Simiyu v Republic (Criminal Appeal E013 of 2022)
[2023] KEHC 17977 (KLR) (2 June 2023) (Judgment)

Neutral citation: [2023] KEHC 17977 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAKAMEGA

CRIMINAL APPEAL E013 OF 2022

WM MUSYOKA, J

JUNE 2, 2023

BETWEEN

JAPHETHER OSANYA SIMIYU ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal from judgment by Hon. CN Njalale, Senior Resident Magistrate, in Butali SPMCCRC No. 248 of 2018, of 8th February 2022)

JUDGMENT

1. The appellant, Japhether Osanya Simiyu, had been charged before the trial court of the offence of theft, contrary to section 268 of the *Penal Code*, Cap 63, Laws of Kenya. The particulars were that between August 25, 2015 and April 23, 2016, at Vuyika village, in Matete Sub-County of Kakamega County, he stole Kshs 64, 681.00, the property of Salome Nabema Wanyora, on behalf of Internet Farmers e-Group. He pleaded not guilty, a trial was conducted, and 3 witnesses testified.

2. PW1, Salome Napema Wanyoba, testified that she was the secretary of the Internet Group, while the appellant was the treasurer. She explained that it was a group of farmers. They would collect bags of maize, which they would give to the appellant, as treasurer, who would sell the same, and bank the money. She stated that they also used to do a merry-go-round, where they would raise money for members to buy fertilisers. In 2017, they collected some Kshs 64, 681.00, which they gave to the appellant as treasurer. They held a meeting on January 4, 2018, and enquired about the money, whereupon the appellant informed them that he should be given 2 weeks to avail the money. On January 19, 2019, they went looking for the appellant for the money, as they needed the same to buy seedlings for planting. They did not find him.

3. PW2, Shem Tisa, was also a member of the Internet Farmers Group, where he served as an assistant secretary. They were planting maize, selling it and the proceeds of sale given to the treasurer, the

appellant herein, for safekeeping. They sat as a group, on January 4, 2018, and calculated what they had collected so far, and established that it totalled Kshs 64, 681.00. The treasurer, the appellant herein, asked to be given 2 weeks, to enable him get the money. On January 19, 2018, they went looking for the appellant, but they did not find him at his home, whereupon they went to see the local village elder. On January 22, 2018, they went to the home of the appellant , but they did not find him, whereupon they went to see the local assistant chief. The treasurer offered to pay Kshs 33, 000.00, but he never paid. PW3, Police Corporal Joseph Njoroge, No 614XX, was the investigating officer. He detailed the steps he took in the course of the investigations.

4. The appellant was placed on his defence. He gave a sworn statement, as DW1. He confirmed that he was the treasurer for the Group. He said that whenever they sat as a group, money would be collected, records kept, and the money given to him for banking. He said that the group never sat and agreed that money was missing. He said it was the treasurer who kept the records, but conceded that he did not have any records with him in court.

5. He called one witness, DW2, Wafula W Kisembe, who was the chairman of the group. He said that as a chair, he never presided over a meeting where it was agreed that a sum of Kshs 64, 681.00 was missing. He said that the money given to the appellant was used in the manner agreed upon by the group. He urged the court to dismiss the case, as the same had been brought without the authority of the group, but by PW1 as an individual.

6. After taking evidence from both sides, the trial court found that the offence of theft had been established against the appellant. Whereupon the appellant was aggrieved, hence the instant appeal. The grounds are that the case was not proved beyond reasonable doubt; the sentence imposed was excessive; the defence was not properly rejected; and the evidence was not properly analysed.

7. When the matter came up for mention on October 6, 2022, Mr Okali, holding brief for Mr Manyoni, for the appellant, invited me to allocate a date for judgement, on the undertaking that the appellant would file written submissions in the interim. I have not seen any written submissions in the record before me.

8. The offence of theft is defined in section 268 of the *Penal Code*, in the following terms:

> " Definition of stealing
>
> (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.
>
> (2) A person who takes anything capable of being stolen or who converts any property is deemed to do so fraudulently if he does so with any of the following intents, that is to say—
>
> (a) an intent permanently to deprive the general or special owner of the thing of it;
>
> (b) an intent to use the thing as a pledge or security;
>
> (c) an intent to part with it on a condition as to its return which the person taking or converting it may be unable to perform;

(d) an intent to deal with it in such a manner that it cannot be returned in the condition in which it was at the time of the taking or conversion;

(e) in the case of money, an intent to use it at the will of the person who takes or converts it, although he may intend afterwards to repay the amount to the owner;

and "special owner" includes any person who has any charge or lien upon the thing in question, or any right arising from or dependent upon holding possession of the thing in question.

(3) When a thing stolen is converted, it is immaterial whether it is taken for the purpose of conversion, or whether it is at the time of the conversion in the possession of the person who converts it; and it is also immaterial that the person who converts the thing in question is the holder of a power of attorney for the disposition of it, or is otherwise authorized to dispose of it.

(4) When a thing converted has been lost by the owner and found by the person who converts it, the conversion is not deemed to be fraudulent if at the time of the conversion the person taking or converting the thing does not know who is the owner, and believes on reasonable grounds that the owner cannot be discovered.

(5) A person shall not be deemed to take a thing unless he moves the thing or causes it to move."

9. According to section 268, theft has 2 components, it could take the form of taking property belonging to another or converting the property of another to own use. The intention, in both, ought to be to deprive the person of the thing taken or converted. From the facts as presented, the offence charged has the component of conversion, and not taking. The appellant is not alleged to have taken the property of another, rather the property of another was lawfully placed in his hands for safekeeping, but then he converted the same to his own use, so that when the owner wanted the money back, the appellant did not have it or did not give it back.

10. To establish whether there was either taking or conversion, it ought to be established whether the property alleged to have been taken or converted existed. So, the question here is whether the sum of Kshs 64, 681.00 existed. A handwritten record was placed before the court. It shows that moneys were being raised by the group. The account is not clear on how much had been raised. No account was placed before the trial court, showing that the sum of Kshs 64, 681.00 was collected at some point, and, therefore, existed. The evidence on record is that moneys were being collected by members of the group, but I have not seen evidence showing that the group at one time collected Kshs 64, 681.00. So, there was no evidence that Kshs 64, 681.00 existed, which the appellant could take or convert.

11. The charge alleges that the sum of Kshs 64, 681.00 was converted between August 2015 and April 25, 2016. No accounts were presented for that period, to show collection of Kshs 64, 681.00, by the group. The witnesses presented did not take the court on a blow by blow account of the collection of that money, demonstrating that by April 25, 2016, a sum of Kshs 64, 681.00 had been collected. The said witnesses said that between 2015 and 2016, they did merry-go-rounds, which meant that the moneys collected would not be given to the appellant, as treasurer, for safekeeping, but would be given to the particular member for whom the merry-go-round would be done at that time. So, the Kshs 64, 681.00 could not have been collected between 2015 and 2016, as pleaded in the charge. The said witnesses said

that they did not do merry-go-rounds in 2017, suggesting that the moneys raised around this time is what they wanted the appellant to account for. They stated that they did calculations, and the amounts totalled Kshs 64, 681.00, yet those calculations were not shared with the court.

12. As indicated above, the case herein relates more to conversion rather than taking, for the appellant was treasurer of the group, and the money was given to him for banking or safekeeping. He did not take the money, it was given to him. So, the crime could only have been committed after the money was lawfully given to him. The crime could only take the form of conversion. So, before it can be established that the appellant converted the money, it has to be proved that the money was given to him in the first place. Was there such evidence? Although PW1 and PW2 testified as the secretaries of the group, they did not produce any minutes of the meetings, where the money was allegedly collected, and given or handed over to the appellant. No minutes were shown to the court by these secretaries showing the handover to the appellant. The record placed on record, which appears to be more of a treasurer's record rather than that of a secretary, has no minutes showing that any of the moneys reflected as collected was ever given or handed over to the appellant. I have gone through the trial record, and I have not seen anything suggesting that the witnesses took the trial court through the document, explaining to it what it was saying, and it would appear that the document was just placed before the trial court, and left to the court to interpret for itself what the document was all about.

13. As there is no evidence that the appellant was ever given or handed over a sum of Kshs 64, 681.00, by either PW1 or PW2 or any other person in the group, for safekeeping or banking, the issue of him converting that money should not arise. He can only be required to produce the money or account for it, where there is evidence that the money was given to him in the first place. There is no evidence that that money was placed in his hands, and, therefore, the question of him converting that money does not arise. He cannot be said to have stolen that money, by way of converting it, where there is no proof that it was ever given to him.

14. In view of what I have stated above, it is my finding and holding, that the trial court did not have before it, material upon which it could convict the appellant, for allegedly stealing Kshs 64, 681.00. He should have been acquitted instead. I find that there is merit in the appeal. I allow it. The conviction is quashed. The sentence is set aside. The appellant shall be set free, if still in custody, unless he is otherwise lawfully held. It is so ordered.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 2ND DAY OF JUNE 2023

W MUSYOKA

JUDGE

Mr. Erick Zalo, Court Assistant.

Appearances

Mr. Manyoni, instructed by Momanyi Manyoni & Company, Advocates for the appellant.

Ms. Kagai, instructed by the Director of Public Prosecutions, for the respondent.