Oyona v Republic (Criminal Appeal E027 of 2023)
[2024] KEHC 16743 (KLR) (10 December 2024) (Judgment)

Neutral citation: [2024] KEHC 16743 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CRIMINAL APPEAL E027 OF 2023

NIO ADAGI, J

DECEMBER 10, 2024

BETWEEN

DANIEL ODOYO OYONA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal from the Judgment of Hon. R. W. Gitau (RM) in Mavoko CMCR Case. No. E1002 of 2021 delivered on 18/04/2024)

JUDGMENT

1. The Appellant was charged with the offence of Stealing by Servant contrary to Section 281 of the *Penal Code*. The particulars of the charge are that diverse dates between 30th of January 2021 and 1st February 2021 at UR Home International Limited Factory in Gilbi Business Park Go Down number 38 at Athi River Sub-County within Machakos County being a driver to the said UR Home International Limited jointly with others not before court stole 980 cartons of KissKids diapers valued at Kshs.3.2 million the property of UR Home international Limited which came into your possession by virtue of your employment in violation of section 281of the *Penal Code*.

2. The Appellant pleaded not guilty to the charge and the matter was set down for hearing. The prosecution called six witnesses in proving its case. The Appellant was convicted of the offence of stealing contrary to Section 268 (1) of the *Penal Code* and sentenced to 3 years in prison without an option of a fine on 9th March 2023.

3. Being dissatisfied with the decision of the trial court, the Appellant has lodged the appeal herein against both the conviction and sentence. The Appellant's grounds of appeal are as follows:

    i. the trial magistrate erred in matters of law and fact by not considering that the oral evidence tendered was impeachable as per the provisions of Section 163(c) of the *Evidence Act*.

ii. the vital witnesses were not called and thus raising doubt in matters relating the credibility of the prosecution case.

iii. the trial magistrate erred in matters of law and fact by not factoring in a period of 11 months that the appellant had spent in remand before the final determination of the case

4. The Parties have filed submissions to canvass the appeal. The Appellant's submissions are filed in court on 24/9/2024 whereas the Respondent's submissions are dated 30/9/2024.

The Appellant's Submissions

5. It was the Appellant's submissions that the prosecution evidence was contradictory and thus impeachable as per the provisions of Section 163 (1) (c) of the *Evidence Act* and further that the narratives by the prosecution witnesses were contradicting and lacked corroboration called by Section 124 of the *evidence Act*.

6. The Appellant submitted that the prosecution failed to call vital witnesses to tender evidence which was detrimental to the prosecution case.

7. The Appellant further submitted that the ingredients of the offence of stealing were not proven beyond reasonable doubt and thus the learned trial magistrate erred in convicting and sentencing him.

8. It was submitted that the trial magistrate erred in law and fact in failing to take into account the period which the Appellant was held in custody in computing the period of the sentence.

The Respondent's Submissions

9. The Respondent submitted that the prosecution discharged its duty and proved the case beyond reasonable doubt thus the conviction was sound and the sentence was lawful. It was further submitted that the ingredients for proof of stealing by servant were proved.

10. It was submitted that the sentence of 3 years imprisonment was lenient as the appellant could have been sentenced to seven years and as such the sentence meted out ought to confirmed.

Analysis and Determination

11. In determining this appeal, this court is fully aware of its duty as the first appellate court as espoused in the case of Okeno Vs R (1972) EA 32 where the court stated:-

> " An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion".

12. Having carefully and cautiously considered and analysed the trial court's record, the grounds of appeal and the Parties' rival submissions on the appeal the issue for determination is whether the Appellant has made a case for this court to interfere with the conviction and sentence imposed by the trial court.

13. It must be appreciated that under Section 107(1) of the *Evidence Act*, the burden of proof is on the prosecution to establish every element in a criminal charge beyond reasonable doubt.

14. This being a criminal case, the prosecution bore the burden of proving the case beyond any reasonable doubt. In Bakare v State (1987) 1 NWLR (PT 52) 579, the Supreme Court of Nigeria emphasized on the phrase proof beyond reasonable doubt, stating:-

> " Proof beyond reasonable doubt stems out of the compelling presumption of innocence inherent in our adversary system of criminal justice. To displace the presumption, the evidence of the prosecution must prove beyond reasonable doubt that the person accused is guilty of the offence charged. Absolute certainty is impossible in any human adventure, including the administration of criminal justice. Proof beyond reasonable doubt means just what it says it does not admit of plausible possibilities but does admit of a high degree of cogency consistent with an equally high degree of probability." (emphasis)

15. The standard of proof was also discussed in the case Gordon Omondi Ochieng v Republic [2021eKLR which referred to the famous case of Miller v Ministry of Pensions, [1947] 2 All E R 372, Lord Denning stated with 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 the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. 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, but nothing short of that will suffice."

16. I will consider two issues in this appeal as follows:

    a. Whether or not the Prosecution proved its case beyond reasonable doubt.

    b. Whether or not the trial court contravened Section 333(2) of the *Criminal Procedure Code*

a. Whether or not the Prosecution proved its case beyond reasonable doubt.

17. The Charge Sheet shows that the Appellant herein was charged with the offence of stealing by servant contrary to Section 281 of the *Penal Code*. This Section provides that:-

    SUBPARA 281-

    "If the offender is a clerk or servant, and the thing stolen is the property of his employer, or came into the possession of the offender on account of his employer, he is liable imprisonment of seven years."

18. To establish a charge of stealing by a servant and to secure a conviction under the above section, the prosecution must prove the following:The accused was an employee of the complainant;The property came into the accused's possession while they were employed;The accused dishonestly took the property, defrauding the employer;

19. Stealing is defined in Section 268 of the *Penal Code* as taking something capable of being stolen without claim of right, or fraudulently converting property to the use of someone other than the owner.

20. On whether the Appellant was an employee of the complainant, the trial Magistrate in her judgment noted as follows:-

> "Although PW-1, 2 and 4 testified that the accused person was an employee of the Complainant, PW-4 clarified that the accused person was an employee of one Quifeng who

had been subcontracted by the Complainant. PW-3 admitted to having paid the accused person's salary from November 2020 through Mpesa as he was holding fort for Quifeng who had gone on holiday.

Although the prosecution produced an employment contract and two payslips as PEX-4 and 5 respectively, I note that the employment contract is dated 1st December 2021 despite the accused person having been arrested in September 2021. I take judicial notice that the accused person requested for his payslip and P9 on 12th November 2021 and it was not until 2nd February 2022 after several mentions that he was furnished with only the payslip and on 23rd February 2022, the court was informed that the accused person earned below the minimum wage hence he was not liable to tax and no P9 was available. If indeed the investigating officer intended to rely on the payslip as part of his evidence, why wasn't it supplied when pretrial was conducted on 28th October 2021?

With the evidence of PW-3, and the above stated chronology of events as to the supply of documents, I cannot help but doubt the authenticity of the employment contract dated 1st December 2021 and the Payslip.

In light of the above, I find that there is no evidence beyond reasonable doubt that the accused person was an employee of the Complainant.

21. Clearly, the trial Magistrate found that the Appellant was not an employ of the Complainant. Having found so, then it automatically followed that the second and third ingredients being; the property came into the Appellant's possession while he was employed and that the Appellant dishonestly took the property, defrauding the employer cannot hold and they needed no proof following the trial court's finding that the Appellant was not an employee of the Complainant.

22. On the foregoing, it is my finding that the prosecution failed to prove the offence of stealing by servant beyond reasonable doubt against the Appellant and the trial magistrate erred in fact and in law by convicting and sentencing the Appellant as it did. This was case for acquitted of the Appellant.

b. Whether or not the trial court contravened Section 333(2) of the *Criminal Procedure Code*

23. Section 333(2) of the criminal Procedure Code provides that:-

> " Subject to provisions of Section 38 of the *Penal Code*, every sentence shall be deemed to commence from, and to include the whole of the day on which it was pronounced, except when otherwise provided in this code.
>
> Provided hat where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody".

24. The record of the lower court indicate that the Applicant was arrested on 26/9/2021 and first arraigned before the court on 4/10/2021. He pleaded not guilty to the charges against him and he was placed on a bond of Ksh.1,000,000/= or cash bail of Ksh.300,000/-. Though he was placed on bond/bail, he was only able to secure his release on 02/9/2022 when the release order was signed the cash bail of Ksh.100,000/= having been paid by one Kelvin Omondi Onyono on 01/9/2022. The case proceeded to trial whereupon the Appellant was found guilty and was convicted and sentenced to serve 3 years imprisonment. The Act prescribes for a sentence of 7 years imprisonment; however, the trial court noted the mitigation of the Applicant as well as the need to have him reform. Consequently, he was sentenced to 3 years imprisonment.

25. I have perused the sentencing provisions of the lower court record. The same do not give any directions on the period the Applicant spent in custody before he secured his release upon paying the cash bail.

26. In the judgment the trial Magistrate stated that:

> "I have considered the mitigation by the Accused. I note that the accused stayed in prison from 4/10/2021 to 25/8/2022. Close to 11 months. He is thus sentenced to 3 years without an option of a fine".

27. From the above, it is clear that the trial court did not account for the said period of 11 months which the Appellant spent in custody in its 3-year sentence.

28. Having found that the prosecution failed to prove the offence of stealing by servant beyond reasonable doubt against the Appellant, it follows therefore that this appeal is merited and must succeed.

29. Accordingly, I set aside the conviction and sentence by the trial court and order that the Appellant be released forthwith unless otherwise lawfully held.

It is so ordered.

JUDGMENT WRITTEN, DATED & SIGNED AT MACHAKOS THIS .10TH DECEMBER 2024

NOEL I. ADAGI

JUDGE

DELIVERED VIRTUALLY ON TEAMS AT MACHAKOS THIS .10TH DECEMBER 2024

In the presence of:-

In person..... for Appellant

Ms. Agatha..... for Respondent

Milly Grace..... Court Assistant