



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. E011 OF 2020

WYCLIFF OMONDI ACHOLA.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(Being an appeal from the Judgment of Honourable – Principal Magistrate, delivered on 20th April, 2020 in Nakuru Chief Magistrate’s Court Criminal Case No. 2909 of 2015)

JUDGMENT

1. The Appellant, Wycliff Omondi Achola, was arraigned before the Chief Magistrate’s Court, Nakuru charged with the offence of stealing contrary to section 283(d) as read with Section 271 of the Penal Code. The facts alleged in the charge sheet were that on diverse dates between 2/7/2012 and 30/3/2015 in Dundori Nakuru within Nakuru County, the Appellant, being an agent to Sisters of the Sacred Heart of Jesus of the Poor stole Kshs. 3,500,000/- being proceeds of the property sold by him, namely Dundori Lanet Block parcels No.s 13/192, 13/194, 13/195, 13/196, 13/197, 13/207, 13/210 and failed to remit the proceeds to the said Servants of the Sacred Heart of Jesus of the Poor (hereinafter “Sisters of the Sacred Heart”).

2. The Appellant pleaded not guilty and the case went on to full trial. The Prosecution called five witnesses. When put on his defence, the Appellant gave an unsworn statement. The Learned Trial Magistrate was persuaded that a case had been made beyond reasonable doubt and convicted the Appellant. He then imposed a sentence of four years imprisonment.

3. The Appellant is aggrieved and has appealed to this Court raising the following grounds of appeal:

1. THAT the Learned Magistrate erred in Law and in fact in failing to find and rule that the evidence adduced by the prosecution was insufficient to sustain the conviction and sentence of the Appellant and in convicting the Appellant herein against the weight of the evidence adduced.

2. THAT the Learned Magistrate erred in Law and in fact in failing to find and rule that there was no cogent, substantial, credible and direct evidence connecting the Appellant to the offence of stealing by agent

3. That the Learned Magistrate erred in Law and in fact in convicting the Appellant on highly contradictory, misleading, inconsistent and unreliable evidence presented by the prosecution.

4. THAT the Learned Magistrate erred in Law and in fact convicting the Appellant on purely circumstantial evidence which was incompatible with the innocence of the Appellant herein.

5. THAT the Learned Magistrate erred in Law and in fact in shifting the burden of proof of the charge from the prosecution to the Appellant.

6. THAT the Learned Magistrate erred in Law in placing reliance on the incredible evidence of the prosecution and in failing to accord due weight to the evidence of the Appellant herein.

7. THAT in any event the Learned Magistrate erred in fact in in meting out sentence that was grave and excessive in the circumstances.

8. THAT the Learned Magistrate erred in Law and in fact in failing to consider the issues raised in mitigation amongst other factors

in sentencing the Appellant.

9. THAT the Learned Magistrate erred in Law and in fact in failing to acquit the Appellant for failure of the prosecution to prove the charge beyond any reasonable doubt.

4. The evidence that emerged from the Lower Court was as follows. PW1, Samuel Kimotho Waweru, testified that the Complainant – Sisters of the Sacred Heart -- had bought and subdivided land in Dundori and intended to sell the same. That he subsequently contracted three people including the Appellant, as agents, to sell the land and deposit the proceeds into the Complainant's account. Samuel testified that the agreement was that the Appellant would receive a commission of Kshs 20,000 from every sale.

5. Samuel testified that they sold 15 plots without any difficulties until 07/09/2015 when he took a purchaser to the plots. There he found an unknown person who alleged that the land belonged to the Armed Forces. Upon further investigation, he learnt that 7 plots had indeed been sold. He contended that the Complainant did not receive the proceeds of the said sale. Samuel said that he was able to trace some of the alleged purchasers and they confirmed to him that they had bought the land from the Appellant and paid the purchase price. He conceded that he did not know how the title transfers happened yet the parcels were in the name of the Sisters of Sacred Heart.

6. PW2, Jemnal Kimani, was a formal witness who simply testified as to the employment of PW1 and his capacity to testify on behalf of the Complainant.

7. PW3, Albert Gatimu Nderitu, was one of the other agents who had been contracted by the Complainant to sell the plots in a similar arrangement as that of the Appellant. He testified that he had been contracted by Catholic Diocese of Nakuru projects for purposes of finding buyers for their plots. He said that upon finding buyers and informing Samuel Kimotho Waweru, the identified buyers would deposit the purchase money into the account of the Sisters of the Sacred Heart.

8. It was Albert's testimony that after selling 4 plots, he was informed to hold off since someone had sold off the plots. In cross examination, he testified that he had not previously dealt with the Appellant and that he had deposited the proceeds of the plots he sold to the account of the Sisters of the Sacred Heart.

9. PW4, Raymond Gitonga, a land Registrar in Nakuru testified that the land in question was first registered to one Gideon Kagenyo Wamae. That the land was subsequently subdivided and sold to different people as follows: Parcels 194 and 195 to Roselyn Akinyi Odeyo, Parcel 196 to Elizabeth Wanjiru Wandeyi, Parcel 197 and 210 to Dennis Ngonyo Maruo. He also testified that the green card to Parcel 207 was missing. The witness testified that the land was never registered in the name of the Catholic Diocese of Nakuru or the Sisters of Sacred Heart. He further conceded that he was unaware how the transfers to the current owners happened as, he said, the copies of the transfer documents were missing from the Lands Office.

10. PW5, No. 30083 CPL Francis Mule, the investigation officer, testified that he had been furnished with sale agreements between the said Gideon Wamae and the Complainant and a letter authorizing Samuel Kimotho Waweru to sell the property on behalf of the Sisters of Sacred Heart. He testified that through his investigation he learnt that there were plots that had been sold yet the Complainant had not issued consent and the same had been dealt with by the Accused.

11. Corporal Mule also testified that the Appellant had purported to be the owner of various plots which had been sold to various buyers and money deposited to the Appellant's account at NIC Bank. The witness produced various documentary exhibits – including the Sale Agreements for Parcels No. 13/195 (as Exhibit 21); No. 13/197 (as Exhibit 22); No. 13/207 (as Exhibit 8); No. 13/210 (as Exhibit 17) that purportedly were used to sell the parcels. He said that he did a search and found that the seven plots had been sold but no money had been remitted to the account of Sisters of Sacred Heart. He also testified that he traced some monies deposited in the Appellant's account – Kshs. 550,000/- on 26/06/2015 by Dennis Maruo; Kshs. 250,000/- on 27/08/2015; and a further deposit of Kshs. 250,000/-. He produced an NIC Bank Statement of the Appellant as Exhibit 18 to show that the amounts were, in fact, deposited in the Appellant's accounts. He further produced the Bank Statements for the Sisters of Sacred Heart to prove that the amounts were never deposited in the account.

12. Upon being put on his defence, the Appellant testified that he had been introduced to the sisters at the offices of Rodi Orege & Company Advocates and that after a meeting with Sister Martine Fosketi, they both signed an authority permitting him to sell the property on behalf of the sisters. He also told the Court that the documents relied upon by the Prosecution were forgeries and that Mr. Orege (advocate) should have been called to testify. He questioned why the persons to whom the land had been sold were not called to testify.

13. The Appellant's counsel filed submissions dated 22/01/2021. The counsel raised four main issues as follows:

- a. That the Prosecution did not prove all the ingredients of the offence of Stealing by servant;
- b. That the Trial Court relied on circumstantial evidence to convict the Appellant;
- c. That the Trial Court relied on statements by witnesses not before court; and
- d. That the prosecution failed to call critical witnesses.

14. The Appellant contends that the Prosecution did not prove its case beyond a reasonable doubt. He relied on the case of **Miller v Minister of Pensions [1947]** cited in **Humphrey Wachira Karimi v Republic [2019] eKLR**.

15. He argues that the Prosecution did not prove all the ingredients required under Section 268 of the Penal code for the offence of stealing by servant. He argues that the Appellant had the authority to sell properties belonging to the Complainant under the agreement that he would receive a commission. That it was not possible for the Appellant to sell the said properties without the titles which were in the Complainant's possession.

16. The Appellant denies the contention that the Bank statements marked PEXBIT 25 are proof that he received money from the purchasers of the properties. He argues that since he was in the business of selling land, the said monies could be from any other sale.

17. The Appellant relies on the cases of **Republic v Richard Itweka Wahiti [2020] eKLR**, in which the court cited the case of **Musili Tulo v Republic [2014] eKLR**. The Appellant also cited the case of **Sawe v Republic [2003] eKLR**.

18. He submits that the Trial Court erred in relying on the bank statements and the sale agreements (PEXBT 17, 21 and 22) to convict him. That the said exhibits were circumstantial evidence. The Appellant also contends that the trial court erred in relying on the witness statements of Janet Wambui Kimani and Jackline Wanjiru without calling them to testify in court.

19. The Appellant also relies on the Case of **Bukenya v Uganda [1972] E.A 549** cited in the case of **AKM v Republic [2019] eKLR**. He submits that the firm of advocates who drew the sale agreement relating to the parcels of land indicated in the charge sheet and the purchasers ought to have been called as witnesses to confirm the existence and veracity of the contents of the sale agreements. That because of this omission, he was not given a fair chance to cross examine the purchasers or the said firm of advocates.

20. The Appellant therefore prays that the conviction and sentence therefrom be overturned.

21. As the first Appellate Court, I am bound to re-evaluate and reconsider all the evidence adduced during the hearing afresh and come to my own conclusions about all the elements of the crimes charged. In doing so, I must make appropriate allowance for the fact that I did not have a chance to see or hear the witnesses. I must also give due deference to the findings of the Trial Court on certain aspects of the case.

22. In re-evaluating and re-considering all the evidence, I must consider the evidence on any issue in its totality and not any piece in isolation. This principle constrains me to reach my own conclusions on the totality of the evidence as opposed to merely using the Trial Court's findings as a foil to endorse or reject its findings. See **Okeno v Republic [1973] E.A. 32; Pandya vs. R (1957) EA 336, Ruwala vs. R [1957] EA 570**.

23. Having looked at the totality of the evidence produced at trial and having read the judgment resulting in the conviction of the Appellant, three issues eminently recommend themselves for resolution.

24. *First*, noting that the evidence adduced at trial was circumstantial evidence, did it meet the threshold required by our law to amount to a conviction?

25. *Second*, was it fatal that some of witnesses were not called? And *third*, did the Appellant admit, as the Learned Trial Magistrate wrote in the judgment, that he had received the monies on behalf of the Sisters of Sacred Heart?

26. The first two issues should be taken together as they relate to the sufficiency of evidence produced at trial. The Court of Appeal defined circumstantial evidence in **Ahamad Abolfathi Mohammed and Another v Republic [2018] eKLR**, as follows:

Circumstantial evidence is evidence which enables a court to deduce a particular fact from circumstances or facts that have been proved.

27. In the same case, the Court enunciated the criteria to be met before a Court should rely on circumstantial evidence to convict. It stated *Before circumstantial evidence can form the basis of a conviction, however, it must satisfy several conditions, which are designed to ensure that it unerringly points to the accused person, and to no other person, as the perpetrator of the offence. In Abanga alias Onyango v Republic, Cr. App No. 32 of 1990 this Court set out the conditions as follows:*

“It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests: (i) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established; (ii) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;

iii. the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.”

28. Can one say that this high threshold was satisfied in this case? Hardly. *First*, the purported Sale Agreements for the plots were produced for only four of the seven parcels of land. For the remaining three, there is nothing whatsoever to link the Appellant with the alleged offence. It is noteworthy that the Appellant is charged with a single count of theft. This means, all the elements as well as the factual predicates for all the alleged illegal sale of all the seven parcels had to be proved for conviction in the single count to be sustained.

29. *Second*, one of the Agreements (Exhibit 8) was, in fact, between the Sisters of Sacred Heart and the purchaser – and not the Appellant. There is no explanation how, if the Agreement is between the alleged purchaser and the Sisters of the Sacred Heart, the purchaser ended up paying monies to the Appellant.

30. *Third*, there was no clear evidence that showed, for the sale of each parcel, how much money was allegedly paid to the Appellant and that it was indeed received by him. There was scattered evidence related to the Appellant's bank statements showing receipts of monies in his account but there was no connection made between the funds so deposited and the alleged theft. There was a need to demonstrate that specific sums received on behalf of the Sisters of Sacred Heart were, in fact, deposited in the account of the Appellant. It was not the same to show that sums were deposited in the Appellant's account.

31. *Fourth*, in none of the seven cases were the purchasers who allegedly paid monies directly to the Appellant rather than to the Sisters of Sacred Heart called to testify. This fatal omission was not explained by the Prosecution. The failure to call these witnesses was fatal because a Court should make adverse inferences where the Prosecution fails to call an essential witness. See, for example, ***Bukenya & Others V Uganda [1972] EA 549***.

32. *Fifth*, the sale agreements purport to have been drawn and witnessed by Rodi Orege and Co. advocates. The Prosecution did not probe further into how these agreements came to be and if indeed it is the said firm of advocates that drafted these agreements or another person. There was no allegation by the prosecution that the same were forgeries or an admission or denial by the said firm of advocates on whether they indeed drew the agreements. No one from the firm of Rodi Orege & Co. Advocates was called to testify, an omission which was not explained by the Prosecution. See, for example, ***Bukenya & Others V Uganda [1972] EA 549***.

33. *Sixth*, in his defence, the Appellant claimed that they were forgeries – an allegation not displaced by Prosecution evidence as required by law. The law is that when the defence places a theory of defence which is possibly plausibly true, it is incumbent upon the Prosecution to displace that defence with evidence beyond reasonable doubt. That did not happen in this case.

34. *Seventh*, the evidence adduced from the Lands Registrar left too many gaps unfilled: if the Appellant never had the titles to the parcels, how did the transfer happen? What happened to the transfer documents? Who was indicated therein as the vendor? The absence of this evidence cannot simply be inferred against the Appellant. It was incumbent upon the Prosecution to prove its case beyond reasonable doubt.

35. The conclusion from this analysis is that from the evidence tendered at trial, the Complainant contracted various agents to sell their property. There was no evidence as to what specific properties were allocated to the Accused. The veracity of the sale agreements between the Appellant and the buyers was not tested. In my view, the evidence does not amount to a compelling rational inference of the appellant's guilt. The facts do not lead to one irresistible conclusion that the Appellant and no one else could have sold the properties. The evidence was not compelling, credible, or cogent.

36. Finally, the Learned Trial Magistrate in his judgment stated that the conviction was also based on the fact that the Appellant had admitted to having received the monies.

However, nowhere in the trial record does such an admission by the Appellant lie. Indeed, throughout the Prosecution case during cross-examination, and in his own evidence, the Appellant denied receiving the amounts alleged.

37. In the end, I find the appeal herein to be merited. It is allowed in its entirety. In the circumstances, it is the duty of this Court to quash the conviction and set aside the sentence imposed which I hereby do. The Appellant shall be set at liberty unless otherwise lawfully held in custody.

38. Orders accordingly.

DATED AND DELIVERED AT NAKURU THIS 23RD DAY OF SEPTEMBER, 2021

.....

JOEL NGUGI

JUDGE

NOTE: This judgment was delivered by video-conference pursuant to various Practice Directives by the Honourable Chief Justice authorizing the appropriate use of technology to conduct proceedings and deliver judgments in response to the COVID-19 Pandemic.