REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL APPEAL NO. 38 OF 2018

JOHNSON KOBIA M' IPWI.....APPELLANT

V E R S U S

REPUBLIC.....RESPONDENT

JUDGMENT

Giving False Information

[1] The Appellant Johnson Kobia M'ipwi was charged with the offence of giving false information to a person employed in the Public Service contrary to Section 129 (a) of the Penal Code CAP 63 of the Laws of Kenya. The particulars of the offence are that; on the 1st day of April 2014 at CID office, Imenti North District within Meru County informed C.I Samuel Yagan and No. 62176 CPL Andrew Nyaga, persons employed in the public service as police officers that a member of staff at Mwalimu Sacco withdrew Kshs 2,250,000 from his account (288) 23 without his knowledge and banked in the account of Sacco general manager Mr. Maiteithia, information he knew to be false, intending thereby to arrest and charge the said member of staff and Maitethia, an act which they ought not to have done if the true state of facts respecting such information was given had been known to them.

[2] The Appellant was subsequently tried and convicted of the offence and fined Kshs 500,000 or in default to serve 24 months imprisonment. The appellant was aggrieved by the said conviction and sentence and filed this appeal on 3rd April 2018, raising the following grounds of appeal:

(a) The Learned Trial Magistrate erred in Law and fact in that she held that the charge of giving false information had been proved against the appellant

(b) The Learned Trial Magistrate erred in law and fact in that she did not find that the charge of giving false information had not been proved and that its ingredients had been proved.

(c) The Learned Trial Magistrate's conviction is against the weight of evidence.

(d) The trial and conviction of the appellant is bad in law as the trial was influenced by a person who had no right to address the court or to submissions thereby prejudicing the accused defence.

(e) The comments by the Learned Trial Magistrate shows that she was biased against the appellant and therefore did not afford him a fair, just trial as the constitution requires.

(f) The Learned Trial Magistrate erred in law and fact in refusing the appellant adjournment to prepare his defence even when it was clear that he was unwell and had been refused chance to submit on no case to answer after the close of the prosecution case.

(g) The sentence of the Learned Chief Magistrate is harsh, excessive and passed in anger of in understanding of a confused layman.

Submissions by Appellant

[3] On the hearing of the appeal on 11th July 2018, with the consent of parties, the court directed the parties to file submissions within 7 days. The Appellant filed submissions but the prosecution did not. Briefly, the Appellant made two arguments; (1) that the entire trial was a

nullity *ab initio;* and (2) that the sentence was harsh since the Appellant was an old man of 62 years with diabetes. He stated that the provisions of Sections 210 and 211 of the Criminal Procedure Code were not properly observed and that further Article 50 (1) (2) (c) of the Constitution was violated by the trial court.

[4] It was further submitted that after close of the prosecution's case, the Learned Chief Magistrate proceeded on 23rd January 2018, to give a ruling date on whether the Appellant had a case to answer, without asking the accused whether he was ready to give his submissions on a no case to answer. Further, the accused who was a layman, had requested the court to recuse itself but it declined. Again, he argued that, on 20th February 2018, when the case was coming up for defence hearing the accused stated that he was sick but nevertheless the trial court declined to adjourn the matter.

[5] It was also submitted that the Appellant was convicted and sentenced on insufficient evidence as the prosecution had not adduced any document to prove that the Appellant had given any instructions to Solutions Sacco teller to withdraw money from his account and that the complainant had stated that the Appellant only gave verbal instructions that the money be withdrawn which was not allowed in banking law. It was further submitted that the instructions to withdraw money from the Appellant's account were given by the Chief Executive Officer (CEO) one Muteithia Mukira and not the Appellant and therefore the charge of giving false information could not stand in the circumstances.

Duty of court

[6] My duty as first appellate court is to evaluate the evidence and come to own conclusions except I am reminded that I should give allowance of the fact that I neither saw nor heard the witnesses when they testified. See: **SELLE & ANOTHER vs. ASSOCIATED MOTOR BOARD COMPANY LTD. [1968] EA 123**. In this exercise, the court is not beholden or compelled to adopt any particular style. However, it must avoid merely rehashing of evidence or merely scrutinizing of the evidence to see if there was some evidence to support the lower Court's findings and conclusions,. Instead, employ a style imbued with judicious emphasis and alertness, have an eye for symmetry or balance (where legally permitted) and have an ear for subtleties of evidence adduced so as not to miss the grace and power of the testimonies of witnesses and the applicable law. Such style insists on simplicity in writing and keeping as close as possible to the words used in the testimony recorded. Finally, I will make my overall impression of the evidence, facts and the law applicable in absolute clarity and directness and render my decision. I shall so proceed.

Preliminary issues

[7] But before I enter into intense interrogation of the evidence, I find some issues to be of preliminary nature and I wish to dispense with them *in limine.* These issues are: (1) lack of summing up submissions; (2) recusal; and (3) adjournment.

Summing up submissions

[8] It was argued that sections 210 and 211 of the Criminal Procedure Code was not complied with and that after close of the prosecution's case, the trial court proceeded to give a ruling date on whether the Appellant had a case to answer without asking him if he was ready to give submissions on no case to answer. Section 211 of the Criminal Procedure Code CAP 75 of the Laws of Kenya provides as follows:

> ***Defence***
>
> ***211 At the close of the evidence in support of the charge, and after hearing such summing up, submission or argument as may be put forward, if it appears to the court that a case is made out against the accused person sufficiently to require him to make a defence, the court shall again explain the substance of the charge to the accused, and shall inform him that he has a right to give evidence on oath from the witness box, and that, if he does so, he will be liable to cross-examination, or to make a statement not on oath from the dock, and shall ask him whether he has any witnesses to examine or other evidence to adduce in his defence, and the court shall then hear the accused and his witnesses and other evidence (if any)***

[9] Under Section 211 (ibid) summing up submissions or arguments may or may not be made. It is however desirable that the parties should intimate to court whether or not they are making the summing up submissions. Of great significance is that, on 23rd January 2018, the accused was called upon to enter his defence on the charges and section 211 was complied with. The accused subsequently opted to give sworn evidence and applied for copies of proceedings and ruling. The trial court therefore complied with section 211 of the CPC. It is evident from the record that that the Appellant ably conducted the trial and his defence and so no prejudice was suffered in not making summing arguments.

Recusal

[10] One of the Appellant's complaints in this appeal is that he had requested the Trial Magistrate to recuse herself from the case but the court declined without giving any reasons. The application for recusal of the trial court was made on 6th February 2018. The court declined the request in a short ruling delivered on the same day, where the learned trial magistrate noted that the Appellant had asked the court to recuse itself from the case without giving reasons. Courts have said in occasions without number that recusal is serious intervention by a party and requires to be supported by sufficient reason of likelihood of bias or partiality, or presence of conflict of interest or impropriety on the part of the court. This will prevent parties from using recusal as a vehicle to shop for a forum which the party applying thinks would produce favorable results in his case. It must also be known that law sub serves legitimate interests of a litigant as opposed to individual desires that a certain judge should or should not hear its case, and its greater concern is to build an independent and robust judicial practice in the adjudication of cases where justice is served to all parties. Therefore, an application for recusal based on no reason will be disallowed. Accordingly, it was sufficient reason for the trial court to have dismissed the application for recusal for it was founded on no reason or nothing. On that basis, I reject the argument on recusal.

Adjournment

[11] Another matter; that on 20th February 2018, when the case was scheduled for defence hearing the accused requested for an adjournment on the basis that he was sick and therefore not prepared to proceed with the case. But the trial court rejected his request fro adjournment. According to the Appellant, the decision thereof violated the rules of natural justice. I have perused the record. It shows that on 20th February 2018, the accused intimated to court that he was unwell and unable to proceed as he was suffering from malaria. The court considered the application and subsequently directed that defence hearing shall proceed as the Appellant had produced unauthentic documents. At noon when the defence hearing was to commence, the Appellant once again intimated to court that he would not proceed and opted to remain silent and let the court rule. This subject of adjournment is replete with judicial decisions and I do not wish to multiply them except to cite the case of **PETER M. KARIUKI vs. ATTORNEY GENERAL [2014] eKLR,** the Court of Appeal stated as follows:

> "***What constitutes adequate time and facilities or proper opportunity for preparation of a defence will certainly depend on the circumstances of each case, so that what may suffice as adequate time for an accused person who is out on bail or bond may not amount to much for an accused person who has been in solitary confinement, without access to an advocate or visitors for a long period before trial. In SAVANNAH DEVELOPMENT COMPANY LTD vs. MERCHANTILE COMPANY LTD, CA NO. 120 of 1992, this Court stated that there may be reasons for seeking adjournment of a case set down for hearing on a particular day and that where there are valid reasons to justify granting of an adjournment, the Court always has unfettered discretion to grant the adjournment. The Court further stated that elements to be taken into consideration in an application for adjournment include the adequacy of the reasons given for the application for adjournment; how far, if at all, the other party is likely to be prejudiced by the adjournment; and whether the other party can be suitably compensated by award of costs.***
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> ***The Supreme Court of Uganda, in FAMOUS CYCLE AGENCIES LTD & OTHERS V MASUKHALAL RAMJI KARIA, (1995) Kampala Law Reports 100, was of the same mind when it stated that granting an adjournment to a party is left to the discretion of the court and the discretion is not subject to any definite rules, but should be exercised in a judicial and reasonable manner and upon proper material. Such discretion, the court continued, should be exercised after considering the party's conduct in the case, the opportunity he had of getting ready and the truth and sufficiency of the reasons alleged by him for not being ready.***
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> ***Also in LOLWE AGENCIES LTD V MIDLAND EMPORIUM LTD, HCCC NO 25 OF 1998 (KSM), the High Court appropriately stated that, although the granting of adjournment is discretionary, it is like all judicial discretion which should be exercised judicially and that means that it must be exercised upon reason and principle and not upon caprice or personal opinion.***
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> ***While bearing in mind that whether to grant an adjournment or not is discretionary and appellate courts are loath to readily question the exercise of discretion by the trial court, nevertheless it must never be forgotten that the right to an adjournment to enable a party to adequately prepare his or her case in a criminal trial is underpinned by no less an instrument than the Constitution. The authorities cited above relate to exercise of discretion to grant or refuse an adjournment in a civil dispute. We are of the opinion that although the same principles are relevant in respect of applications for adjournments of criminal trials, nevertheless because of the constitutional basis of that right and the potential impact on a citizen's liberty, the court is obliged to be more circumspect in rejecting an application for adjournment and to specifically consider whether denial of such a right guaranteed by the Constitution would result in miscarriage of justice.***

[12] In this case, the Learned Trial Magistrate gave her reasons as to why she declined the adjournment; to wit, the accused person had presented unauthentic documents. At the trial, the Appellant had stated that he was suffering from malaria while in his submissions he stated that he was diabetic. Therefore, the trial magistrate rightly rejected his request for adjournment. His remaining silence and leaving it to the court to decide should be taken to be in exercise of his right guaranteed in Article 50(2) (i) of the Constitution:-

> ***(i) to remain silent, and not to testify during the proceedings;***

The trial magistrate did not violate the rights of the accused person to fair trial. Thus, nothing turns on that ground. I reject it.

Evaluation of evidence

[13] I should establish whether the prosecution proved its case against the Appellant beyond any reasonable doubt. The charge was ***''Giving false information to a person employed in the public service''*** contrary to section 129 of the Penal Code. The said section provides:-

> ***129. Whoever gives to any person employed in the public service any information which he knows or believes to be false, intending thereby to cause, or knowing it to be likely that he will thereby cause, the person employed in the public service –***
>
> ***(a) to do or omit anything which the person employed in the public service ought not to do or omit if the true state of facts respecting which such information is given were known to him; or***
>
> ***(b) to use the lawful power of the person employed in the public service to the injury or annoyance of any person, is guilty of a misdemeanour and is liable to imprisonment for three years.***

What evidence was offered in support of the charge?

[14] PW1 was Daniel Kinyua Marete, the CEO of Solutions Sacco who testified that on 25th July 2015, he was called by officers from the Banking and Anti-Fraud Unit who informed him that they wanted to investigate a matter that had been raised by one of their members Johnson Kobia (the appellant), in relation to a withdrawal of money from his account in the year 2008. That, he called the head office in Meru Mwalimu Plaza as he was in Machakos then, and informed one David Thuranira Muguika who was the accountant and requested him to assist the officer to get the information that he wanted. He stated that he learnt later that the investigation was in relation to a complaint by

the accused person to the effect that 2.2 million had been withdrawn from his account; the accused had secured a loan of Kshs 3,000,000 which amount was debited into his account; and that the accused had wanted to buy a lorry.

[15] It was his further evidence that he was aware that the accused had travelled to Mombasa and indentified a truck and informed the CEO and gave their accountant number to the CEO Mr. Mukira Muteithia who in turn requested the teller on duty to make a withdrawal for Mr. Kobia's account who in turn withdrew Kshs 2,250,000 and deposited it into the account and that the money was deposited in the vendor's account one Bat-hefHHussein Said. It was his further evidence that he was aware that the vehicle was bought because the Appellant took possession of the same and that the appellant had initially defaulted in payment of the loan after which he eventually paid up in December 2016 and that he later complained that his money had been withdrawn after he failed to pay the loan whereupon he was thrown out of the board.

[16] PW1's evidence remained firm, consistent and uncontroverted even in cross examination. He reiterated that money was withdrawn legally and that the Appellant had given verbal consent and even indicated the account in which the money was to be deposited.

[17] PW2 to 5 all corroborated PW1' evidence. PW2 Maitethia Mukira testified having inter alia accompanied the Appellant to Mombasa on 16th January 2008 to buy a truck, which truck they indentified whereupon the Appellant instructed him to call back the office in Meru and Kshs 2,250,000 was withdrawn in his account and banked in the truck seller's account and that this money was paid by Mr. Marete (PW1). In cross examination, he reiterated that he gave instructions directly and personally and indeed confirmed PW1's version that it was indeed Pw1 who banked this money. PW3 corroborated PW1 and 2's evidence that his instructions were to withdraw the money and give it to Marete (PW1) who was to deposit it in the vendor's account. PW4 Mureithi Thuranira, a motor vehicle dealer confirmed the Appellant having called to help him source for a lorry which he did and telephoned him and he came to Mombasa. In cross examination he corroborated PW2's evidence that the Appellant went with Mukira (PW2) to Mombasa and that indeed the Appellant made a call requesting the money to be deposited into the vendor's account. PW5 David Thuranira while corroborating PW1-4's evidence was more categorical in cross examination when he inter alia stated as follows;

> ***"You were even the chairman of the credit committee. We withdrew money with your authority. You gave verbal instructions and even gave the account of the seller where money was to be deposited…"***

Again this evidence towards this respect remained unchallenged and uncontroverted throughout the trial.

[18] PW6 Josiah Gichobi who was the investigation's officer in this case testified that; on 26th June 2014, the in charge Anti Banking Fraud Investigation Unit minuted to him a complaint letter instructing their office to carry out investigations because a person by the name Johnson Kobia (the Appellant) had complained to the head of service that his loan at Solutions Sacco had been withdrawn without his approval on 17th January 2008, whereupon he commenced investigations. It was his evidence that he later realized that the letter that had been written to their office about the complain of the Appellant was not true as he found out that the Appellant had bought a lorry in Mombasa and had given instructions at Solutions Sacco for withdrawal of his loan money of Kshs 2,250,000, and the same was banked in the account of motor vehicle dealers in Mombasa and realized that the Appellant had given him false information. His evidence towards this effect remained firm; consistent and unshaken even in cross examination where he stated as follows:

> ***"You had complained of your money being withdrawn by a stranger. There was no stranger who withdrew your money. It was on your instructions. You were in Mombasa buying a vehicle. You were a member of the Sacco and a board member. I investigated this matter. There was no unauthorized person who withdrew the money. It was your instructions. It was a legal withdraw. The CEO withdrew money with your authority."***

[19] Contrary to the submissions by the Appellant that the prosecution had not produced any document to prove that the Appellant had given any instructions to Solutions Sacco to withdraw money from his account, the evidence of all the prosecution witnesses firmly and overwhelmingly established that it was the Appellant who had given instructions on the withdrawal of the money in issue. He had even specified the specific account that the money was to be deposited in. The witnesses were consistent on this fact and the truthfulness of their testimonies was not shaken throughout the trial. Indeed, on the basis of the evidence adduced, the Learned Trial Magistrate clearly and correctly stated *inter alia* in her judgment;

> ***"……..from the evidence laid before me, I am satisfied beyond reasonable doubt that when the accused made that complainant he was giving false information to a Senior Sergeant Josiah Gichobi a person employed in the Public Service, information which he knew or believed to be false intending thereby to cause the said Senior Sergeant Gichobi to use his lawful power to the annoyance of Solutions Sacco Ltd. Indeed it became very clear from the evidence on record that the accused only raised a complaint long after he was unable to repay the loan leading to his vehicle being auctioned."***

[20] In light thereof, the submission by the Appellant that the instructions to withdraw money from the appellant's account were given by the CEO one Muteithia Mukira and not the Appellant and hence the charge of giving false information could not stand, with due respect to counsel for the Appellant is not defensible at all. It is not productive in this appeal as no evidence was laid to that effect.

[21] Taking into account the totality all the circumstances of this case, the evidence tendered by the prosecution in support of the charge was overwhelming, strong, firm and consistent. It proved the case against the Appellant beyond any reasonable doubt. Accordingly, conviction of the Appellant was proper. I uphold it.

Of sentence

[22] Last but not least, it was submitted that the sentence imposed on the Appellant was harsh and excessive. The penalty provided in Section 129 (a) of the Penal Code CAP 63 of the Laws of Kenya pursuant to which the Appellant was charged is imprisonment for three years. The

appellant herein was sentenced to a fine of Kshs 500,000 or in default 24 months imprisonment. As was held by Makhandia J. (as he then was) in **FATUMA HASSAN SALO vs. REPUBLIC [2006] eKLR:**

> ***"Sentencing is a matter for the discretion of the trial court. The discretion must however be exercised judicially. The trial court must be guided by evidence and sound legal principle. It must take into account all relevant factors and exclude all extraneous factors ….."***

[23] *Again, as was stated by the Court of Appeal (*sitting in Eldoret) *in the case of* ***SHADRACK KIPCHOGE KOGO vs. R*** **CRIMINAL APPEAL NO. 253 OF 2003**:

> ***"Sentence is essentially an exercise of the trial court and for this court to interfere, it must be shown that in passing the sentence, the court took into account an irrelevant factor or that a wrong principle was applied or short of those the sentence was so harsh and excessive that an error in principle must be inferred"***

[24] The record shows that the Appellant stated that he had nothing to say in mitigation. Nothing shows that the Learned Trial Magistrate exercised her discretion wrongly or that she omitted relevant factors or took into account irrelevant or extraneous factors or employed a wrong principle. In addition, the penalty provided for the offence in section 129 of the Penal Code is three years. A fine of Kshs. 500,000 or in default to serve twenty four (24) months imprisonment imposed by the trial court is therefore not excessive or harsh. Except, however, I do not wish to miss the Appellant's argument that custodial sentence may be inappropriate for he is an old man aged 62 years and diabetic. Medical evidence produced during the application for bail pending appeal show that he is diabetic and requires continuous medication. Given the condition of the Appellant, I am persuaded to impose a non-custodial sentence. Accordingly, I direct that the Appellant shall serve the remainder of his sentence under probation. It is so ordered.

Dated, signed and delivered in open court at Meru this 17th day of September 2018

F. GIKONYO

JUDGE

In the presence of:

M/s. Rimita for Appellant

Mr. Kiarie for Respondent

F. GIKONYO

JUDGE