower? This was part-payment, not full payment and hence his employer still had a stake on the motorbike.

34. Thirdly, in his own words, upon PW3, the guarantor telling him that the motorbike had been repossessed, presumably by the Complainant, his reaction was to advise him to report the matter to the police. Why advise the client to report the "theft" to the police yet the complainant would have been repossessing the vehicle, as a matter of legal right?

35. The above are some of the questions that ought to have been put to the Appellant in cross-examination. His answers would have been illuminating regarding his culpability or otherwise on the disappearance of the motorbike. But the prosecution opted not to examine the Appellant, a move that I find rather perplexing, in the circumstances.

36. The prosecution equally lost the opportunity to question the Appellant on the mysterious person identified as Enock, who allegedly paid the ksh. 8,000 and took the motorbike .From the evidence of PW3, it is evident that the Appellant was the first person to bring up the name Enock .

37. The Appellant faults the prosecution for failing to summon the Enock. I find the Appellant's assertion in this regard rather insincere considering that he was the one who either released, supervised the release,

or was with the alleged Enock when he took the motorbike. As pointed out by the by the trial court the onus was on the Appellant to summon the Enock, and if I may add, if the alleged Enock did indeed existed.

38. I think I have said enough to show that I don't believe the Appellant's narrative as to what happened to the motorbike.

What is the law?

39. The burden of proof in criminal cases is beyond reasonable doubt and the burden is on the prosecution.

What is reasonable doubt?

40. In the case of Elizabeth Waithiegeni Gatimi vs Republic (2015) e KLR Mativo J had this to say "reasonable doubt is not mere possible doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the mind of the court in that condition that it cannot say it feels an abiding conviction to a moral certainty of the truth of the charge"

41. In the case of Miller vs Ministry of pensions(19470 2ll . ER372,it was held in regard to the degree of proof beyond reasonable doubt: "that degree is well settled . It need not reach certainty but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond a shadow of a doubt. 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, but not in the least probable, the case is proved beyond reasonable doubt"

42. Finally in pius Arap Maina vs Republic (2013) e KLR the court stated, "it is gainsaid that the prosecution must prove a criminal charge beyond reasonable doubt. As a corollary, any evidential gaps in the prosecution's case raising material doubts must be in favour of the accused"

43. There are gaps in the prosecution's case some of which I have already pointed out. Indeed at the close of prosecution's case one could not tell what happened or who went with the motorbike. More explanation came from the Appellant on his defence, which explanation, as expected, selective.

44. The prosecution on the other hand failed to extract more from him. In the case of Robert Bariya vs Republic(2013) e KLR it was held : a cardinal principle of the rule of law is that the burden of proof , subject to section 111 of the Evidence Act , rest entirely on the prosecution. It never shifts to the accused. The Appellant was not obliged to fill the gaps left by the prosecution. Any doubts must be interpreted in favour of the accused"

45. There was no direct evidence linking the Appellant to theft. In my view the entire evidence is circumstantial. However in Musili Tulo vs Republic (2014) e KLR the court of Appeal stated that 3 requirements must be established where a case is based on circumstantial evidence :

    a) .....

    b) .....

    c) That the circumstances taken cumulatively should form a chain so complete that there is no other escape from the conclusion that within all human probability the crime was committed by the accused and no one else, and that before drawing conclusion, that it is necessary to ensure that there are no other co- existing circumstances that would weaken that inference" (Emphasis added).

46. In the present case PW2 saw at least 3 persons go with the motorbike: The Appellant, martin shitanda , the borrower/ co- owner of the motorbike and one unidentified person. The prosecution could not establish with certainty the person who among the 3 stole the bike. The obvious suspect is the Appellant herein, considering that he never accounted for the money he allegedly received, and giving away the motorbike while he knew that his employer still co-owned it. The borrower too could have devised his own way of avoiding paying the balance of the debt. The prosecution therefore cannot convince this court that it is the Appellant and not anyone else who could have committed the offence.

47. Earlier on in this judgment, I had expressed my misgivings about the Appellant's testimony but misgivings, doubts or suspicions can never be the basis of conviction.

    In the canadian case of Rvs Lifchus (1997)3SCR320 , cited with approval in waithegenie case (supra) the court held that "even if you believe that the accused is guilty or likely to be guilty that is not sufficient. In those circumstances you must give the benefit of doubt to the accused...."

48. It is my finding that the prosecution failed to prove its case beyond reasonable doubt. Therefore the Appellant is entitled to the benefit of doubt as a matter of right.

49. In conclusion, the Appeal succeeds.

50. Having found that the conviction was faulty, I need not address myself to the legality of the sentence.

    The conviction is hereby quashed and the sentence set aside.

    Right of Appeal- 14 days

DATED, SIGNED AND DELIVERED VIRTUALLY AT KAKAMEGA THIS 8TH DAY OF MAY 2023

S. Chirchir

Judge

In the presence of:

Eric- Court Assistant

Mr. Mulama, for the Appellant

No appearance by the Respondent.