



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL APPEAL NO 30 AND 31 OF 2017

JOHN KARIUKI IRERI..... 1ST APPELLANT

CAROLINE MUMBI NGONDI..... 2ND APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

(Being appeals from the original judgement, conviction and sentence of Hon V.O. Nyakundi delivered on 1st August 2017 in the Chief Magistrate's Court at Embu in Criminal Case No 593 of 2014, Republic v. John Kariuki and Caroline Mumbi Ngondi)

JUDGEMENT

INTRODUCTION

APPEAL OF THE 1ST APPELLANT – JOHN IRERI KARIUKI

1. The 1st appellant has appealed against his conviction and sentence as follows in respect of the following.

1. Four (4) years imprisonment in count 1 in respect of the offence of stealing by servant contrary to section 268 (1) as read with section 281, of the Penal Code (Cap 63) Laws of Kenya
2. One (1) year imprisonment in count II in respect of the offence of forgery contrary to section 349 of the Penal Code (Cap 63) Laws of Kenya.
3. Four years (4) imprisonment in count III in respect of the offence of fraudulent false accounting contrary to section 330 (b) of the Penal Code (Cap 63) Laws of Kenya.
4. Four years (4) imprisonment in count V in respect of the offence of stealing by servant contrary to section 268 (1) as read with section 281 of the Penal Code (Cap 63) Laws of Kenya.

APPEAL OF THE 2ND APPELLANT – CAROLINE MUMBI NGONDI

2. The second appellant has appealed against her conviction and sentence of four years' imprisonment in count IV in respect of the offence of fraudulent false accounting contrary to section 330 (b) of the Penal Code (Cap 63) Laws of Kenya.
3. The 1st appellant was employed as a manager in the Embu beer depot of the complainant namely Alexander Mugo Mutetu (Pw 1). The 2nd appellant was also employed by Pw 1 as a cashier at the same place of business by PW1.
4. For convenience, I will deal with the appeal of each appellant separately.

The appeal of the 1st appellant.

5. In this court the appellant has raised nine grounds of appeal in his amended petition.

6. In will consider ground 8 first in which the appellant has faulted the trial court for convicting him when the case was not proved beyond reasonable doubt. In count 1 the appellant was convicted of the offence of stealing by servant of Shs 148, 500/=. In this regard, the prosecution called Robert Ngare Njiru (Pw 3) trading as Muthambi & Mwaniki. Pw 3 testified that he gave the appellant cash Shs. 148,

500/=, being the purchase price for beer he bought from that depot. This was on 2nd January 2014. This money was not deposited in the bank. The evidence of Pw 3 is supported by that of his employee namely Patrick Mugendi (Pw 4), who was an eye witness to the transaction. That the money was not banked is clear from the report of the auditor (Pexh 12) namely Nicasion Njue Njiru (Pw 6). There is also the report of the document examiner namely C I Daniel Gutu (Pw 8). In answer to this evidence, the appellant who testified on oath labelled Pw 3 a liar.

7. I have independently re-assessed the entire evidence as a first appeal court. As a result, I find that this count I was proved beyond reasonable doubt. I therefore dismiss ground 8 for lacking in merit.

8. In ground 2 the appellant has faulted the trial court for failing to find that crucial witnesses were not summoned to give evidence. The prosecution was not bound to call all witnesses to prove the offence charged in view of the ample evidence produced against the appellant. This ground lacks merit and is hereby dismissed.

9. In grounds 3 and 5 the appellant has faulted the trial court for failing to consider that Pw 3 failed to give his genuine signature for comparison purposes. It should be borne in mind that Pw 3 was not a suspect or accomplice in this case. He was not involved in preparing the books of account of Pw 1. The document examiner compared the questioned documents and hand writing specimen of this appellant and found that it is this appellant who was the author of both the questioned documents and his specimen handwriting. These grounds lack merit and are hereby dismissed.

10. In ground 4 the appellant has faulted the trial court for giving the prosecutor an adjournment to enable him to go and coach Pw 1. It is clear from the record of the proceedings that on 20th July 2015, the prosecutor applied for and was granted an adjournment to enable him to get documents of the business transactions with Keroche Breweries. I find no evidence of coaching. This ground lacks merit and is hereby dismissed.

11. In ground 6 the appellant has faulted the trial court for failing to consider that Pw 3 did not produce his books of account to prove that he had taken stock on the material dates. Pw 3 was not on trial. It was not therefore necessary for the court to consider the books of account of Pw 3. This ground lacks merit and is hereby dismissed.

12. In ground 7 the appellant has faulted the trial court for failing to find that his constitutional rights were violated in that he was placed in police custody for more than 24 hours; without being taken to court. These proceedings are concerned with whether the offences were proved beyond reasonable doubt or not. The issue of infringement of one's constitutional rights is a matter for a court exercising civil jurisdiction to decide and enforce in terms of articles 22 (1) and 23 (1) of the 2010 Constitution of Kenya. This ground lacks merit and is hereby dismissed.

13. Ground 9 is in relation to the appellant being given a right of audience before this court, which has been complied with.

The appeal of the 2nd appellant – Caroline Mumbi Ngondi

14. The appellant has in this court raised seven grounds of appeal in her petition.

15. In ground 1 the appellant has faulted the trial court for failing to consider that the police failed to produce in court the delivery notes and that the witnesses did not produce their stock record books. These books she claims could have confirmed that the witnesses purchased the stock from the depot. It is to be borne in mind that the witnesses were not on trial. It was therefore not necessary for their stock records to be produced in court. The evidence of CI Daniel Gutu (Pw 7) is that he received the questioned documents marked A1 – A12 which were the stock records of the depot and specimen handwriting of this appellant marked B1 – B4. Upon examination Pw 7 concluded that they were made by this appellant. This is clear from his report exhibit Pexh 14.

16. In answer to prosecution evidence this appellant swore that she was only allowed to sell one crate of beer to bar owners. She also testified that she could only release beer to the bar owner, after the latter had availed a delivery note. She labelled Robert Ngare (Pw 3) an untruthful witness, who could not tell the court his true names. She further testified that she was charged with the false entry relating to Pw 3. She termed the evidence against her to be hearsay and false.

17. After independently re-assessing the entire evidence as a first appeal court, I find that this ground lacks merit and is hereby dismissed. I therefore find that this offence of fraudulently false accounting (count IV) was proved beyond reasonable doubt.

18. In count V both appellants are charged with theft by servant. The prosecution evidence through Robert Ngare Njiru (Pw 3) who trades as Muthambi & Mwaniki is that he gave cash money in the sum of Shs. 168,000/= to the first appellant. The evidence of Pw 3 is supported by Pw 4, who was the employee of Pw 3. The auditor's report exhibit Pexh 12 also supports the evidence of Pw 3.

19. Again after independently re-assessing the entire evidence, I find that this offence (count V) was proved beyond reasonable doubt.

20. In ground 2 the appellant has faulted the trial court in failing to find that no cash money was recovered from her, when she was arrested. This fraud and the subsequent auditing of the books of accounts of Pw 1's were done as a result of the information from an informer. The offences covered a period of more than one year. It is not humanly possible to arrest a person with the stolen money over such a period. This ground lacks merit and is hereby dismissed.

21. In ground 3 the appellant has faulted the trial court for failing to summon the informer as a witness pursuant to the court's power to summon a witness on its own motion under section 150 of the Criminal Procedure Code (Cap 75) Laws of Kenya. The evidence of an informer is privileged in terms of **section 132 of the Evidence Act (Cap 80) Laws of Kenya**. Although section 132 only appears to cover public officers, in my view it covers members of the public to whom disclosures of the commission of crimes has been made. This is

universal rule, which may only be waived if the disclosure is to assist the accused to establish his innocence. See *Marks v. Beyfus (1820) 25 QBD 494*. This is not the position in the instant appeal. Section 150 of the Criminal Procedure Code was not violated; since the informer's potential evidence was not required to establish the appellant's innocence. This ground lacks merit and is hereby dismissed.

22. In ground 4 the appellant has faulted the trial court in failing to consider that the prosecution evidence was based on allegations. After independently re-assessing the entire evidence, I find that the prosecution evidence was relevant and had probative value. This ground lacks merit and hereby dismiss it.

23. In ground 5 the appellant has faulted the trial court for failing to consider that most of the prosecution witnesses were accomplices, who should have been charged rather than being used as prosecution witnesses, since they were adversely mentioned. I find from the evidence produced that the prosecution witnesses were not accomplice witnesses. Even if some prosecution witnesses were accomplice witnesses, their evidence is by virtue **section 141 of the Evidence Act** competent evidence. This grounds lacks merit and is hereby dismissed.

24. In ground 6 the appellant has faulted the trial court for failing to consider the defence evidence as required by section 169 of the Procedure Criminal Code and section 212 of the Criminal Procedure Code. Section 212 only applies to calling of rebuttal evidence by the prosecution in response to new evidence produced by the accused that was not foreseen by the prosecutor after exercising due diligence. This appellant gave evidence on oath and did not call any witnesses. She labelled as untruthful evidence of the key prosecution witness namely Pw 3, which implicated her. She also labelled the other evidence as hearsay. After considering the entire evidence, the trial court which saw and heard all the witnesses who testified, found the evidence of the defence incredible and that of the prosecution to be credible. I have shown in the foregoing paragraphs that the findings of the trial court are based on the evidence produced at trial. I therefore find that the defence evidence was considered and rejected for being incredible. This ground lacks merit and is hereby dismissed.

25. In ground 7 the appellant had sought to be allowed to make submissions during the hearing of the instant appeal. This was complied with.

26. After considering the entire evidence, the submissions of the parties and the applicable law, I find that the appellants were convicted on sound evidence.

The sentences were merited.

27. The upshot of the foregoing is that the appeals of the appellants fail and are hereby dismissed in their entirety.

Judgement signed and dated at Narok this 29th day of October, 2019.

J. M. Bwonwong'a

Judge

Judgement signed, dated and delivered in open court at Embu this 7th day of November, 2019 in the presence
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F. Muchemi

Judge