REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYAMIRA

CRIMINAL APPEAL NO. E004 OF 2021

CONSOLIDATED WITH

CRIMINAL APPEAL NO. 2 & 3 OF 2021

BETWEEN

PETER OGUSO BURUCHARA.....1ST APPELLANT

SAMWEL MOGAKA ONGAKI.....2ND APPELLANT

FLORENCE MORAA ONKWANI.....3RD APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence by Hon. B.M. Kimutai (PM)

on 14th January 2021 in Keroka Principal Magistrate's Court

Criminal case No. 1158 of 2016).

JUDGEMENT

The appellants were charged with the offence of **Stealing By Agent contrary to Section 283(b) of the Penal Code** whose particulars were that on diverse dates between 1st January 2015 and 31st December 2015 at Menyenye village in Borabu sub-county within Nyamira County, they jointly stole Kshs.1,519,298/= of Rionkwani Village Self Help Group which was members shares and dividends.

The appellants pleaded not guilty to the charge but after hearing and evaluating evidence from both sides the trial magistrate found that the case against the appellants had been proved beyond reasonable doubt, convicted them and placed them on probation for a period of three years each. The appellants who had all along maintained their innocence felt aggrieved by the conviction and sentence and preferred this appeal.

The grounds of appeal are:-

1. **That the learned trial magistrate erred in law and in fact by convicting the appellants when the prosecution did not prove their case to the required standard thereby occasioning the appellants a miscarriage of justice.**

2. **That the learned trial magistrate erred in law and in fact in convicting the appellants where the essential ingredients of the charge of stealing by agent had not been proved by the prosecution.**

3. **That the learned trial magistrate erred in law and fact by drawing adverse inference against the appellants thus shifting the burden of proof contrary to the law of evidence.**

4. **That the learned trial magistrate erred in law and fact by failing to consider the defence and submissions by the defence.**

5. That the judgment is not well reasoned and is based on guess work and speculation.

6. The learned trial magistrate erred in law and in fact by basing this judgment on inconsistent, incredible and contradictory evidence of the prosecution witnesses.

7. That the learned trial magistrate erred in law and in fact by basing his judgment on assumption and suspicion thus arriving at a finding which was contrary to evidence on record.

8. That the learned trial magistrate erred in law and in fact by failing to appreciate that the value of the purported stolen money was not proved by the prosecution.

9. That the learned trial magistrate erred in law and fact by failing to consider that the relied witnesses had taken loans of amount purported to have been stolen.

10. That the learned trial magistrate erred in law and in fact by failing consider the defence testimony on how the money was borrowed and how members were fully paid their shares and dividends thus arriving at wrong finding.

11. That the evidence on record was not sufficient to sustain a conviction.

When Counsel for the parties appeared before me on 7th June, 2021 they consented to argue the consolidated appeals by way of written submissions and also agreed on the timelines, but whereas the submissions of Counsel for the appellants were received on 29th June 2021 those of Senior Prosecution Counsel Majale were never filed. Counsel for the appellants framed four issues for determination and then submitted on each separately.

The issues are:-

a) "Did the prosecution prove its case on (sic) required standard and in particular did the prosecution prove the essential ingredients of the charge of stealing by agent.

b) Did the trial court fail to consider the appellants' defence and did the said court shift the burden of proof.

c) Was there an error in convicting the appellant as charged.

d) Did the trial court make a finding that was contrary to the evidence."

On issue (a) counsel submitted that the evidence adduced by the prosecution did not prove the guilt of the appellants beyond reasonable doubt. Relying on the cases of **Benson Limantes Lesimir & another v Republic CR/APP NO.102 &103 of 2002** and **Joan Chebichi Sawe v Republic CR Appeal l NO. 2 of 2002** respectively Counsel submitted that the case against the appellants did not meet the test required to prove a case on circumstantial evidence and that suspicion cannot suffice to infer quilt. Counsel contended that the prosecution fatally failed to prove the ingredients of the offence; that the audit report relied upon by the prosecution did not meet the international standards and that it was in any event compiled after the appellants had pleaded to the charges. Counsel stated that the ingredients of the offence of Stealing by Agent were dealt with by the Court of Appeal in the case of **Ong'are Moguche v Republic CR Appeal 57 of 2015** and contended that the case against the appellants did not meet the test in that case. Counsel stated that monies collected by the appellants from the members of the Self Help Group were banked and later loaned out to members and that defence witnesses who were members attested to that fact and also admitted to not repaying the loans. Counsel submitted that there was therefore no money to be stolen and that the auditor's figure of Kshs. 1,519,298/= was not supported by any documents. Counsel contended that the audit report did not take into account the loans and the share contributions paid back to the members. Counsel faulted the trial magistrate for not appreciating this fact. Counsel further submitted that there was no agency relationship between the appellants and the Self Help Group and that monies were collected by loans officers who were not charged and that therefore no property capable of being stolen came into the hands of the accused persons.

On issue (b) counsel submitted that the trial magistrate turned a blind eye on the oral and documentary evidence that even some of the prosecution witnesses took loans from the group but failed to repay. Counsel invited this court to scrutinize the list of borrowers produced by the defence as defence Exhibit 8 and which confirmed the default by the prosecution witnesses. Counsel wondered how the same witnesses hoped to get a refund of their shares without repaying the loans. Counsel also urged this court to consider the evidence of the appellants and their witnesses which he contended was ignored by the trial court. He also faulted the trial court for what he described as shifting the burden of proof to the appellants.

On issue (c) Counsel submitted that the trial court did not evaluate the evidence; that no money was stolen and that indeed the complainants herein had filed a civil suit in **Keroka CC NO. 135 of 2016** for reimbursement of their shares but the suit was dismissed after the trial court found that all parties' shares had been reimbursed. Counsel submitted therefore that the appellants could not have stolen any money when no claim for money by the members was pending.

On issue (d) Counsel submitted that the trial court erred by failing to properly analyze the evidence and facts and thereby arrived at a wrong conclusion. He urged this court to find the appeal meritorious, allow it quash the conviction and set the sentence aside.

I have considered Counsel's submissions and also re-evaluated the evidence in the trial court so as to arrive at my own independent conclusion while being alive to the fact that I did not see or hear the witnesses as did the trial magistrate.

That the case against the appellants hinges on the audit report prepared by Nyasae & Associates on 15th September 2016 is not in doubt. That report was produced in evidence by Zacharia Ongeri (PW3). This witness testified that he was detailed to do the audit after a CID officer took to him a book which he perused and concluded that for one year the Rionkwani Self Help group had made a profit of Kshs. 1,519,298/=. He stated that there was a sum of Kshs. 72,425/= in one of the group's account and Kshs.2,377/= in another account. He stated that the group's total income came to Kshs. 1,736,733/= against a total expenditure of Kshs. 267,435/= and that there was Kshs. 1,519,298/= in the account. He further, stated that the members' contributions totaled Kshs.819,183/= while the loans taken by members amounted to Kshs. 902,500/=. The typed proceedings also have him stating that Kshs. 902,500/= was given to him. The witness also alleged that the appellants took two loans using the name of the Self Help Group without the consent of the members. The report produced in evidence is a photocopy and the figures at the bottom are not legible but suffice it to state that nowhere does the report or its author state that the appellants siphoned a sum of Kshs. 1,519,298/= from the group's coffers. To the contrary and that was also PW3's testimony the said sum of Kshs. 1,519,298/= is what the group made as profit for one year. That figure is entered as the surplus for the year 2015 in the statistical information at page 5 of the report. Other than stating that the management committee were loaned Kshs. 480,000/= by Wakenya Pamoja Sacco and that they were running an entity known as Rinoni Farmaers Co-operative Society Limited with other members and financing it from the contributions from members of Rionkwani Self Help Group without their knowledge, the auditor does not point to the figure of Kshs. 1,519,298/= as having been stolen. There was evidence from the prosecution and the defence that the Self Help Group was involved in what is known as table banking where members of the group would borrow money at an interest. At pages 12, 13 and 14 of the audit report is a table showing the names of the members who borrowed money, the interest charged and the amount paid. From this table it would appear that some members borrowed money and paid but they were either not charged interest or they did not pay interest. It is however instructive that the table does not list members who borrowed but never paid at all yet the defence called witnesses who gave evidence and produced documents that prove the unpaid loans which evidence was not rebutted by the prosecution. In my view, the trial court erred in not considering this evidence by the defence. The burden of proof is always upon the prosecution to prove the case against the accused person beyond reasonable doubt. The accused is not required to disprove the case or to prove his/her innocence except where facts are especially within their knowledge which was not the case here. In this case the prosecution should have proved the amount from members contribution vis avis the expenditure, loans taken by members and interest earned, the cash at hand and in the bank but also taken into account the liabilities and loans and interest that remained unpaid. Only then would it have come to an accurate figure of the amount that was expected to be in the group's account but was missing. To hold that the appellants stole money from the Self Help Group simply because they did not account for it while the auditor's report is itself inconclusive is shifting the burden of proof to them. I agree with counsel for the appellants that the charge against the appellant was not proved beyond reasonable doubt. In the premises this appeal has merit and it is allowed. The convictions are quashed and the sentences set aside and the appellants are to be set at liberty forthwith unless otherwise lawfully held. It is so ordered.

DATED, SIGNED AND DELIVERED ELECTRONICALLY THIS 7TH DAY OF OCTOBER, 2021.

E.N. MAINA

JUDGE